Lock Them up and Throw away the Vote

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I. INTRODUCTION

"Injustice anywhere is a threat to justice everywhere.”

On March 30, 2004, the European Court of Human Rights ruled unanimously that laws in the United Kingdom barring inmates from voting violate their human rights. The Court expressed that “any devaluation or weakening of th[e] right [to vote] threatens to undermine [the democratic] system and should not be lightly or casually removed.” The European Court of Human Rights recognized the constitutional utility of prisoners participating in the democratic process, and that the denial of prisoners’ rights can have a deleterious effect on democracy as a whole. The United Kingdom is not alone in this felon disenfranchisement dilemma. Despite a growing international consensus, nearly five million free US citizens are prohibited from casting votes by the laws of the states in which they live.

While the right to vote is widely recognized as a fundamental political right, this right is not fully enforced for millions of individuals in the United States who are disfranchised for having committed a crime.

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* BA 1999, Dartmouth College; JD Candidate 2005, The University of Chicago. For comments and discussion on earlier drafts, I thank Alaina Beverly, Ryan Haygood, and Reginald Skinner.


2 Hirst v United Kingdom No 2, App No 74025/01, 38 Eur HR Rep 40, ¶ 42 (Mar 30, 2004).

3 Id at ¶ 41.

In the United States, blanket disenfranchisement and disproportionate provisions that fail to consider individuals’ circumstances are widespread. Today, fourteen American states permanently disenfranchise ex-felons. In forty-eight states and the District of Columbia, criminal disenfranchisement laws deny the vote to all convicted felons in prison.\(^5\) Thirty-five states also disenfranchise felons on parole; thirty-one of these states disenfranchise those on probation.\(^6\) And, unlike anywhere else in the world, in seven states ex-offenders who have fully served their sentences remain barred for life from voting.\(^7\) Overall, approximately two percent of the adult population in the United States cannot vote as a result of a felony conviction.\(^8\)

American felon disenfranchisement laws were enacted with the intent to disenfranchise African Americans and have a disparate effect on minorities.\(^9\) As a result of felon disenfranchisement laws, at least two million African American citizens are legally prevented from casting their votes.\(^10\) Convicted felons essentially become noncitizens under current US policy, which works to further alienation among poor and minority voters, destroy minority communities, and undermine representative government.\(^11\) These millions of US citizens are denied the enjoyment of a fundamental political right: the right to participate in the political process.

The emerging international consensus views broad felon disenfranchisement as illegitimate. Significant international treaties enshrine ex-felon offenders’ claims to “universal and equal” suffrage. In particular, Article 5, Section (c) of the Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights guarantee every citizen certain fundamental rights, including “universal and equal suffrage” without “unreasonable restrictions” and without regard to “race, colour, or national or ethnic origin.”\(^12\) These international

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\(^6\) Id.

\(^7\) Id.

\(^8\) Id.


\(^10\) Uggen and Manza, *Felon Disenfranchisement Project Summary* at 1 (cited in note 3).


antidiscrimination laws set out basic principles for electoral democracy, condemning any voting law that yields a discriminatory racial impact.

This Comment examines whether US felon disenfranchisement laws are consistent with international legal principles and concludes that international obligations to provide equality under law and equal protection of the law would be met by allowing felon offenders the right to vote. Section II gives a history of American felon disenfranchisement laws. Section III examines felon voting rights in the United States, which are often classified as the world’s most restrictive. Section IV considers the basic principles for electoral democracy under international law. Finally, Section V finds that electoral practices excluding ex-convicts from voting in the United States are unreasonably discriminatory and recommends amending the Voting Rights Act of 1965 to reform US voting law.

II. FELON DISENFRANCHISEMENT IN THE UNITED STATES

A. HISTORY OF FELON DISENFRANCHISEMENT LAWS

In the United States, felon or criminal disfranchisement laws are state statutes that prohibit people with felony convictions from voting.\(^\text{13}\) Laws denying convicted felony offenders the right to vote can be traced to ancient Greece and Rome. In Renaissance Europe, people who committed certain crimes were condemned to a “civil death,” which “put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence.”\(^\text{14}\) English colonists brought these concepts with them to North America.\(^\text{15}\) Felon disenfranchisement laws went unquestioned because many other groups, such as African Americans, Native Americans, women, the propertyless, and the mentally ill were also not permitted to vote in the United States.\(^\text{16}\)

In the seventeenth and eighteenth centuries, the removal of voting rights had a visible and known dimension in America. For example, in the

\(^{13}\) In the United States, state law determines qualifications for voting in state and federal elections and governs removal of the right to vote for federal and state offenses.


Massachusetts Bay Colony, loss of voting rights was permitted as an additional penalty for “any shamefull and vitious crime,” such as sexual relations. In Maryland, the law declared that a third conviction for intoxication incurred loss of suffrage. The reasoning behind a disenfranchisement statute in Plymouth Colony in 1658 was stated in the law as: “some corrup members may creep into the best and purest societies.” In addition, early colonial law dealt directly with the time period for the loss of the right to vote. For instance, in Plymouth the penalty seems to have been permanent, but Connecticut law stated that “good behaviour shall cause restoration of the privilege.” Furthermore, in both Massachusetts and Connecticut, the decision to restore voting rights was left to the court.

While felon disenfranchisement laws have a recognized history in America, there are important differences between colonial and contemporary policies. In colonial times, voting rights were usually taken away due to egregious violations of the moral code and the purposes of their removal were explained in the law. Furthermore, it was usually a subtle part of the punishment, requiring judicial implementation in most cases. In contrast, modern criminal disenfranchisement laws are automatic and applied to broad categories of crimes. Modern American criminal disenfranchisement laws are invisible in the criminal justice process and considered “collateral” rather than punitive.

In recognition of the entrenched white resistance to African American emancipation, the post-Civil War Congress enacted the Fifteenth Amendment, which forced states to permit African Americans the right to vote. Despite the constitutional amendment granting former slaves the right to vote free of racial discrimination, US lawmakers used a variety of schemes to take voting rights away from African Americans following Reconstruction—including ownership requirements, white-only primaries, grandfather clauses, poll taxes, and felon disenfranchisement provisions. While voting laws excluding felons existed in the

17 Bishop, History of Elections at 1, 55-56 (cited in note 16).
18 Bradley Chapin, Criminal Justice in Colonial America, 1606-1660, 161 n 150 (Georgia 1983).
20 Id.
21 See McKinley, The Suffrage Franchise at 459 (cited in note 16).
22 Alec C. Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 Wis L Rev 1045, 1062 (discussing the significant differences between colonial and contemporary criminal disenfranchisement).
23 Id.
24 Id.
25 Id.
26 US Const amend XV, § 1.
Lock Them up and Throw away the Vote

United States before passage of the Fifteenth Amendment, racially motivated changes to laws disenfranchising criminals were prominent features of the post-Reconstruction white backlash in America. 27 John B. Knox, president of the Alabama constitutional convention of 1901 made the goals of the legislators clear by stating: "[W]hat is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 28 Carter Glass, delegate to the Virginia convention of 1906, said:

This plan of popular suffrage will eliminate the darkey as a political factor in this State in less than five years, so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of the government. 29

That "plan" consisted of using the law of felon disenfranchisement to exclude African American voters. 30

Felon disenfranchisement laws became important tools in preventing African Americans from voting. "[B]etween 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other preexisting voting disqualifications, to increase the effect of these laws on black citizens." 31 Some states enacted laws that disenfranchised felons for crimes such as using insulting gestures or language, preaching the gospel without a license, or intent to steal. 32 States often aimed their disenfranchisement statutes at crimes thought to be committed mostly by African Americans, such as theft, while "white" crimes, such as murder, contained no loss of voting rights. 33 For instance, in Alabama, under state disenfranchisement laws, a man convicted of

29 See Paul Lewinson, Race, Class, and Party: A History of Negro Suffrage and White Politics in the South 86 (Oxford 1932). Glass told the delegates, "Discrimination! Why, that is precisely what we propose; that, exactly, is what this convention was elected for." J. Morgan Kousser, The Shaping of Southern Politics 59 (Yale 1974).
32 Sasha Abramsky, The Other Election Scandal: Millions of Former Prisoners Have Lost the Right to Vote Forever, 876 Rolling Stone 47, 50 (Aug 30, 2001), citing Eric Foner, Reconstruction: America's Unfinished Revolution (Harper & Row 1988). North Carolina made "intent to steal" a felony offense. Alabama, South Carolina, and Mississippi made certain felony offenses considered to be "African-American" crimes worthy of disenfranchisement but let those convicted of other crimes, such as murder, which was thought to be predominate a "White" crime, maintain their right to vote. Id.
vagrancy would lose his right to vote, but a man convicted of killing his wife would not. In the state of South Carolina, lawmakers made thievery, adultery, arson, wife beating, housebreaking, and attempted rape into felonies accompanied by the deprivation of voting rights, while murder and fighting were excluded from disenfranchisement. The United States criminal disenfranchisement laws amounted to state collaboration in social race-based subordination—an official endorsement of discrimination on the basis of race.

B. CURRENT IMPACT OF FELON DISENFRANCHISEMENT LAWS

The United States imprisons more people than any other country in the world, currently incarcerating over two million people. Today, state felon disenfranchisement laws are justified on race-neutral grounds, but their discriminatory impact remains. Laws denying ex-felons the right to vote disproportionately weaken the voting power of African American and Latino communities, who comprise more than half of the convicted offenders prevented from voting. This effect largely results from the disproportionate enforcement of drug laws in African American and Latino communities, which has expanded exponentially the class of persons subject to disenfranchisement.

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34 Id at 361 & n 16.
35 Id at 362. For example, John Field Bunting, who introduced a new disenfranchisement law, estimated that “the crime of wife-beating alone would disqualify sixty percent of the Negroes.” Shapiro, 103 Yale L J at 541 (cited in note 31).
37 International Centre for Prison Studies website, available online at http://www.kcl.ac.uk/depsta/rel/icps/about.html (visited Nov 16, 2004) (listing US prison population total as highest in the world, both in absolute and proportional terms, at 2,078,570); Scott Shane, Locked up in Land of the Free Inmates: The United States Has Surpassed Russia as the Nation with the Highest Percentage of Citizens behind Bars, Baltimore Sun 2A (June 2, 2003) (finding the United States to have the largest prison population of any developed or developing countries). For example, in the state of Maryland (approximately 35,200) are in prison which is greater than the number of people in prison in the country of Canada (approximately 31,600), even though Canada’s population is six times greater than Maryland. Id.
38 Scholars estimate that 13 percent of illegal drug users are African American, yet African Americans make up 55 percent of those convicted and 74 percent of those sentenced for drug possession. The US Sentencing Commission estimates that 65 percent of crack cocaine users are white, but 90 percent of those prosecuted for crack crimes in federal court are African American—and are subject to greater penalties than are those convicted of crimes involving cocaine in the powder form. Marc Mauer and Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later, 1, 12 (Oct 1995). See also Bernard E. Harcourt, From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law, 66 L & Contemp Probs 99, 137–38 (2003) (exploring the development of an actuarial approach to criminal law and relating it to the racial imbalance in America’s prison
13 percent of African American men in the United States—1.4 million individuals—are disenfranchised, representing over one-third of the total disenfranchised population. For example, in Florida and Alabama, one in three African American men is barred from voting. If current trends continue, the level of disenfranchisement for African American men could reach 40 percent in the states that ban ex-convicts.

Since statutory law determines whether felon offenders retain their right to vote, criminal disenfranchisement is not imposed by order of a judge as part of a criminal sentence. It is a collateral consequence of conviction that occurs automatically and administratively. Conviction of any crime that is punishable with imprisonment is a basis for losing the right to vote. For example, a nineteen-year-old, first-time offender convicted of participating with others “in a course of disorderly conduct” who receives a nonprison sentence could lose the right to vote for life based on the state felon disenfranchisement law. The crime need not be notably serious nor have any connection to electoral or political processes or to the security of the state. The array of disenfranchising offenses is broad—one might be permanently disenfranchised for “writing a bad check,” “inducing another to engage in gambling,” or “breaking a water...
"Shoplifting or possession of a modest amount of marijuana also suffice."

Maine and Vermont are the only states without some form of felon disenfranchisement. The remaining forty-eight states can be divided into one of four disenfranchisement practices: (1) disenfranchise prison inmates, (2) disenfranchise felon offenders who are incarcerated or on parole, (3) disenfranchise felon offenders serving any type of sentence (incarcerated, on parole, or probation), or (4) disenfranchise felon offenders after completion of sentence. Specifically, in the fourth category, fourteen states mandate that ex-offenders who have fully served their sentences remain disenfranchised for a certain period of time, usually a minimum of five years after they are released.

Seven of these states deny the right to vote to all ex-offenders who have completed their sentences. As a result, nearly three-quarters of this disenfranchised population is not in prison. Rather, these individuals are on probation or parole or have completed their sentences.

46 See Wyo Stat Ann §§ 6-7-101(a)(viii)–102 (Michie 2001) (crime of “professional gambling”).
48 Fellner and Mauer, Losing the Vote at 6 (cited in note 39).
49 Me Const art II, § 1; Vt Stat Ann tit 28, § 807 (1986) (voting allowed by absentee ballot during incarceration). Maine allows inmates to vote by absentee ballot and permits election officials to visit the prisons to facilitate inmate voting. Lawmakers have introduced bills to disenfranchise felons in both Maine and Vermont but none of the bills have passed. See SP 311, 120th Leg, 1st Reg Sess (Me 2001), available online at <http://janus.state.me.us/legis/bills> (last visited on Nov 16, 2004); H 286, 2001-2002 Leg (Vt 2001), available online at <http://www.leg.state.vt.us/docs/2002/bills/intro/H-286.htm> (last visited Nov 16, 2004).
50 For disenfranchisement of incarcerated citizens, the thirteen states (and the District of Columbia) are Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, and Utah. The Sentencing Project, Felony Disenfranchisement Laws in the United States at 3 (cited in note 3).
51 For disenfranchisement of persons who are incarcerated or on parole, the four states are California, Colorado, Connecticut, and New York. Id.
52 The seventeen states that disenfranchise persons serving any type of sentence are Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin. Id.
53 The fourteen states in this category are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Maryland, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Washington, and Wyoming. Id.
54 The seven states in this group are Alabama, Florida, Iowa, Kentucky, Mississippi, Nebraska, and Virginia. Id.
C. CONSTITUTIONALITY OF FELON DISENFRANCHISEMENT

The US Constitution prohibits the denial of the right to vote on the basis of race, sex, mature age, or failure to pay a poll tax. Most other restrictions are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. As a matter of constitutional law, the United States Supreme Court has said that felon disenfranchisement laws do not violate the Fourteenth or Fifteenth Amendments, so long as they were not enacted purposefully to deprive racial minorities of the right to vote. Despite civil rights advocates’ and legal scholars’ efforts to overcome discrimination in the areas of race, it is unlikely that the Supreme Court will strike down a felon disenfranchisement provision based on an equal protection challenge without a showing of intentional discrimination. The Supreme Court majority held in Richardson v Ramirez that felon disenfranchisement is “affirmatively sanctioned” by Section 2 of the Fourteenth Amendment. However, Justice Marshall wrote a lengthy dissent that warned of the potential abuses of discretion if the phrase “other crimes” was allowed to be loosely interpreted.

56 US Const amend XV, § 1 (addressing right to vote regardless of race); US Const amend XIX (addressing right to vote regardless of sex); US Const amend XXIV, § 1 (addressing right to vote without poll tax); US Const amend XXVI, § 1 (addressing right to vote regardless of age if over the age of eighteen).

57 In the United States, a racially disparate impact is not sufficient to establish a violation of the Equal Protection Clause. Under US law, a discriminatory intent or purpose is required for Fourteenth and Fifteenth Amendment challenges and may thus send plaintiffs on a “fishing expedition for unspecified evidence.” Wesley v Collins, 791 F2d 1255, 1263 (6th Cir 1986). Furthermore, “[a] finding of liability under section 2 would obviate the necessity to decide the plaintiffs’ Fourteenth and Fifteenth Amendment claims.” Lee County Branch of the NAACP v City of Opelika, 748 F2d 1473, 1478 (11th Cir 1984).


59 On the other hand, some lower US courts have struck down felon disenfranchisement on equal protection grounds. In McLaughlin, the court ruled that Mississippi’s disenfranchisement provision violated equal protection laws. See McLaughlin, 947 F Supp at 971 (“When brought beneath [the] axe [of disenfranchisement], the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box ... the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.”). See also Jill E. Simmons, Note, Beggars Can’t Be Voters: Why Washington’s Felon Re-enfranchisement Law Violates the Equal Protection Clause, 78 Wash L Rev 297 (2003) (arguing that the State of Washington’s requirement that offenders pay money before re-enfranchisement violates the Equal Protection Clause of the US Constitution).

60 Id at 54.

61 Id at 73–86 (Marshall dissenting).
American criminal disenfranchisement laws are also subject to challenge under the Voting Rights Act of 1965 ("Voting Rights Act"),\(^6\) which prohibits any voting law or scheme that results in a minority group having less opportunity than other groups to participate in the electoral process. The Voting Rights Act was adopted to buttress the Fifteenth Amendment and remedy racial discrimination in American voting.\(^6\) Recognizing that the intent standard used in American constitutional claims was virtually impossible to satisfy for plaintiffs in voting rights cases, the United States Congress formally enacted a results test where plaintiffs do not need to demonstrate that the challenged election law was designed for a discriminatory purpose.\(^6\) Under the results test, an election law violates the Voting Rights Act if under the "totality of the circumstances," the law results in a protected minority group having less opportunity to participate in the political process. The Voting Rights Act has led to the disqualification of many voting barriers in the United States and, therefore, a significant increase in African American voting and representation.\(^6\)

Recently, numerous academics, legal scholars, civil rights advocates, and political figures have begun to argue that felon disenfranchisement laws violate the Voting Rights Act.\(^6\) While courts generally do not consider laws that disproportionately burden groups to be violative of American law, when voting rights are concerned, a court must take into account whether there is a disparate racial impact. The United States Supreme Court follows the principle that: "The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of..."


\(^6\) Lani Guinier, Voting Rights and Democratic Theory: Where Do We Go From Here?, in Bernard Grofman and Chandler Davidson, eds, Controversies in Minority Voting: The Voting Rights Act in Perspective 283, 284-85 (Brookings Institution 1992) (stating the Voting Rights Act "is premised on a broad vision of political equality and empowerment that would value political participation for its own sake in order to recognize the autonomy and dignity of black voters.")

\(^6\) Id.


\(^6\) For example, in Baker v Pataki, 85 F3d 919 (2d Cir 1996), inmates claimed New York laws denying the franchise to incarcerated and paroled felons violated the Voting Rights Act because of its racially disproportionate impact. The court divided evenly on whether Section 2 applied to state felony disenfranchisement laws; see also Shapiro, 103 Yale L J at 543 (cited in note 31) ("criminal disenfranchisement is an outright barrier to voting that, like the poll tax and literacy test, was adopted in some states with radically discriminatory intent and has operated throughout our nation with racially discriminatory results.").
representative government." Therefore, based on this fairness principle and the disproportionate number of racial minorities denied the right to vote under criminal disenfranchisement policy, the majority of circuit courts addressing the issue have held that the Voting Rights Act can be used to consider evidence of discrimination in the civil justice system and to evaluate criminal disenfranchisement law claims by looking at the totality of the circumstances. Nonetheless, no US court has abolished a state's practice of disenfranchising for a felony conviction. Despite the differing perspectives among and within the court of appeals, the Supreme Court has not yet addressed the legitimacy of applying the Voting Rights Act to felon disenfranchisement laws.

III. UNIVERSAL AND EQUAL SUFFRAGE

It is the ever-growing tendency of international bodies to adopt the view that blanket statutory felon disenfranchisement laws are unjust. International law sets out basic principles for electoral democracy. Many documents to which the United States is a party mandate equal protection of the laws on the grounds of race and encourage official action to protect citizens' voting rights from discriminatory or unreasonable restrictions. As recently recognized in the European Court of Human Rights' Hirst v United Kingdom No 2 decision, voting rights are important freedoms that should not be denied easily.


68 Compare Farrakhan v Washington, 338 F3d 1009, 1020 (9th Cir 2003) (holding that the Voting Rights Act can apply to felon disenfranchisement), Howard v Gilmore, 205 F3d 1333 (4th Cir 2000) (unpublished) (same), and Wesley, 791 F2d 1255 (same) with Munuaqim v Coombe, 366 F3d 102 (2d Cir Apr 23, 2004) (holding that the Voting Rights Act does not apply to felon disfranchisement). Originally, the Eleventh Circuit court agreed with the Ninth, Fourth, and Sixth Circuit courts that the Voting Rights Act can apply to felon disenfranchisement laws that disparately impact minorities. Johnson v Governor of Florida, 353 F3d 1287, 1303-04 (11th Cir 2003). However, the decision was vacated and an en banc hearing was granted. Johnson v Governor of Florida, 277 F3d 1163 (11th Cir July 20, 2004).

69 Angela Behrens, Note, Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws, 89 Minn L Rev 231, 251 (2004) (finding most challenges of felon disenfranchisement laws to be ultimately unsuccessful); One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv L Rev 1939, 1955 (2002) ("Most courts engaging in this inquiry have found no such connection between the disenfranchisement of felons and impermissible race discrimination.")

70 See, for example, Pataki v Baker, 516 US 980 (1995) (denying petition for certiorari); Locke v Farrakhan, 73 USLW 3286 (Nov 8, 2004) (same).

A. INTERNATIONAL DECLARATIONS AND COVENANTS

1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights ("Universal Declaration") is a significant document on human rights, adopted unanimously by the United Nations General Assembly. In outlining principles of representation and equality, Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, ... or other status." Blanket felon disenfranchisement laws threaten the rights and freedoms of persons based on their status as felon offenders; the United States' laws on what citizens should be denied the right to vote, as remnants of America's racist past, hinder the rights of criminal offenders on the basis of race. Among the rights recognized by the Universal Declaration is that "[t]he will of the people shall be... by universal and equal suffrage." In this document, universal and equal suffrage is a key component of democratic representation.

2. The International Covenant on Civil and Political Rights

The requirement of "universal and equal suffrage" is also displayed in the International Covenant on Civil and Political Rights ("ICCPR"). Article 25 of the ICCPR assures every citizen the right to vote, and that right may not be subject to discrimination on the basis of race, sex, religion, and other enumerated categories or to "unreasonable restrictions." As a party to the ICCPR, the United States has accepted its provisions as a law of the land. Article 25 states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) 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; (c) To have access, on general terms of equality, to public service in his country.

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73 Id art 2.
74 Id art 21(3).
75 International Covenant on Civil and Political Rights at 179 (cited in note 12).
76 See Maria v McElroy, 68 F Supp 2d 206, 231–32 (EDNY 1999) ("Although the ICCPR is not self-executing... it is an international obligation of the United States and constitutes a law of the land.").
77 International Covenant on Civil and Political Rights at 179 (cited in note 12).
Similar to the language in the Universal Declaration, the ICCPR legislation uses the phrase “universal and equal suffrage” when discussing every citizen’s right to vote. However, the phrase “without unreasonable restrictions” implies that some restrictions on election participation, not based on prohibited distinctions, are “reasonable” and, therefore, permissible.\textsuperscript{78}

The legislative history of Article 25 indicates that restrictions based on mental capacity, criminal disenfranchisement, and minimum residency were considered reasonable by the framers of the ICCPR.\textsuperscript{79} Societal standards concerning who should be allowed the right to vote, however, have changed significantly since the drafting of the ICCPR. The fact that felon disenfranchisement was referenced briefly when creating the ICCPR does not mean that the current practice of US permanent felon disenfranchisement is legitimate under international law. For example, the US delegate discussed the legitimacy of exclusion of illiterates from voting in drafting the ICCPR.\textsuperscript{80} However, the practice of excluding illiterates is now unconstitutional in the United States and no longer considered reasonable under modern standards of democracy.\textsuperscript{81} While the exclusion of many groups has been prevalent at various times in history, many disenfranchisement practices are no longer considered reasonable under current standards.

The UN Human Rights Committee, which reviews adherence to the ICCPR, has affirmed that Article 25 “lies at the core of democratic government based on the consent of the people” and that restrictions on the right to vote should only be based on grounds that are “objective and reasonable.”\textsuperscript{82} Noting the existence of criminal disenfranchisement laws, the committee has stated that “if conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.”\textsuperscript{83} The UN Human Rights Committee has consistently discouraged and attempted to limit the reach of felon disenfranchisement laws.\textsuperscript{84} In addition, according to the Committee, the ICCPR not only protects the right of every

\textsuperscript{78} Id.
\textsuperscript{79} See 138 Cong Rec S4781-01 (Apr 2, 1992) (ratifying ICCPR).
\textsuperscript{80} Fellner and Mauer, Losing the Vote at 20 n 72 (cited in note 39).
\textsuperscript{81} Id.
\textsuperscript{82} United Nations, General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No 25(57), Annex V(I), UN Doc CCPR/C/21/Rev.I/Add.7 at 3, ¶ 1, 4 (Aug 27, 1996).
\textsuperscript{83} Id at 5, ¶ 14.
\textsuperscript{84} Discussing the voting restrictions in laws in Hong Kong, for example, the committee expressed concern “that laws depriving convicted persons of their voting right for periods of up to ten years may be a disproportionate restriction of the rights protected by Article 25.” Id.
citizen to vote, but also requires states to take necessary measures to ensure that citizens have an effective opportunity to enjoy that right.\footnote{States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to USHC registration should not be imposed. If residence requirement apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by informed community.” Id at 5, ¶ 11.} 

3. Convention on the Elimination of All Forms of Racial Discrimination

Converging with these international legal recognitions, recognizing the links between voting disenfranchisement and race discrimination, and codifying some of the earliest and widely agreed-upon views of the international community, the Convention on the Elimination of All Forms of Racial Discrimination ("CERD") guarantees "[p]olitical rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage," without distinction as to race, color or national origin.\footnote{International Convention on the Elimination of All Forms of Racial Discrimination (1966), part I, art 5(c), 660 UN Treaty Ser 212, 220 (1969).} Similar to the Voting Rights Act, the CERD does not require discriminatory intent for a finding of discrimination. The CERD advises state parties to eliminate laws or practices that may be race-neutral on their face but have "the purpose or effect" of restricting rights on the basis of race. Thus, this Convention, to which the US is a party, makes discriminatory effect a factor for the basis of determining the legitimacy of a law.

B. INTERNATIONAL DECISIONS ADDRESSING FELON OFFENDERS RIGHT TO VOTE

The following subsections examine rulings of three high courts: the Supreme Court of Canada, the Constitutional Court of South Africa, and the European Court for Human Rights. This brief survey is intended to provide insight into how national courts have interpreted the right to vote. These cases specifically address several questions left unresolved by ambiguous treaty language and are, therefore, useful in interpreting the human rights treaties. Modern case law and recent commentary suggest broad and permanent felon disenfranchisement, like the system used in the United States, is not a reasonable standard for democratic nations.
1. Canada

Sauvé v Canada provides a strong illustration of the international community's growing recognition that all citizens of democratic states have the right to participate in the political process. In that case, the Supreme Court of Canada reviewed a constitutional challenge to a law passed by the Canadian Parliament which denied the right to vote to "every person who is imprisoned in a correctional institution serving a sentence of two years or more." Recognizing the right to vote as fundamental to the rule of law, the court struck down the statute as inconsistent with the respect for the dignity of every person that lies at the heart of democracy. The court rejected the government's stated reasons for the denial of the right to vote, including the propositions that felony disfranchisement would enhance civic responsibility, respect for the rule of law, and the general purpose of criminal sanction. The Chief Justice, speaking for the court, explained that:

[denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force . . . . In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote . . . . The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy.]

The clear language used to denounce the government's purported objectives make the impact of the Sauvé decision powerful. While there is no racial discrimination involved in Sauvé, the case weighs in on the reasonableness of denying citizens the right to vote because of prior criminal convictions. This case has and will continue to be persuasive in any prisoner litigation over felon voting rights in countries with similar constitutional guarantees as Canada.

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87 Sauvé v Canada (Chief Electoral Officer) [2002] 3 SCR 519, 520 (Canada).
88 Id at 543–44.
2. South Africa

_August and Another v Electoral Commission and Others_ established prisoners’ right to vote in South Africa.\(^{90}\) The Constitutional Court of South Africa, the country’s highest court, ruled that inmates should be allowed to vote in the country’s elections. In a unanimous decision, the court paid particular attention to how disenfranchisement profoundly affects a person’s self-respect and relegates him or her to the status of second-class citizen. The judge stated, “[t]he vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.”\(^{91}\) The Constitutional Court judges overturned a lower court ruling that inmates had forfeited their voting rights by committing crimes, making 146,000 South African inmates eligible to register and vote. The Constitutional Court ordered the Electoral Commission, Minister of Home Affairs, and Minister of Correctional Services to make necessary arrangements to enable inmates to register for and to vote in the next election.\(^{92}\)

Following the decision in _August_, South Africa’s Parliament enacted a statute that prohibited voting by incarcerated individuals.\(^{93}\) However, after reviewing the government’s reasons for limiting the voting rights of prisoners, the Constitutional Court found the new statute to be unconstitutional.\(^{94}\) The Court explicitly rejected the government’s arguments based on costs, scarce resources, desire to appear tough on crime, and retribution. Striking down the felon disenfranchisement law, the court found that disqualifying prisoners from voting was inappropriate and inconsistent with enhancing respect for the law and ensuring appropriate punishment.\(^{95}\)

3. European Court of Human Rights

As mentioned earlier, the European Court of Human Rights ruled in the case of _Hirst_ that the blanket restriction on voting rights for incarcerated persons in the UK constitutes a violation of the European Convention on Human Rights. John Hirst, a British national serving a life sentence in the United Kingdom, brought suit against the United Kingdom in this case.\(^{96}\) The Court

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\(^{90}\) _August and Another v Electoral Commission and Others_, [1999] 3 SALR 1, ¶ 18 (CC South Africa).

\(^{91}\) Id at ¶ 18.

\(^{92}\) _August_, 3 SALR 1.

\(^{93}\) The Electoral Act 73 of 1998, amended by the Electoral Laws Amendment Act Act 34 of 2003 (South Africa).


\(^{95}\) Id at ¶¶ 65–67.

\(^{96}\) _Hirst_, 38 Eur HR Rep at ¶ 9.
first noted the divergences between law and practice in the countries which had ratified the European Convention on Human Rights: in eighteen countries, no restrictions were imposed on prisoners’ right to vote; in about thirteen countries, prisoners were not able to vote; and, in the remainder of the contracting states, loss of voting rights was tailored to specific offenses or left to the sentencing court. The Court reiterated, however, that any weakening of the right to vote threatened to undermine the democratic system and should not be taken lightly.

Next, the Court found that the United Kingdom’s voting restrictions stripped a large number of people (more than 70,000) of their right to vote, in a manner which was indiscriminate. The law imposed a blanket restriction on all convicted prisoners. It applied automatically to all prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offense. For instance, a prisoner sentenced to a week’s imprisonment for a minor infraction might lose the right to vote if detained over election day, while a prisoner serving several years for a more serious crime might avoid missing an election. The Court observed that there was no evidence that the Parliament had ever sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners. The Court, therefore, concluded that there had been a breach of Article 3 of Protocol 1, the right to free election clause of the European Convention on Human Rights.

Similar to the examples in Canada and South Africa, disparate racial impact was not an issue with the felon disenfranchisement laws in Hirst. Nonetheless, the United Kingdom looked at the blanket nature of its felon disenfranchisement laws and determined that the laws were unreasonable under the European Convention on Human Rights. The Court found no legitimate reason to justify a broad ban on the voting rights of criminal offenders.

C. CUSTOMARY INTERNATIONAL LAW

No other democracy other than the United States permanently disenfranchises convicted offenders who have served their sentences. International law scholar Karl Josef Partsch flatly rejects blanket criminal disenfranchisement provisions, asserting that an exclusion from the vote may be reasonable only if it “has been pronounced by a judge for a certain time, in connection with punishment for some particular offense, for instance those

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97 Id at ¶ 32.
98 Id at ¶ 31.
99 Id.
100 Id.
connected with elections or for high treason . . . ”101 Some countries condition
disenfranchisement of prisoners on the seriousness of the crime or the length of
their sentence, while other countries simply permit all prisoners to vote.102 In
Germany, the law obliges prison authorities to encourage prisoners to assert
their voting rights.103 A few countries restrict the vote for a short period after
conclusion of the prison term. For example, in Finland and New Zealand,
persons convicted of buying or selling votes or of corrupt practices would have
their vote restricted after serving their sentence.104 In South Africa, prisoners
helped elect one of their own: Nelson Mandela.105 In Israel, an incarcerated felon
led the Shas Party in its victory in gaining seats in the Israeli parliament.106
According to research by Penal Reform International, prisoners generally
maintain their right to vote in countries such as Japan, Norway, Peru, Poland,
Kenya, Denmark, the Czech Republic, Romania, Zimbabwe, the Netherlands,
Sweden, France, Norway, and Germany.107

In most countries, constitutions with detailed provisions for the protection
of the fundamental rights and freedoms of all people, including convicted felons,
have been enacted.108 As a result of all these mechanisms and other factors,
courts have become more willing to protect felons’ rights. The wide acceptance
among civilized nations of universal suffrage and limited felon voting

101 See Karl Josef Partsch, Freedom of Conscience and Expression, and Political Freedoms, in Louis Henkin,
102 For example, in France, disenfranchisement is only allowed when it is imposed by a court order.
Fellner and Mauer, Losing the Vote at 17–18 (cited in note 39).
103 German prison authorities must encourage voting participation by prisoners and facilitate voting
procedures. Id at 18.
104 Id at 17.
105 Prisoners participated in the 1994 South African elections which resulted in the election of former
prisoner and President Nelson Mandela. Rebecca Perl, The Last Disenfranchised Class, 277 The Nation 11, 12 (Nov 24, 2003), available online at
106 Israel affirmed the fundamental right of all citizens, including prisoners, to be part of the
electorate. The Israeli case is especially fascinating because it resulted from a challenge to the
voting rights of Yigal Amir, the man convicted of killing former Prime Minister Yitzhak Rabin.
Rabin’s Widow Tells Israelis Vote for Peres, May 29, 1996, available online at
107 Fellner and Mauer, Losing the Vote at 18 (cited in note 48).
108 In the last three decades, every single new constitution has established a citizen’s entitlement to
vote. Richard S. Katz, Democracy and Elections 216 (Oxford 1997). For example, most constitutions
have sections similar to Article 49 of the constitution of Portugal which states, “All citizens who
are over 18 years of age have the right to vote…. ” Portugal Const, art IC, available online at
restrictions show there is a growing consensus against broad and permanent felon disfranchisement.¹⁰⁹

IV. THE CASE FOR BANNING FELON DISENFRANCHISEMENT

The right to a driver’s license is a privilege that can be revoked. But is the right to vote a privilege or the birthright of any citizen of a country? The above analysis and comparison of international principles and decisions support the conclusion that the denial of felon’s right to vote in the United States is overinclusive, overbroad, and inconsistent with principles of democracy. It serves no distinct legitimate purpose and denies democratic participation to a substantial group of citizens, many of whom are racial minorities. The Hirst decision is America’s most recent wake-up call.¹¹⁰ The European Court of Human Rights in Hirst admits that blanket restrictions on voting rights are violative of principles of human rights. There is now little doubt that laws excluding convicts from voting are unreasonable and disproportionate from an international policy perspective. At a minimum, those who have violated laws and paid their debt to society deserve to participate in their country’s democracy.

The United States’ felon disenfranchisement policies run afoul of international treaties concerned with racial discrimination and democratic principles.¹¹¹ The dramatic increase in African American imprisonment tracks the changes in voting laws in the United States.¹¹² The continued existence of social and economic conditions that make minorities more likely to be convicted of felonies, and cultural forces that promote its tolerance, unchallenged by or reflected in state laws, run contrary to international equality requirements and undertakings. Specifically, US felon disfranchisement laws are inconsistent with the principles of nondiscrimination contained in both Article 5, Section (c) of the Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights, as

¹⁰⁹ Nora V. Demleitner, Preventing Internal Exile: The Need for Restriction on Collateral Sentencing Consequences, 11 Stan L & Pol'y Rev. 153, 159-60 (1999) (discussing how felon disfranchisement laws reinforce stigma, humiliation, and communicate second-class-citizen status to felons, in conflict with international human rights norms).

¹¹¹ See Nora V. Demleitner, Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative, 84 Minn. L. Rev. 753 (2000) (presenting German law as a model for how the United States can conform US voting law to recognize international principles of universal and equal suffrage).

¹¹¹ Jason McClurg, Human Rights Court Invalidates Voting Restrictions on Prisoners, 20 Intl Enforcement Law Rep 511 (2004) (“[T]he Hirst decision may someday be considered persuasive enough to cause a panel of judges to question their own country’s domestic prisoner disenfranchisement laws in light of international human rights treaties and conventions governing these issues.”).

American disenfranchisement laws were originally enacted in the background of racial animus and have a disproportionate impact on the African American and Latino populations. These documents illustrate a widely recognized principle of universal and equal suffrage for all, without regard to race, gender, class, ethnicity, or national origin.

By the customary standards of most democratic nations, American disenfranchisement policies are extreme. Most countries have limited or abolished voting restrictions on felon offenders. Evolving notions of customary international law support the right to vote for felon offenders. There is a strong international legal standard against laws depriving all felon offenders of the right to vote while on probation, on parole, or after the completion of an incarceration sentence. Most nations acknowledge that once released from prison, a felon has paid her debt to society and is entitled to the full rights of citizenship.

Disenfranchisement is a disproportionate penalty for the crimes committed and should not be imposed as a collateral consequence upon the majority of felon offenders. Even though recent legal decisions display hope for overturning disenfranchisement laws under American antidiscrimination legal principles, courts are unlikely to broadly invalidate the denial of voting rights to felons. Therefore, given the significant impact of criminal disenfranchisement laws on the voting population, in particular their extreme disparate impact on African Americans, and the lack of judicial enforcement options, US policymakers should consider alternative policies that will better protect voting rights. Legislation may be the best and most probable method to remove permanent state felon voting restrictions.\(^{113}\) In order to comply with customary international legal standards and antidiscrimination treaties, the United States should consider legislating removal of restrictions on voting rights for former felons under the Voting Rights Act of 1965.

Congress should ban felon disenfranchisement laws. The power to enact felon reenfranchisement legislation is found under the enforcement clauses of the Fourteenth or Fifteenth Amendment. In fulfillment of its mandate to "guarantee to every State in this Union a Republican form of Government," Congress should outlaw states' discriminatory restrictions on voting rights.\(^{114}\) Any broad laws restricting felon voting will have a disproportionate impact on racial minorities. It is well-known that the population of inmates does not reflect

\(^{113}\) Congress has failed to enact several bills seeking to restore the right to vote in federal elections to all unincarcerated offenders. See HR 5510, 107th Cong (2002); HR 906, 106th Cong (1999). In January 2003, John Conyers (D-Mich), reintroduced The Civic Participation Act of 2003, HR 259, 108th Cong (2003). See also HR 1433, 108th Cong (2003) (proposing as part of The Ex-Offenders Voting Rights Act of 2003 that voting rights of all persons who have completed their criminal sentence be restored in federal elections).

\(^{114}\) US Const art IV, § 4.
the racial composition of the United States as a whole. Rather, it consists disproportionately of large numbers of African American and Latino people. Based on the importance of addressing racial discrimination, Congress would be justified in ensuring "equal and universal suffrage" rights for former felon offenders due to the disparate racial composition of the group in the United States and because the current US broad disenfranchisement policy may have been racially motivated.

American disenfranchisement laws should follow preselected sentencing guidelines. Depriving citizens of a political right should only be undertaken for compelling reasons and only to the extent necessary to further those interests. The law should require that imprisoned offenders only be excluded from voting when a judge imposes such punishment as part of a specific criminal sentence. Even the American Convention on Human Rights, the only international treaty that explicitly permits countries to restrict voting, requires that the denial of voting rights be a part of criminal sentence by a court.

Such legislation should also specify, at a minimum, that restoration of the right to vote following release from prison is automatic and immediate. Ex-offenders have paid their debt to society; they are as affected by the actions of government as any other citizen and should be able to participate in governmental decisionmaking under recognized principles of human rights law. By requiring that voting rights be restored after completion of incarceration in the United States, this legislation would prevent claims of unreasonableness, conform to the practice of most countries, lessen disparate racial impact, and encourage ex-offenders to rehabilitate into law-abiding and productive citizens by allowing them to function as citizens and participate in the political process.

V. Conclusion

The right to vote is a well-established norm of international law. Significant international treaties and several recent decisions protect citizens' claim to universal and equal suffrage. While disenfranchisement laws should be of concern in any democracy, the impact of felon disenfranchisement laws in the

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115 45 percent of prison inmates are African American and 18 percent are Latino, compared to 12.3 percent and 12.5 percent of the general population, respectively. Similarly, while one in sixty-three White males aged twenty-five to twenty-nine was in prison or jail in 2001, the number is one in eight for African American men and one in twenty-seven for Hispanic men. The Sentencing Project, Facts about Prisons and Prisoners (May 2004), available online at <http://www.sentencing.project.org/pdfs/1035.pdf> (visited Aug 3, 2004). Population numbers are taken from the 2000 US Census figures at 3, available online at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf> (visited Sept 14, 2004).

United States is beyond compare—an estimated five million US citizens are disenfranchised, including over one million who have fully completed their sentences.

The affirmative obligation of states to protect their citizens’ right to vote is recognized in international treaties and declarations adopted by the United Nations and by regional treaty organizations. Regardless of each statute’s language, voting restrictions designed to disfranchise a particular group on the basis of race trample citizen’s political rights. Similarly, voting restrictions which have a disproportionate impact on particular racial and ethnic groups abandon customary international law and antidiscrimination treaties. As a party to many international treatises concerning political rights, the United States should take into consideration international discussions on the importance of citizens’ right to vote and the unreasonableness of blanket felon voting restrictions. Furthermore, given the overwhelmingly disparate racial impact of American criminal disenfranchisement laws and their historically discriminatory purpose, Congress should amend the Voting Rights Act of 1965 to conform with antidiscrimination and customary international laws. The United States should reform its state voting laws to allow suffrage rights for criminal offenders. American lawmakers should become vigilant in enforcing international antidiscrimination treaties in light of the racial composition and history of racial animus in this country.