



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W

THE
SENTENCING
PROJECT
RESEARCH AND
ADVOCACY FOR REFORM

The Discriminatory Effects of Felony Disenfranchisement Laws, Policies
and Practices on Minority Civic Participation in the United States

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I. INTRODUCTION

The felony disenfranchisement laws, policies and practices of the United States deny the right to vote to a large segment of its minority population in a manner inconsistent with the general principles of international human rights law as codified in international obligations by which the United States is bound, such as the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and the American Declaration of the Rights and Duties of Man (ADRDM).

The right to vote and the right to be free from discrimination have long been recognized in the international system, yet the United States stands out in terms of the breadth, depth, and severity of its disenfranchisement practices, which curtail and deny these rights. Yet, disenfranchisement laws, as applied by the United States, disproportionately deprive minority and marginalized populations of voting rights and impose correspondingly cumbersome reinstatement procedures on those individuals formerly disenfranchised. For example, in the United States, nearly two million African Americans – or 8.25 percent of the African American population – are disenfranchised, a rate *three* times the national average.¹

In light of these apparent violations of both the right to vote and the right to be free from discrimination in the application of felony disenfranchisement laws, the organizations listed herein respectfully submit this assessment of the impact of felony disenfranchisement laws on racial and ethnic minorities in the United States.

II. DISENFRANCHISEMENT IN THE UNITED STATES

The United States bars 5.3 million Americans – or one in forty-one adults – from voting due to a criminal conviction, most of which are non-violent in nature.² Of that number, thirty-nine percent have fully completed their sentences, including probation and parole, yet such

¹ Jeff Manza & Christopher Uggen, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 253 (Oxford University Press 2006).

² Jeff Manza and Christopher Uggen, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 77 (Oxford University Press 2006).

individuals are still deprived of their right to vote.³ The scope and impact of the disenfranchisement laws in the United States are beyond comparison, especially with regard to the continued deprivation of voting rights after incarceration.⁴

Each state in the United States has established its own laws with regard to the deprivation of voting rights due to criminal conviction. Consequently, disenfranchisement laws vary widely. Thirty-five states go so far as to prohibit voting by individuals who are not incarcerated but are on parole; thirty deny voting rights to persons on felony probation;⁵ ten states restrict the voting rights of certain individuals who have entirely completed their sentence; and in two of these states all individuals with felony convictions must obtain clemency from the governor before they can vote again.⁶ Only two states do not disenfranchise individuals with felony convictions while incarcerated, notable exceptions to the rule.⁷

As will be discussed in depth below, U.S. felony disenfranchisement laws, dating back to colonial times, grew significantly in the late 1800s after slaves were freed following the civil war. State laws and constitutions that specified disqualifying crimes often focused exclusively on offenses associated with the freed slaves and did not include serious crimes such as murder,

³ *Id.* at 250.

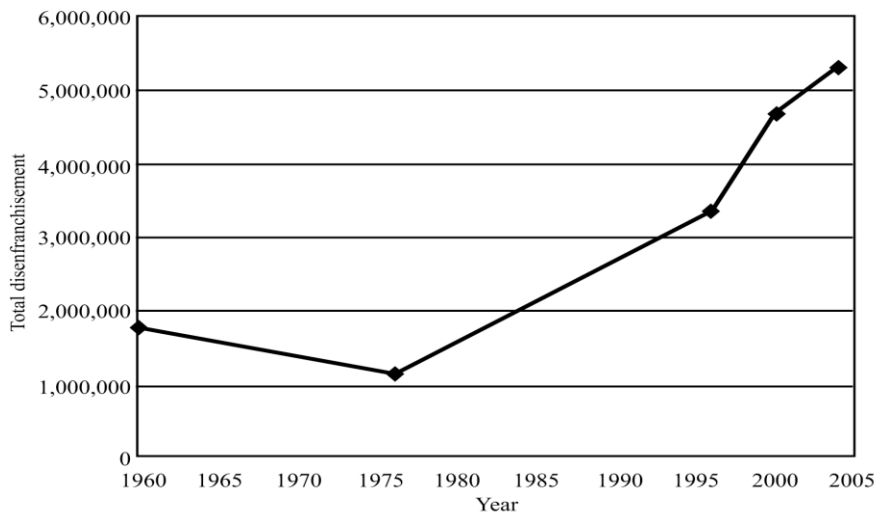
⁴ “Felony disenfranchisement” or (“criminal disenfranchisement”), refers to the loss of one’s voting rights as a consequence of a felony criminal conviction. Depending on the specific applicable law, such disenfranchisement can occur during incarceration or after incarceration, either while an individual is on probation or parole, or after the sentence is entirely completed.

⁵ Probation is a sentence ordered by a judge, usually instead of, but sometimes in addition to, serving time in jail. Parole is the conditional release of a prison inmate after serving part (if not all) of his or her sentence.

⁶ Two states deny the right to vote to all ex-felons who have completed their sentences. Nine others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period (*e.g.*, five years in Delaware and Wyoming, and two years in Nebraska). The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2008), http://sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

⁷ Rare outliers, Maine and Vermont comprise the two states that do not deny those with felony convictions the right to vote. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2008), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf

which was considered a “white crime.”⁸ At present, states with greater nonwhite prison populations are more likely to ban convicted persons from voting than states with proportionally fewer nonwhites in the criminal justice system.⁹ Furthermore, African Americans are not only disproportionately disenfranchised, but are also less likely to have their voting rights restored.¹⁰ In recent decades, the disenfranchised population in the United States has experienced significant growth due to both the increase in the number of overall felony convictions and the existence of restrictive state laws that bar individuals with felony convictions from voting. This trend has resulted in the steady expansion of the disenfranchised population in states with permanent disenfranchisement laws, as seen in the figure below.¹¹



⁸ Erika Wood and Neema Trivedi, *The Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls*, *Journal of Poverty Law and Policy*, CLEARINGHOUSE REVIEW (Sargent Shriver National Center on Poverty Law), May-June 2007.

⁹ Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the “Menace of Negro Domination”*: *Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 *AJS* 559, 596 (Nov. 2003). See also, Jeff Manza and Christopher Uggen, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 67 (Oxford University Press, 2006) (Chapter 2, *The Racial Origins of Felon Disenfranchisement*, co-written with Angela Behrens) (where African Americans make up a larger proportion of a state’s prison population, the state is significantly more likely to adopt or extend felon disenfranchisement).

¹⁰ *Id.* at 592.

¹¹ Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *AM. SOC.* 777, 782 (2002).

Although the United States defends its felony disenfranchisement laws as race neutral, arguing that the laws are based on individual criminal tendencies, not race, the African American disenfranchisement rate consistently exceeds that of whites.¹²

III. THE RIGHT TO VOTE

Universal and regional human rights law, including treaty-based and customary international law, has long recognized the right to vote. While not absolute, international human rights law also recognizes that any restriction imposed by a State on the right to vote must serve a legitimate state aim and be reasonably related – or proportionate – to that aim.¹³

Article 21(1) of the Universal Declaration on Human Rights (“Universal Declaration”) states that “[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives.” Article 21(3) of the Universal Declaration further states: “The will of the people shall be the basis of the authority of government; this 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.” Similarly, Article 25(b) of the International Covenant on Civil and Political Rights (“ICCPR”) requires that *every citizen* 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.” Importantly, neither of these instruments limit the right to “universal and equal suffrage” to citizens who have never been incarcerated or convicted of any crime.

A. Any Restrictions On the Right to Vote Must Serve a Legitimate State Aim and be Reasonably Related to that Aim

Under international human rights law, the right to vote is not absolute and the state can legitimately impose restrictions on the right. The European Court of Human Rights has adopted a similar test in assessing the compatibility of any restriction imposed by Council of Europe member states on voting rights with the right to vote recognized under the European Convention

¹² Jeff Manza and Christopher Uggen, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 77 (Oxford University Press, 2006).

¹³ *Statehood Solidarity Committee v. United States*, Case 11.204, Report No. 98/03 (2003).

for the Protection of the Human Rights and Fundamental Freedoms of the Council of Europe (the “European Convention”).¹⁴

Similarly, Article 23(2) of the American Convention provides for the regulation of voting rights due to “sentencing by a competent court in criminal proceedings.” This grant of discretion to OAS member states is constrained by the requirement that any restriction be made only in pursuit of a legitimate state aim to minimize the impact on the fundamental right to vote. In interpreting Article 23, the Commission requires member states to demonstrate that any laws impinging on the right comply with certain minimum standards or conditions that preserve the essence of the right to vote. The Commission’s role in this process is to examine the restriction imposed and to ensure that any differential treatment applied in relation to voting rights is both objective and reasonable.¹⁵

Applying this test, certain restrictions on voting rights may be permissible. For example, member states may impose limitations on the right to vote so long as they are not only tailored toward legitimate ends, but are also reasonably and fairly related to the objectives pursued by the disenfranchisement law.¹⁶ For example, restrictions on voting rights based on the legal capacity of minors or mentally incompetent persons, who lack the capacity to protect their interests, would serve to further a legitimate state aim and be reasonably related to that aim.¹⁷ By contrast, the mere fact that one has been convicted of a crime does not impact that individual’s ability to protect their interests and participate in society and, thus, should not be considered a basis for restricting their right to vote.

¹⁴ See *Hirst v. United Kingdom* (No.2), 681 Eur. Ct. H.R. (2005) (stating that restrictions on the right to vote must pursue a legitimate end and that the means employed to achieve that aim may not be disproportionate).

¹⁵ *D.C. Voting Rights Case*, Inter-Am. C.H.R., ¶ 89 (2003); *Andres Aylwin Azocar et al. v. Chile*, Case 11.863, Inter-Am. C.H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 536 (1999), ¶¶ 99, 101.

¹⁶ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), ¶ 57.

¹⁷ *Id.* ¶ 56.

B. Any Restrictions On the Right to Vote Must Be Proportionate to the Offense and the Sentence Imposed

Even where disenfranchisement laws are found to serve some legitimate state aim, they must also be reasonably related – or proportionate – to the offense charged and the sentence imposed. In *Hirst v. United Kingdom*,¹⁸ the European Court of Human Rights reviewed obligations imposed on state parties by the European Convention and other authorities, including the ICCPR, to find that the right to vote was indeed a right, “not a privilege,” and that, ultimately, a “blanket ban” on voting for those currently incarcerated stood in violation of this principle.¹⁹

The European Court conceded that commission of certain criminal offenses, such as the serious abuse of a public position or conduct that threatens “to undermine the rule of law or democratic foundations,” may indeed warrant disenfranchisement, and agreed with the United Kingdom government’s submission that crime prevention was a legitimate purpose for any disenfranchisement law.²⁰ However, because the law at issue barred *all* prisoners from voting during their incarceration, the Court found the ban disproportionate to the state aim.²¹ Furthermore, the Court found it significant that 48,000 prisoners were disenfranchised by the measure.²² As the Court noted, this figure included a wide range of minor and major offenders. Finally, the Court held that the United Kingdom’s “general, automatic and indiscriminate restriction on a vitally important convention right” fell outside “any acceptable margin of appreciation.”²³

¹⁸ *Hirst v. United Kingdom* (No.2), 681 Eur. Ct. H.R. (2005).

¹⁹ *Id.* ¶¶ 58-59

²⁰ *Id.* ¶ 77.

²¹ *Id.* ¶ 71.

²² *Id.* The court cited approvingly the Venice Commission’s recommendation that withdrawal of political rights should only be carried out by express judicial decision, as “a strong safeguard against arbitrariness.” *Id.*

²³ *Id.* ¶ 82. The ECHR judges split 12-5, with the dissenters arguing, *inter alia*, that courts should not assume legislative functions. *Id.* ¶ 6 (Wildhaber, J., dissenting).

Similarly, the European Commission for Democracy through Law (the “Venice Commission”)²⁴ also requires any ban on prisoner voting to be proportional, limited to serious offenses, and explicitly imposed by sentencing courts.²⁵ In its Report on the Abolition of Restrictions on the Right to Vote in General Elections,²⁶ which comprises both an aggregation and an evaluation of the European Court of Human Rights’ voting rights jurisprudence, the Venice Commission concluded: “[t]he Court constantly emphasizes that . . . there is room for inherent limitations . . . however measures of the state must not impair the very essence of the rights protected under Article 3 Protocol No. 1.”²⁷

C. International Human Rights law and State Practice Impose Restrictions on Disenfranchisement Laws

National courts around the world have also rejected laws that seek to disenfranchise based solely on past criminal convictions. The Canadian Supreme Court reached the same conclusion as the *Hirst* decision in the *Sauvé* cases. In *Sauvé v. Canada* (Attorney General) (*Sauvé No. 1*),²⁸ the Canadian Supreme Court struck down a “blanket” ban on voting for those

²⁴ The Venice Commission, available at http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E. The United States has observer status at the Commission. See Members of the Venice Commission, Observer States, available at http://www.venice.coe.int/site/dynamics/N_members_ef.asp?L=E.

²⁵ The Commission’s Code of Good Practice in Electoral Matters (2002) states that: “(i) provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions. (ii) It must be provided for by law. (iii) The proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them. (iv) The deprivation must be based on mental incapacity or a criminal conviction for a serious offense. (v) Furthermore, the withdrawal of political rights . . . may only be imposed by express decision of a court of law.” Code of Good Practice in Electoral Matters, Part I (1)(dd), available at [http://www.Venice.coe.int/docs/2002/cdl-el\(2002\)005-e.asp](http://www.Venice.coe.int/docs/2002/cdl-el(2002)005-e.asp), adopted at the Commission’s 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on November 6, 2002. Adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

²⁶ Report on the Abolition of Restrictions on the Right to Vote in General Elections, CDL-AD(2005)012, endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)012-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)012-e.asp).

²⁷ *Id.* ¶ 82.

²⁸ [1993] 2 S.C.R. 438.

currently incarcerated.²⁹ There, the Court held that such a ban was not reasonably related to a legitimate state aim. When the disputed law was amended by the government to deny voting rights to those incarcerated for at least two years, the plaintiff returned to court to challenge this new law. In *Sauvé v. Canada, (Chief Electoral Officer) (Sauvé No. 2)*,³⁰ the Supreme court struck down the law, stating that “[d]enying a citizen the right to vote denies the basis of democratic legitimacy,”³¹ and that even this narrower restriction on voting rights failed to further a legitimate state aim.³²

National courts in South Africa and Israel have reached the same conclusion. In *August and another v. Electoral Commission and others*,³³ and in *Minister of Home Affairs v. NICRO*,³⁴ the Constitutional Court of South Africa held that practices denying prisoners absentee ballots and the right to vote were not justified under the constitution. Upholding the right to vote vested in all citizens, the Court observed, “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.”³⁵

Likewise, in *Hila Alrai v. Minister of the Interior and Yigal Amir*,³⁶ the government of Israel requested that the right to vote be denied to Yigal Amir, who was imprisoned for assassinating Prime Minister Yitzhak Rabin. The Israeli court, however, denied the petitioner’s request, reasoning: “Without the right to vote, the infrastructure of all other fundamental rights would be damaged. Therefore, in a democratic system, the right to vote will be restricted only in

²⁹ *Id.*

³⁰ 3 S.C.R. 519, 2002 S.C.C. 68 (2002).

³¹ *Id.* ¶ 32.

³² *See generally* 3 S.C.R. 519, 2002 S.C.C. 68 (2002).

³³ 1999 (3) SA 1 (CC).

³⁴ 2005 (3) SA 280 (CC).

³⁵ *Id.* at ¶ 28, quoting *August* ¶ 17.

³⁶ H.C. 2757/96 (1996).

extreme circumstances enacted clearly in law.”³⁷ The Israeli court refused to alter its practices, and affirmed that the right to vote is limited by only two criteria: citizenship and attaining the age of 18.³⁸

In short, foreign constitutional courts have found that the disqualification of prisoners from voting violates basic democratic principles.³⁹ Thus, disenfranchisement laws – such as those present in the United States that disenfranchise those who have been released from prison – will likewise violate these same principles. International human rights law guarantees the right of legal capacity to vote and any restriction imposed by the state on that right must serve a legitimate state aim and be reasonably related to that aim. Any law that seeks to impose a blanket voting ban on individuals with criminal convictions cannot serve a legitimate aim of the state and, in any event, is impermissible because it is disproportionate to the offense charged or the sentence imposed.

IV. THE RIGHT TO VOTE FREE FROM DISCRIMINATION

The Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities affirms the right of persons belonging to ethnic minorities to fully participate in public life, which includes the right to vote. The Declaration declares that “minorities have the right to participate effectively in cultural, religious, social, economic and public life.”⁴⁰ Similarly, the U.S. Government is obligated under the International Convention on the Elimination of all forms of Racial Discrimination to ensure that racial discrimination in all its forms is eliminated and that everyone, regardless of race, color or national or ethnic origin can participate in elections on the basis of universal and equal suffrage.

³⁷ *Id.* at 2 (citations omitted).

³⁸ *Id.*

³⁹ Laleh Ispahani, *Voting Rights and Human Rights*, in *CRIMINAL DISENFRANCHISEMENT* 25 (Alec Ewald & Brandon Rottinghaus, eds., 2009).

⁴⁰ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Article 2(2).

A. International Human Rights Law Prohibits the Discriminatory Effects of Felony Disenfranchisement

Many felony disenfranchisement laws in the United States have a disproportionate impact on the voting rights of black and Hispanic individuals.⁴¹

Under universal and regional human rights law, discriminatory conduct is considered unlawful where the purpose *or effect* of the alleged treatment is discriminatory in nature. This effects-based standard is incorporated in both the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (the “ICERD”). The United Nations Human Rights Committee (“HRC”) has elaborated on the ICCPR’s equal protection provision found in Article 26, including in its General Comments that Article 26 “[p]rohibits discrimination in law or *in fact* in any field regulated or protected by public authorities.”⁴² Significantly, the HRC expressed concern that the United States’ felony disenfranchisement practices have “significant racial implications.”⁴³ The HRC noted also that “general deprivation of the right to vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 and 26 of the [ICCPR].”⁴⁴

Similarly, the ICERD defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”⁴⁵ The Committee to End Racial Discrimination

⁴¹ For further discussion of this issue *see* NEW JERSEY PETITION, Exhibit A.

⁴² Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) (emphasis added).

⁴³ Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, CCPR/C/USA/CO/3/Rev.1 (2006) 35.

⁴⁴ *Id.* Article 25(b) of the ICCPR 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.” 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.” ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171.

⁴⁵ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, *entered into force* Jan. 4, 1969.

(“CERD”)—the body tasked with monitoring compliance with ICERD—highlighted its concern about the “[t]he political disenfranchisement of a large segment of the ethnic minority population [in the United States] who are denied the right to vote by disenfranchising laws and practices.”⁴⁶ The CERD called upon the United States to take all appropriate measures to ensure political participation rights to its citizens without discrimination. As of this date, no action has been undertaken by the United States in response.

B. International Law, Discrimination and Disfranchisement Laws

National courts and international tribunals that have considered the alleged discriminatory impact of felony disenfranchisement laws have struck them down as discriminatory. For example, in *Sauvé No. 2*, the Canadian Supreme Court overturned a national election law that disenfranchised individuals with felony convictions serving two years or more in prison, noting the potential for systemic discrimination given the disproportionate representation of aboriginal Canadians in the federal inmate population. The Court concluded that the provision was unconstitutional and specifically “contrary to Canada’s movement toward universal suffrage.”⁴⁷ The Court went further to render “blanket discrimination as being arbitrary and not fulfilling any of the traditional goals of incarceration, such as deterrence, retribution, or rehabilitation.”⁴⁸

The *Sauvé No. 2* decision made clear that “racial discrimination exacerbates the deprivation of a fundamental right,” with the Court emphasizing “the strong potential for discrimination against indigenous populations in the denial of the franchise to prisoners.”⁴⁹ Furthermore, in the context of the *Sauvé* litigation, “two novel equality rights arguments were made . . . [that] prisoners as a group constitute a discrete and insular minority that has been

⁴⁶ Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 397 (2001).

⁴⁷ Christopher Uggen, Mischelle Van Brakle, & Heather McLaughlin, et al., *Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement*, in *CRIMINAL DISENFRANCHISEMENT* 59, 72-73 (Alec Ewald & Brandon Rottinghaus, eds., 2009).

⁴⁸ *Id.* at 73.

⁴⁹ Richard J. Wilson, *The Right to Universal, Equal and Nondiscriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner’s Right to Vote*, in *CRIMINAL DISENFRANCHISEMENT* 109, 131 (Alec Ewald & Brandon Rottinghaus, eds., 2009).

subjected historically to social, legal and political discrimination [and] [t]hat the criminal justice system is riddled with systemic discrimination because of disproportionate representation of aboriginal Canadians in the federal inmate population.”⁵⁰

Similarly, in *Hirst*,⁵¹ the European Court of Human Rights highlighted the *discriminatory effect* of the British disenfranchisement law. The law, a blanket deprivation of voting rights to “all prisoners for their entire period of imprisonment, regardless of the crime they committed,” was found to violate the European Convention for the Protection of the Human Rights and Fundamental Freedoms of the Council of Europe.⁵² The European Court concluded that the law was arbitrary and discriminatory, finding that the disputed sentencing practice lacked “any direct link between the facts of any individual case and the removal of the right to vote.”⁵³

C. State Practice Supports Extending Voting Rights For Prisoners

While disenfranchisement policies vary, an increasing number of nations are moving toward greater recognition for political rights, including voting rights, for those who have a criminal conviction.⁵⁴ Seventeen European countries⁵⁵ allow all prisoners to vote and eleven⁵⁶ extend voting rights to some people in prison.⁵⁷ In several of the countries where certain

⁵⁰ Christopher Manfredi, *In Defense of Prisoner Disenfranchisement*, in CRIMINAL DISENFRANCHISEMENT 259, 261 (Alec Ewald & Brandon Rottinghaus, eds., 2009).

⁵¹ *Hirst v. United Kingdom (Hirst No. 1)* 30.6.2004, Rep 2004.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ “Dozens of countries, particularly in Europe, allow and even facilitate voting by prisoners, whereas many others bar some or all people under criminal supervision from the franchise.” Laleh Ispahani, *Out of Step With the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies*. American Civil Liberties Union (2006), available at http://www.aclu.org/images/asset_upload_file825_25663.pdf.

⁵⁵ *Id.* (Albania, Austria, Croatia, the Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Lithuania, the former Yugoslav Republic of Macedonia, Montenegro, the Netherlands, Serbia, Slovenia, Sweden and Switzerland).

⁵⁶ *Id.* (Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Portugal and Romania).

⁵⁷ *Id.*

prisoners are barred from voting, legislation requires that the court impose this additional penalty strictly on a case-by-case basis. All but four of the countries that disfranchise prisoners do so in relation to certain, serious offenses. The remaining European nations only disqualify certain prisoners from voting based on the length of sentence.⁵⁸

All of the remaining twelve European nations⁵⁹ allow individuals to automatically vote upon release from custody.⁶⁰ Of the twelve European nations that bar individuals from voting until their release, all but two are former Eastern Bloc countries with limited histories of universal suffrage.⁶¹ Thus, even in post-communist Eastern European nations, where democratic values are still emerging, governments are taking notably proactive steps to ensure prisoners can vote. In Kosovo, for example, “the municipal elections of 2000 allowed for special electoral assistance to ‘special needs voters,’ [which] include[ed] . . . those incarcerated in prison, not convicted of a felony.”⁶² Macedonia provides another example where *all* prisoners are allowed to vote rather than just those not convicted of felonies.⁶³ Though debates and divisions persist among European nations regarding disenfranchisement, and the region still struggles with tensions related to economic and social heterogeneity, “it is extremely rare for anyone who is not in prison [in Europe] to lose the right to vote.”⁶⁴

Finally, Australia presents a good example of another nation wrestling with prisoner disenfranchisement issues based on their discriminatory effects. The Australian Human Rights and Equality Opportunity Commission addressed the issue recently in the Commission’s

⁵⁸ *Id.*

⁵⁹ *Id.* Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Spain, Ukraine and the United Kingdom.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Brandon Rottinghaus, *Incarceration and enfranchisement: International Practices, Impact, and Recommendations for Reform* 32-33 (International Foundation for Election Systems) 2003.

⁶³ *Id.* at 34.

⁶⁴ *Id.* at 27. For example, “in Belgium, Romania, and Lithuania, more than 60 percent of the inmates vote.” *Id.* at 26.

“submission to the Senate Inquiry into the Electoral and Referendum Amendment” noting that “the right to participate in the political process, including the right to vote, is a fundamental civil liberty and human right and should be enjoyed by all people *without discrimination*’ given the nation’s status as party to the ICCPR and ICERD.”⁶⁵ Similar to the discrimination against minorities suffered in the Americas, “there is increasing evidence that disenfranchisement affects indigenous Australians disproportionately, in a way that amounts to discrimination,” an argument gaining strength as “indigenous imprisonment rates and levels of disproportionately worsen.”⁶⁶

V. THE DISCRIMINATORY NATURE OF FELONY DISENFRANCHISEMENT LAWS

A. The United States

The ultimate effect of felony disenfranchisement policies in the United States is to exacerbate racial exclusion. Several scholars have traced the enhanced impact of disenfranchisement laws in certain states to a mid-nineteenth century effort to bar newly-freed African Americans from participating in local elections.⁶⁷ Other devices in support of this strategy included literacy tests, poll taxes, and grandfather clauses which allowed for inconsistent and discriminatory application of the laws. Essentially, states purposefully tied the loss of voting rights to those crimes believed to be predominantly associated with black citizens, while excluding those crimes believed to be more often committed by whites. For example, in Alabama the crime of “wife-beating” – thought by lawmakers to be a crime predominantly committed by blacks – carried with it a penalty of disenfranchisement, whereas the crime of

⁶⁵ Ronnit Redman, David Brown, & Bryan Mercurio, *The Politics and Legality of Prisoner Disenfranchisement in Australian Federal Elections*, in CRIMINAL DISENFRANCHISEMENT 167, 190 (Alec Ewald & Brandon Rottinghaus, eds., 2009).

⁶⁶ *Id.* at 169.

⁶⁷ See, e.g. Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 732 (2006); Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 626 (2004); Marc Mauer, *Felon Disenfranchisement: A Policy whose Time Has Passed?* (2004), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_fdpolicywhosetime.pdf; Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. 777, 781 (2002).

murder, allegedly committed equally by whites and blacks, did not lead to disenfranchisement.⁶⁸ While facially discriminatory laws were eventually overturned, felony disenfranchisement laws are vestiges of this exclusionary strategy. Now, more than ever, these laws require intense scrutiny based on international human rights norms.

The unwarranted racial disparities in the criminal justice system in the United States (in terms of policing, arrest, sentencing, and incarceration) result in felony disenfranchisement laws having a disproportionate impact on African American and Hispanic minority groups. In 2007, thirty-eight percent of the nation's 1.5 million prison inmates were black and twenty-one percent were Hispanic,⁶⁹ despite the fact that these groups only represent twelve and fifteen percent of the general population, respectively.⁷⁰ As for why these minorities are disproportionately represented in the criminal justice system, a study by criminologist Alfred Blumstein revealed that there is greater room for sentencing discretion regarding lower-level offenses and drug offenses, and that "the room for discretion also offers the opportunity for the introduction of racial discrimination."⁷¹ Another study, examining Pennsylvania sentencing practices to compare sentencing outcomes for white, black, and Hispanic defendants, found "overall more lenient treatment of white defendants" in both drug and non-drug cases.⁷²

Such insidious discriminatory patterns in the criminal justice system contribute to the prospect that three in ten black men can expect to be disenfranchised at some point in their

⁶⁸ Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Votes*, 48 CASE W. RES. L. REV. 727, 741 (1998).

⁶⁹ The Sentencing Project, *Facts About Prisons and Prisoners* (2009) (citing Bureau of Justice Statistics), available at http://www.sentencingproject.org/doc/publications/inc_factsaboutprisons.pdf.

⁷⁰ U.S. Census Bureau, Population Estimates Program (2007).

⁷¹ Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 746 (1993).

⁷² Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Comparisons Decisions: Hispanic-Black-White*, CRIMINOLOGY 39 (2001). "As socially disadvantaged offenders and recent immigrants, Hispanic defendants [in particular] may lack the resources (e.g., financial, cultural) to resist or soften the imposition of harsh penalties. They also may feel alienation from a system they believe treats them unfairly and seem more recalcitrant." *Id.* at 168.

lifetime.⁷³ Thus, disenfranchisement laws disproportionately affect those minorities already struggling to gain representation in the national electorate. Not only are such populations denied the right to vote, but those who have completed sentences find themselves unable to completely rejoin their community when deprived of the democratic rights afforded to other citizens, thus engendering resentment and alienation.⁷⁴ Although courts in the United States uphold the right to disenfranchise citizens based on felony convictions, the discriminatory effects of these laws remain impermissible under international and regional human rights standards.

1. Cost of Disenfranchisement Laws

The suppression of overall voter registration rates in communities with high rates of disenfranchisement, suggesting that eligible voters are also failing to register, represents a significant consequence of felony disenfranchisement laws.⁷⁵ This result amplifies the cost of racial disenfranchisement and results in reduced political participation by affected communities.⁷⁶ Sentiments from those recently able to vote, for the first time in the recent 2008 election after losing and regaining the right to vote following a criminal conviction, reflect the toll that these laws have on individuals and their community. Terry Sallis, a formerly incarcerated individual, described the feeling of disenfranchisement as something that “reflects on you, and a lack of respect for yourself and the status quo.”⁷⁷ On the restoration of her right to vote, Linda Steele said:

⁷³ The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2008), available at http://sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

⁷⁴ “Millions of convicted felons across the nation, once they have served their sentence, find they are not allowed to participate in the electoral process—the fact of their conviction barring them from the very act that defines our national identity and our citizenship. This is possibly a worse sentence than the one they have already served. If a woman cannot vote, if a man cannot cast his ballot, they are being punished again for a crime they have already paid for.” *Walter Mosley*, Editorial, *THE NATION*, Feb. 12, 2007, at 8

⁷⁵ Ryan King, *A Decade of Reform: Felony Disenfranchisement Policy in the United States*, The Sentencing Project, Oct. 2006, at 19 available at http://www.sentencingproject.org/doc/publications/fd_decade_reform.pdf.

⁷⁶ Ryan King, *A Decade of Reform: Felony Disenfranchisement Policy in the United States*, The Sentencing Project, Oct. 2006, at 19 available at http://www.sentencingproject.org/doc/publications/fd_decade_reform.pdf.

⁷⁷ Brennan Center for Justice, *My First Vote 5* (2009), available at http://brennan.3cdn.net/619b90033df11589af_wam6vqy4s.pdf.

There were tears in my eyes as I waited to vote. I felt like I was finally a productive member of society. I've never before felt like I could make a difference in terms of what happens around me. But I walked out of the polling place on Election Day feeling like I mattered, that I made a difference. I realized how far I've come. Amazing.⁷⁸

At twenty years of age Andres Idarraga was told he could not vote until his 58th birthday, a wait of over thirty years, due to a drug conviction.⁷⁹ Idarraga completed his prison sentence, but due to a decades-long parole term would not be eligible to vote for this lengthy period. However, in 2006 he was able to help reform the now-amended Rhode Island law, once prohibiting individuals with felony convictions from voting until they completed parole and probation; now Mr. Idarraga can exercise his right to vote.⁸⁰ On registering to vote, he explained, "It feels good to be a part of the democratic process. It was very fulfilling, but truthfully, I had mixed feelings. I thought, 'why did I have to work so hard just to sign this little piece of paper.'" ⁸¹ While Rhode Island's reform exemplifies the potential for changing harsh disenfranchisement penalties, many more states await such change and resist reformation efforts.

In sum, felony disenfranchisement not only affects an individual's ability to vote, but also presents an impact on a societal level, leading to the further civic isolation of marginalized racial minority groups. As set forth by the Supreme Court of Canada in *Sauvé v. Canada*, "[d]epriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility."⁸²

⁷⁸ *Id.* at 2.

⁷⁹ Sentencing Project, Felony Disenfranchisement, Featured Stories, *available at* <http://www.sentencingproject.org/template/page.cfm?id=130>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Sauvé v. Canada (Chief Electoral Officer) (Sauvé No. 2)*, [2002] 3 S.C.R. 519, 2002 S.C.C. 68, ¶ 38.

2. U.S. Position on Felon Disfranchisement Laws

The legal mechanisms available in the United States for addressing the disparate racial impact of disenfranchisement laws are woefully inadequate. The proof requirements under the 14th Amendment of the United States Constitution render the invalidation of felony disenfranchisement laws, on the basis of their disproportionate impact on racial minorities, an extremely difficult task.

The United States Supreme Court in *Richardson v. Ramirez*, 418 U.S. 24 (1974) held under the Equal Protection Clause of the United States Constitution states need not demonstrate a compelling interest before denying the vote to citizens convicted of crimes, because Section 2 of the 14th Amendment expressly allowed states to deny the right to vote for participation in rebellion, or other crime. The Supreme Court interpreted this as the Constitution permitting states to limit voting rights. Some courts have circumvented the rule and constraints of *Ramirez*.⁸³ Yet, most courts have embraced *Ramirez*'s view that Section 2 of the 14th Amendment expressly sanctions disenfranchisement laws.

In *Hunter v. Underwood*, the Supreme Court made clear that *Ramirez* left open a valid argument that the unequal enforcement of disenfranchisement laws is unconstitutional, and found that Alabama's disenfranchisement laws had been enacted to intentionally discriminate on account of race.⁸⁴ Furthermore, under *Hunter*, to demonstrate discrimination under the Equal Protection Clause, a plaintiff must introduce historical evidence that legislators deliberately passed the disputed law in order to discriminate against minorities.⁸⁵ The Court concluded that Section 2 of the Fourteenth Amendment was "not designed to permit the purposeful racial discrimination attending the enactment and operation of [the felony disenfranchisement statute] which otherwise violates Section 1 of the Fourteenth Amendment."⁸⁶ But the standard set forth

⁸³ See *Thiess v. State Administrative Board of Election Laws*, 387 F. Supp. 1038 (D. Md. 1974) (*Ramirez* left open the possibility that unequal enforcement may violate the Equal Protection Clause of the Fourteenth Amendment); *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982) (selective enforcement can lead to the invalidation of an otherwise constitutional disenfranchisement law).

⁸⁴ 471 U.S. 222 (1985).

⁸⁵ *Id.*

⁸⁶ *Id.* at 233.

in *Hunter* remains a stringent one as intentional discrimination is generally difficult to prove. Consequently, most courts have not found disenfranchisement laws to violate the Equal Protection Clause.⁸⁷ Some courts have even tried to narrow the protections of *Hunter*.⁸⁸

Two avenues remain available to challenge a felony disenfranchisement law under the Equal Protection Clause of the Fourteenth Amendment: showing a pattern of unequal or selective enforcement, and showing the law was enacted to intentionally discriminate.

Internationally, the United States has engaged in a dialogue about the legality and discriminatory impact of disenfranchisement under international law, though only to a limited extent. The United States was confronted specifically about the issue during the 2003 country review before the Committee on the Elimination of Racial Discrimination where U.S. delegate Ralph F. Boyd, Jr., acknowledged that “the issue was serious” and that it was to be given “very serious consideration.”⁸⁹ In 2008, the CERD again confronted the disparity of the application of disenfranchisement laws in the U.S., and recommended that the U.S. adopt certain measures to relieve this disparity including the automatic restoration of the right to vote after the completion

⁸⁷ See *Howard v. Gilmore*, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000) (Commonwealth’s decision to disenfranchise felons pre-dated adoption of the constitutional amendments and the extension of the franchise to African-Americans; the Fourteenth Amendment itself permits denial of franchise upon criminal conviction; the VRA claim failed because there was no nexus established between disenfranchisement of felons and race).

⁸⁸ See *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) (although the original statute was enacted to discriminate against African-Americans and included only crimes thought to be primarily committed by African-Americans, subsequent amendments that broadened the list of crimes removed the discriminatory taint associated with the original version; the Fifth Circuit found that the original discriminatory intent was no longer present and the current statute was not unconstitutional); see also *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (Eleventh Circuit ruled en banc that Florida’s initial decision to adopt the disenfranchisement provision was based on a non-racial rationale because, at the time, the right to vote was not extended to African Americans, the existence of racial discrimination behind some of the constitutional provisions in Florida did not show that racial animus motivated the criminal disenfranchisement provision given Florida’s long-standing tradition of criminal disenfranchisement, and reenactment eliminated any taint from the allegedly discriminatory 1968 provision).

⁸⁹ U.N. CERD, 59th Sess., 1476th mtg. on Aug. 6, 2001 at 3, U.N. Doc. CERD/C/SR.1476 (May 22, 2003), ¶ 57; Richard J. Wilson, *The Right to Universal, Equal and Nondiscriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner’s Right to Vote*, in CRIMINAL DISENFRANCHISEMENT 109, 122-23 (Alec Ewald & Brandon Rottinghaus, eds., 2009).

of the criminal sentence.⁹⁰ However, since that time, the United States government has taken no demonstrable action concerning felony disenfranchisement policy.

CONCLUSION

The discriminatory impact of felony disenfranchisement laws is clear. Although racially neutral on their face, these laws have had an unquestionably disproportionate impact on racial and ethnic minorities; depriving millions of effective participation in our democracy. We urge that a recommendation be made that the United States address the disparate racial impact of these laws by returning the right to vote to all who are no longer in prison.

⁹⁰ U.N. CERD, 72nd Sess., 1870th mtg. on March 5, 2008 at 9, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2006), ¶ 27.

SUPPORTING ORGANIZATIONS

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FED CURE

Fraternal Order of X-Offenders

National Association of Offender Rights

National Association of Social Workers, Association of Women in Social Work, CA Chapter

National Black Police Association

National Resource Center on Children and Families of the Incarcerated

Resource Information Help for the Disadvantaged

Rhode Island Family Life Center