Request for a Thematic Hearing on the Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices in the Americas

September 8, 2009

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

ACLU
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September 8, 2009

Dr. Santiago A. Cantón
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
1889 F. Street, NW
Washington, DC 20006

RE: Request for a Thematic Hearing on the Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices in the Americas

Dear Secretary Cantón,

Pursuant to Article 64 of the Rules of Procedure of the Inter-American Commission on Human Rights, we respectfully submit this request on behalf of the undersigned non-governmental advocacy organizations for a thematic hearing on the issue of the discriminatory effects of felony disenfranchisement laws during the upcoming fall session of the Commission. Along with this Request, we include a copy of LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY by Jeff Manza and Christopher Uggen for each of the Commissioners.

As detailed in the attached Request, the felony disenfranchisement laws, policies and practices of certain OAS member states violate the right to vote free from discrimination under the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights. Accordingly, we urge the Commission to carry out a comprehensive review of the felony disenfranchisement laws of member states to assess their compliance with relevant human rights guarantees.

We respectfully ask that the Commission grant this request for a thematic hearing. During the hearing we propose to provide the Commission with an overview of the effect of felony disenfranchisement laws on racial and ethnic minorities. Our presentation will include the testimony of U.S. citizens who have lost their right to vote, academics who have studied the effects of such laws, and discussion from leaders of organizations and attorneys working to achieve the re-enfranchisement of those with felony convictions.

If our request is granted we would also respectfully ask that you send an invitation to the government of the United States requesting that their attendance at the hearing.

Should you require any further information before deciding on this request, please contact me at (202) 662-8346.

Sincerely,

Marcia Johnson-Blanco,
on behalf of the requesting organizations

cc: Steven Watt, American Civil Liberties Union
Ryan King, The Sentencing Project
Weil, Gotshal & Manges, LLP

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INTRODUCTION

Pursuant to Article 64 of the Rules of Procedure of the Inter-American Commission, the undersigned nongovernmental organizations write to request that the Inter-American Commission on Human Rights ("the Commission") hold a hearing to examine the laws, policies, and practices among member states of the Organization of American States ("OAS") relating to the issue of felony disenfranchisement. As discussed in more detail below, it is our considered opinion that these laws, policies and practices violate fundamental provisions of the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights, including the right to vote and the right to be free from discrimination recognized by these two instruments.

The right to vote and the right to be free from discrimination have long been recognized in the inter-American system, yet many OAS member states deny or curtail these rights through the operation of disenfranchisement laws, policies, and practices in their respective criminal justice systems. The United States, in particular, stands out in terms of the breadth, depth, and severity of its disenfranchisement practices, but the United States is not alone in maintaining harsh disenfranchisement schemes. Like the United States, several other OAS member states, including Uruguay and the Dominican Republic, have laws in place that disenfranchise their citizens even after they have left prison.

Moreover, disenfranchisement laws, as applied by OAS member states, are discriminatory in their operation as they 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 by OAS member states, the organizations listed herein respectfully request that the Commission conduct a study of

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

disenfranchisement laws in the Americas to assess their compatibility with applicable human rights' guarantees recognized under the American Declaration of the Rights and Duties of Man, the American Convention, and universal and regional human rights law generally.[2]

[2] During their consideration of the information presented in this Request, we wish to draw the Commissioners' attention to a petition pending before Commission addressing the issue of New Jersey state felon disenfranchisement laws, policies and practices. *Petition Alleging Violations Of The Human Rights Of the New Jersey State Conference NAACP, The Latino Leadership Alliance of New Jersey, Councilwoman Patricia Perkins-Auguste, Councilman Carlos J. Alma, Stacey Kindt, Michael Mackason, Charles Thomas, and Dana Thompson By the United States Of America And The State Of New Jersey, With Request For An Investigation And Hearing On The Merits*, September 13, 2006 (attached as Exhibit A) [hereinafter NEW JERSEY PETITION].

REQUESTING ORGANIZATIONS

The Lawyers' Committee for Civil Rights Under Law (LCCRUL)

Founded in 1963 by President John Kennedy, the principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law by marshaling the pro bono resources of the private bar for litigation, public policy advocacy and other forms of service to promote the cause of civil rights. Given the United States' history of racial discrimination, de jure segregation, and the de facto inequities that persist, the Lawyers' Committee's primary focus is to represent the interests of racial and ethnic minorities, and other victims of discrimination in order to secure justice for all. Through national and international advocacy, and representation, the organization works to promote the economic development of minority communities, and ensure voting rights, fair housing, equal access to education and employment, and environmental justice. Additionally, the Lawyers' Committee works to ensure full compliance by the United States with treaty obligations particularly rights under treaties that foster full civil participation by minorities and women and the elimination of racial discrimination.

The Sentencing Project

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, and promotes cost-effective and humane responses to crime. For more than a decade, The Sentencing Project has been one of the leading organizations conducting research on the practice of felony disenfranchisement in the United States and advocating for reform at the federal and state-level. Staff have authored numerous studies on the policy, including a 1998 study that provided the first state-based estimates of the impact of disenfranchisement. In addition, staff have testified before federal and state legislative bodies and submitted reports to the United Nations' Human Rights Committee and the Committee on the Elimination of Racial Discrimination documenting the impact of disenfranchisement policies.

The American Civil Liberties Union (ACLU)

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights

protected under the U.S. Constitution and other civil and human rights laws. Since the tragic events of 9/11, the core priority of the ACLU has been to stem the backlash against human rights in the name of national security.

In 2004, the ACLU created a Human Rights Program specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy on issues relating to racial justice, national security, immigrants' rights, and women's rights.

The ACLU's Racial Justice Program aims to preserve and extend the constitutional rights of people of color. Committed to combating racism in all its forms, the Program's advocacy includes litigation, community organizing and training, legislative initiatives, and public education.

The full breadth of the ACLU's work can be seen at www.aclu.org

I. DISENFRANCHISEMENT IN THE AMERICAS

A. 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.[3] Of that number, thirty-nine percent have fully completed their sentences, including probation and parole, yet such individuals are still deprived of their right to vote.[4] 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.[5]

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;[6] 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.[7] Only two states do not disenfranchise individuals with felony convictions

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

[4] *Id*. at 250.

[5] "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.

[6] 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.

[7] 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.

while incarcerated, notable exceptions to the rule.[8] To illustrate the various state disenfranchisement practices across the United States, a map and further discussion is provided in Exhibit B, courtesy of the Brennan Center for Justice.

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, which was considered a "white crime."[9] 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.[10] Furthermore, African Americans are not only disproportionately disenfranchised, but are also less likely to have their voting rights restored.[11]

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.[12]

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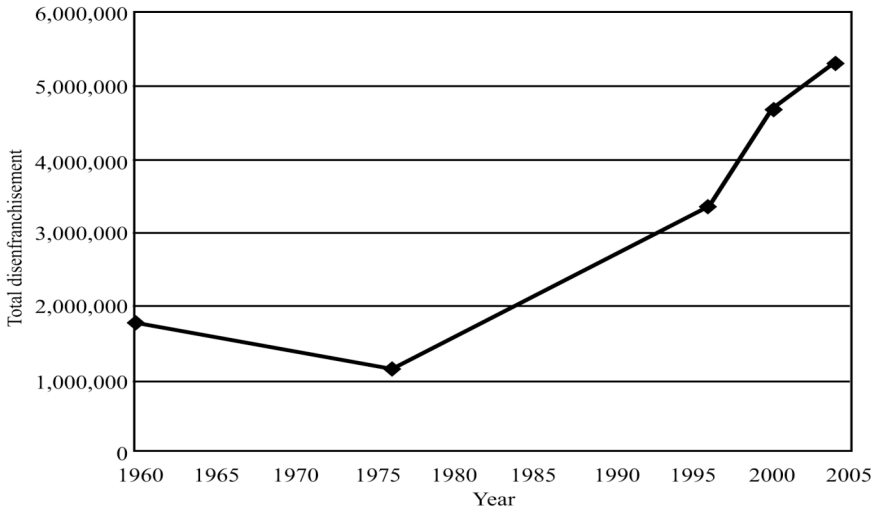
[8] Rare outliers, Maine and Vermont comprise the two states that do not deny those with felony convictions the right to vote. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2008), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf

[9] 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.

[10] 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).

[11] *Id.* at 592.

[12] 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 disfranchisement 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.[13]

B. The Americas

Other countries in the Americas do not generally impose automatic disenfranchisement after a person completes his or her sentence, and no nation of the Americas disenfranchises to the same extent as the United States. To illustrate, in addition to the United States, only nine other countries in the Americas disenfranchise individuals who have completely served their sentence—including probation and parole—while fifteen countries specifically forbid permanent disenfranchisement.[14] For a fuller examination of the different disenfranchisement laws operating in the Americas, we refer the Commission to The Sentencing Project's 2007 request for a thematic hearing, *Barriers to Democracy*.[15]

The Dominican Republic – one of the few countries in the Americas that allow permanent and automatic disenfranchisement – limits this restriction to crimes of disobedience

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

[14] Countries with a prohibition against permanent disenfranchisement include: the Bahamas, Belize, Bolivia, Canada, Ecuador, El Salvador, Guyana, Haiti, Jamaica, Mexico, Panama, Peru, St. Lucia, Suriname, and Trinidad and Tobago.

[15] *See* Exhibit C attached.

regarding civic obligations. For instance, disenfranchisement is imposed on those convicted of "treason, espionage, or conspiracy against the Republic, or for taking up arms, assisting in, or participating in any attack against it."[16]

Suriname and Uruguay also have broad policies of permanent disenfranchisement. Article 58 of Suriname's Constitution states that people shall lose the right to vote when such a right has been "denied by an irrevocable judicial decision." Yet, the degree to which the courts in Suriname actually revoke the right to vote in practice is unclear. Article 80 of Uruguay's Constitution permits the state to permanently disenfranchise individuals who habitually engage in morally dishonest activities, who are "member[s] of social or political organizations which advocate the destruction of the fundamental bases of the nation by violence or propaganda inciting to violence," and those who show "a continuing lack of good conduct."

II. 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.[17]

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

[16] CONSTITUCION POLITICA DE LA REPUBLICA DOMINICANA, art. 14.

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

"universal and equal suffrage" to citizens who have never been incarcerated or convicted of any crime.

The Inter-American system likewise reflects a commitment to the principles of universal and equal suffrage. The American Declaration on the Rights and Duties of Man ("American Declaration") protects the right of "[e]very person having legal capacity" to "participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free."[18] Article 2 of the American Declaration states that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." The American Convention on Human Rights (the "American Convention") guarantees similar rights. For example, Article 23 of the American Convention provides that every citizen shall enjoy the right and opportunity "to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters." Although subsection (2) permits member states to regulate the right to vote on the basis of "sentencing by a competent court in criminal proceedings" (indicating that member states may impose certain restrictions on the voting rights of people with criminal convictions), no such restriction appears in the Declaration's equivalent.

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. Article 20 of the American Declaration, for example, limits the right to vote to those having "legal capacity" and the American Convention provides that the right may be restricted by, among other things, the "sentencing [of] a competent court in criminal proceedings."[19]

However, for a state to curtail a fundamental freedom such as the right to vote, the limitation on the right must serve a legitimate state aim and be reasonably related to that aim. The Commission itself referenced this "legitimate aim" test in *Statehood Solidarity Committee v.*

[18] American Declaration, art. 20.

[19] American Convention, art. 23(2).

United States, where it found that restrictions on voting rights must (1) "pursue a legitimate" end that is (2) "reasonably and fairly related" to such a restriction.[20] Further, in *Claude Reyes and others v. Chile*, the Inter-American Court of Human Rights held that it is a principle of the Inter-American human rights system that restrictions on rights—such as the right to universal and equal suffrage—be justified by reference to a legitimate goal and "necessary" in a democratic society.[21] 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 for the Protection of the Human Rights and Fundamental Freedoms of the Council of Europe (the "European Convention").[22]

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.[23]

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

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[20] *Statehood Solidarity* at 90, *citing* I/A Court H.R., Advisory Opinion OC-4/84 of January 19, 1984, ¶ 57.

[21] Judgment of the Inter-American Court of Human Rights *in Claude Reyes and others v. Chile*, delivered on 11 October 2006, ¶ 95.

[22] *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).

[23] *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.

disenfranchisement law.[24] 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.[25] 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.

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*,[26] 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.[27]

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.[28] However, because the law at issue barred *all* prisoners from voting during their incarceration, the Court found the ban disproportionate to the state aim.[29] Furthermore, the Court found it significant that 48,000 prisoners were disenfranchised by the

[24] 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.

[25] *Id*. ¶ 56.

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

[27] *Id*. ¶¶ 58-59

[28] *Id.* ¶ 77.

[29] *Id.* ¶ 71.

measure.[30] 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."[31]

Similarly, the European Commission for Democracy through Law (the "Venice Commission")[32] also requires any ban on prisoner voting to be proportional, limited to serious offenses, and explicitly imposed by sentencing courts.[33] In its Report on the Abolition of Restrictions on the Right to Vote in General Elections,[34] 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."[35]

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[30] *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.*

[31] *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).

[32] 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 a*t http://www.venice.coe.int/site/dynamics/N_members_ef.asp?L=E.

[33] 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, 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).

[34] 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.

[35] *Id.* ¶ 82.

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)*,[36] the Canadian Supreme Court struck down a "blanket" ban on voting for those currently incarcerated.[37] 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)*,[38] the Supreme court struck down the law, stating that "[d]enying a citizen the right to vote denies the basis of democratic legitimacy,"[39] and that even this narrower restriction on voting rights failed to further a legitimate state aim.[40]

National courts in South Africa and Israel have reached the same conclusion. In *August and another v. Electoral Commission and others*,[41] and in *Minister of Home Affairs v. NICRO*,[42] 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."[43]

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[36] [1993] 2 S.C.R. 438.

[37] *Id.*

[38] 3 S.C.R. 519, 2002 S.C.C. 68 (2002).

[39] *Id.* ¶ 32.

[40] *See generally* 3 S.C.R. 519, 2002 S.C.C. 68 (2002).

[41] 1999 (3) SA 1 (CC).

[42] 2005 (3) SA 280 (CC).

[43] *Id*. at ¶ 28, quoting *August* ¶ 17.

Likewise, in *Hila Alrai v. Minister of the Interior and Yigal Amir*,[44] 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 extreme circumstances enacted clearly in law."[45] 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.[46]

In short, foreign constitutional courts have found that the disqualification of prisoners from voting violates basic democratic principles.[47] 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.

III. THE RIGHT TO BE FREE FROM DISCRIMINATION

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

The Commission itself has highlighted that the right to equality before the law should exist in practice, as well as in substantive provisions of the law.[48] Not only do many felony

[44] H.C. 2757/96 (1996).

[45] *Id.* at 2 (citations omitted).

[46] *Id.*

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

[48] *See e.g.*, *William Andrews v. United States*, Case 11.139, Inter-Am. C.H.R., Report No. 57/96, OEA/Ser.L/V?ii.95, doc. 7 rev. at 570 ¶ 173 (1997).

disenfranchisement laws in the United States and elsewhere in the Americas lack a legitimate state aim, they also have a disproportionate impact on the voting rights of black and Hispanic individuals.[49]

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."[50] Significantly, the HRC expressed concern that the United States' felony disenfranchisement practices have "significant racial implications."[51] 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 of 26 of the [ICCPR]."[52]

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."[53] The Committee to End Racial Discrimination ("CERD")–the body tasked with monitoring compliance with ICERD—highlighted its concern

[49] For further discussion of this issue *see* NEW JERSEY PETITION, Exhibit A.

[50] 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).

[51] 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.

[52] *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." Articles 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.

[53] 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.

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."[54] 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."[55] 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."[56]

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."[57] 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

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

[55] 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).

[56] *Id*. at 73.

[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, 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."[58]

Similarly, in *Hirst*,[59] 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.[60] 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."[61]

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.[62] Seventeen European countries[63] allow all prisoners to vote and eleven[64] extend voting rights to some people in prison.[65] In several of the countries where certain

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

[59] *Hirst v. United Kingdom* (*Hirst No. 1*) 30.6.2004, Rep 2004.

[60] *Id.*

[61] *Id.*

[62] "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.

[63] *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).

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

[65] *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.[66]

All of the remaining twelve European nations[67] allow individuals to automatically vote upon release from custody.[68] 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.[69] 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."[70] Macedonia provides another example where *all* prisoners are allowed to vote rather than just those not convicted of felonies.[71] 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."[72]

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

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[66] *Id.*

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

[68] *Id.*

[69] *Id.*

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

[71] *Id*. at 34.

[72] *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."[73] 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."[74]

IV. 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.[75] 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

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[73] 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).

[74] *Id.* at 169.

[75] *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.[76] 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,[77] despite the fact that these groups only represent twelve and fifteen percent of the general population, respectively.[78] 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."[79] 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.[80]

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

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

[77] 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.

[78] U.S. Census Bureau, Population Estimates Program (2007).

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

[80] Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Comparisons Decisions: Hispanic-Black-White*, CRIMONOLOGY 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.[81] 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.[82] 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.[83] This result amplifies the cost of racial disenfranchisement and results in reduced political participation by affected communities.[84] 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

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

[82] "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

[83] 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.

[84] 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. .

on you, and a lack of respect for yourself and the status quo."[85] On the restoration of her right to vote, Linda Steele said:

> 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.[86]

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.[87] 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.[88] 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.'"[89] 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

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

[86] *Id.* at 2.

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

[88] *Id.*

[89] *Id.*

unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility."[90]

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*.[91] 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.[92] 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.[93] The Court concluded that

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

[91] *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).

[92] 471 U.S. 222 (1985).

[93] *Id.*

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."[94] But the standard set forth 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.[95] Some courts have even tried to narrow the protections of *Hunter*.[96]

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."[97] In 2008, the CERD again confronted the disparity of the application of

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[94] *Id.* at 233.

[95] *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).

[96] *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).

[97] 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).

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 of the criminal sentence.[98] However, since that time, the United States government has taken no demonstrable action concerning felony disenfranchisement policy.

B. The Americas

While there is a dearth of data demonstrating the actual effects of felon disenfranchisement policies in the Americas, outside of the United States, a preliminary analysis of the laws and policies of other OAS member states demonstrate that the laws of certain states fail to comply with international human rights standards protecting the right to vote and be free from discrimination. As mentioned above, the Uruguayan constitution provides for post-incarceration disenfranchisement for broad and ill-defined categories such as those that "habitually engage in morally dishonest activities." Similar to the example provided for Alabama in the United States, a person in Uruguay can lose their voting rights even after being released from prison because they were engaged in the so-called "morally dishonest activity" of writing fraudulent checks. International human rights standards proscribe disenfranchisement following release from prison because such a practice is not proportional to the crime committed.

Unlike practices in the various states of the United States and Uruguay which disenfranchise based on more general categories (*i.e.* any felony conviction or "morally dishonest activity"), the disenfranchisement-eligible crimes of the Dominican Republic involve subversion of the state – "treason, espionage, or conspiracy against the Republic, or for taking up arms, assisting in, or participating in any attack against it." As these are actions that stand in direct opposition to civil participation, it is arguable that the deprivation of the right to vote is a proportional to those crimes.

A preliminary analysis of disfranchisement laws in the Americas also demonstrates the potentially discriminatory effect of these laws on minority and marginalized populations in those countries. Brazil, for example, disenfranchises prisoners during incarceration for criminal

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

convictions and strips voting rights from those sentenced by courts of "last resort," where the appellate process is exhausted.[99]

The issue of race intersects with disenfranchisement policy in Brazil, as black and mestizo Brazilians are overrepresented in certain inmate populations in relation to their white counterparts. In its 2003 report to the CERD, Brazil highlighted three states, São Paolo, Rio Grande do Sul and Minas Gerais, where overrepresentation of black and mixed-race populations permeates the prison system.[100] Thus, the policies and practices that exist in Brazil to limit voting rights and civic benefits based on criminal convictions have disproportionate repercussions on populations overrepresented in the criminal justice system.

[99] CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL, art. 15.

[100] Committee on the Elimination of Racial Discrimination, *Report Submitted by States Parties Under Article 9 of the Convention Addendum* 414-16, CERD/C/431/Add.8 (Brazil) (Oct. 16, 2003).

CONCLUSION AND REQUEST

Based on the aforementioned evidence and discussion, we urge the Commission to grant this request for a thematic hearing and after the hearing (1) conduct out a comprehensive review of the felon disfranchisement laws, policies and practices of OAS member states to assess their compliance with applicable human rights guarantees including the right to vote and the right to be free from discrimination and (2) where appropriate, make recommendations to member states as to how they may bring their laws into compliance with those standards.

SUPPORTERS OF REQUEST

A. National Organizations

A. Philip Randolph Institute
African American Human Rights Foundation
Association of Community Organizations for Reform Now
Brennan Center for Justice
Campaign for Youth Justice
Center for International Human Rights, Northwestern Law School
Center for Constitutional Rights
Coalition for the Peoples' Agenda
Coalition for Nonviolence and Restorative Justice
Dēmos
Fraternal Order of X-Offenders
International CURE
International Human Rights Clinic at American University College of Law
Just Detention International
Justice Fund
National Black Police Association
National Congress of Black Women
National Women's Prison Project
National Resource Center on Children and Families of the Incarcerated
Nonprofit Voter Engagement Project
November Coalition Foundation
Penal Reform International/The Americas
People Advocating Recovery
Prison Legal News, a Project of Human Rights Defense Center
Quest Institute, Inc., Books-Behind Bars
Real Cost of Prisons Project
The Inner Voices
The Wright Institute
United Methodist Church General Board of Church & Society
Voice of the Ex-offender
Wallace Global Fund

B. State Organizations

AdvoCare, Inc.
Alabama CURE
American Civil Liberties Union of Alabama
American Civil Liberties Union of Alaska
American Civil Liberties Union of Arizona
American Civil Liberties Union of Florida
American Civil Liberties Union of Kentucky
American Civil Liberties Union of Mississippi
American Civil Liberties Union of Northern California
Arizona African American Legislative and Leadership Council
Arizona Public Defender Association
California Prison Focus
Central Kentucky Council for Peace and Justice
Colorado CURE
Community Service Society
Drug Policy Forum of Hawaii
Florida CURE
FedCURE
Georgia Rural Urban Summit

Hamden Consulting
Justice Maryland
Kentuckians For The Commonwealth
Maricopa County NAACP
Michigan CURE
Mississippi Voter Empowerment Coalition
Missouri CURE
New Mexico CURE
New York CURE
New York State Defenders Justice Fund
Pennsylvania Institutional Law Project
Restore the Vote WI NOW! Coalition a project of the ACLU of Wisconsin
Rhode Island Family Life Center
The Primavera Foundation
Virginia C.U.R.E.
Virginia Reentry Initiative
Women's Council of the California Chapter of the National Association of Social Workers and the Association of Women in Social Work

C. International Supporters

Centro de Estudios Legales y Sociales (CELS), ARGENTINA
Instituto Terra, Trabalho e Cidadania (ITTC), BRAZIL
John Conroy, Counsel for British Columbia Civil Liberties Association in *Sauvé v. Canada,* CANADA
Dr. Julio C. Guastavino Aguiar, Member of Prison's Commission, URUGUAY

EXHIBIT A

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF THE NEW JERSEY STATE CONFERENCE NAACP, THE LATINO LEADERSHIP ALLIANCE OF NEW JERSEY, COUNCILWOMAN PATRICIA PERKINS-AUGUSTE, COUNCILMAN CARLOS J. ALMA, STACEY KINDT, MICHAEL MACKASON, CHARLES THOMAS, AND DANA THOMPSON, BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY, WITH REQUEST FOR AN INVESTIGATION AND HEARING ON THE MERITS

By the undersigned, appearing as counsel for the petitioners under the provisions of Article 23 of the Commission's Regulations, on behalf of above Petitioners including Non-Governmental Organizations Registered Under the Laws of the United States and United States citizens:

Laleh Ispahani
Steven Macpherson Watt
Ann Beeson
American Civil Liberties Union
Human Rights &
Racial Justice Programs

Professor Frank Askin
Professor Penny Venetis
Rutgers School of Law
Constitutional Litigation Clinic

Submitted: September 13, 2006

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY, WITH REQUEST FOR AN INVESTIGATION AND HEARING ON THE MERITS

I.

INTRODUCTION

Petitioners are citizens residing in New Jersey who were sentenced for committing crimes, and who are on parole and probation living in their communities throughout the State of New Jersey. Petitioners cannot vote because a New Jersey law disfranchises probationers and parolees. Petitioners seek review from this Commission in their efforts to restore their most fundamental of rights – the right to vote. This Petition is not merely about the right of individual offenders to cast a ballot; it is also about the right of the African-American and Latino communities to participate fully and effectively in the political process.

Because of acknowledged racial profiling and other discriminatory aspects of the criminal justice system in New Jersey and throughout the United States,[1] persons of color are investigated, arrested, prosecuted and convicted out of all proportion to their propensity to commit crime. Felon disfranchisement law thus disproportionately affects them. By disproportionately excluding from the electorate so many African Americans and Latinos, felon disfranchisement significantly dilutes the political power of those constituencies.

The scandalous nature of felon disfranchisement in the United States was highlighted in an editorial, which appeared in the *New York Times* on October 14, 2005:

> The United States has the worst record in the democratic world when it comes to stripping convicted felons of the right to vote. Of the nearly five million people who were barred from participating in the last presidential election, for example,

[1] See Point II. B.

> most, if not all, would have been free to vote if they had been citizens of any one of dozens of other nations. Many of those nations cherish the franchise so deeply that they let inmates vote from their prison cells.

The individual disfranchised Petitioners are joined by others including the leading organizations of black and brown communities in New Jersey - the New Jersey State Conference of the NAACP and the Latino Leadership Alliance of New Jersey. They are also joined as Petitioners by two members of the City Council of Elizabeth, New Jersey, a major urban center with a large racial minority population.

Petitioners challenged New Jersey's practice of denying suffrage to convicted felons on parole and probation, alleging that the practice denied them Equal Protection of the Laws under the New Jersey Constitution because of its discriminatory and disparate impact on the African-American and Latino electorate in the State. Both trial and appellate courts dismissed the Complaint for failure to state a claim on which relief could be granted, and the New Jersey Supreme Court denied the petition for appeal to that court.

Petitioners, after exhausting all available judicial remedies at the domestic level, now bring their claims to this Honorable Commission. Petitioners' claims constitute violations of some of most fundamental rights protected under the American Declaration on the Rights and Duty of Man, including the right to vote (Article XX), the right to be free from racial discrimination (Article II) and the right to rehabilitation (Articles I and XVII), rights long recognized under international human rights law and explicitly protected by the Declaration.

Petitioners' situation is not isolated – 19 other U.S. states and the District of Columbia have disfranchisement policies that are less sweeping than New Jersey's; 19

have the exact same policies; and another 12 exclude even more categories of persons from the franchise than the State of New Jersey. Only two of the 50 U.S. states permit voting in prison, a practice embraced by at least 8 OAS states and nearly one-half of Europe's nations. Notably, those states, Maine and Vermont, are far more racially homogeneous than the rest of the country, and have larger Caucasian prison populations than the rest of the U.S.

Petitioners request, *inter alia*, that the State of New Jersey bring its disfranchisement law and policies into line with internationally recognized standards by amending its laws to permit post-incarceration voting; that all 35 U.S. states with any post-incarceration restrictions on voting be made to remove restrictions that fail to comport with international standards; and that the federal government enact comprehensive voting rights legislation which complies with international voting rights standards; specifically, legislation that would extend the right to vote to persons with federal felony convictions who have completed the incarcerative portion of their sentences. Finally, Petitioners ask that courts and public defenders be made to advise defendants who are pleading guilty and those being sentenced for disfranchising crimes if and when they will lose the right to vote, and the procedures for how they might gain restoration of that fundamental right.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Law of Felon Disfranchisement in New Jersey

New Jersey Statute 19:4-1(8) provides that:

> No person shall have the right of suffrage . . . . [w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under

the laws of this or another state or of the United States.

That statute was passed pursuant to Article 2, ¶7 of the Constitution of New Jersey, which provides as follows:

> The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate.[2]

B. As a Consequence of Racial Profiling In the State of New Jersey, a Greatly Disproportionate Number of Members of the Minority Community Have Been Disfranchised

The consequences of the disfranchisement law have been drastic for the African-American and Latino populations of New Jersey. The data is clear that African-Americans and Latinos are investigated, prosecuted, convicted, sentenced and thereby disfranchised at rates substantially greater than non-Hispanic white persons – and at rates greatly in excess of their propensity to commit crime.

The United States Census for the year 2000 reported that African-Americans constituted 13.6 percent of the New Jersey population and Hispanics approximately 13.3 percent. In contrast, African-Americans constitute more than 63 percent of the current prison population, more than 60 percent of persons on parole and approximately 37 percent of probationers; and Hispanics make up approximately 18 percent of the prison population, about 20 percent of parolees and more than 15 percent of those on probation. Collectively, African-Americans and Hispanics make up 81 percent of New Jersey's prison population, more than 75 percent of those on parole and more than 52 percent of probationers. In contrast, non-Hispanic whites constitute some 72.6 percent of the State's total population, but only 19 percent of prisoners and parolees, and 41 percent of those on

[2] Plaintiffs had argued in the underlying New Jersey case that a law enacted pursuant to a constitutional delegation of authority, unlike a direct constitutional prohibition, was subject to Equal Protection analysis. But the New Jersey courts rejected that argument.

probation.

According to the Urban Institute of Justice, in 2002, 75 percent of prisoners being released from state prisons to New Jersey communities were either African-American (62 percent) or Hispanic (13 percent).[3]

From 1977 to 2002, the prison population in New Jersey quadrupled to more than 27,000. In 1980, 3,910 offenders were released from New Jersey prisons. In 2001, 14,849 offenders were released from New Jersey prisons.[4] From 1980 until 2002, the incarceration rate in New Jersey increased from 76 to 331 per 100,000 persons. In 2002, white males were incarcerated at a rate of 161 per 100,000 persons; African-American males were incarcerated at a rate of 2,117 per 100,000; and Hispanic males were incarcerated at a rate of 759 per 100,000 persons.[5]

As a consequence, New Jersey has raised its budget spending on the criminal justice system due to the high incarceration rates. In the fiscal year 1983, the state spent $200 million and the budget expanded to $1.1 billion in the fiscal year 2003.[6] According to the Urban Institute, approximately 70,000 offenders were expected to return from state prisons to New Jersey from 2002 to 2007. These offenders are 62 percent African-American. Nearly one-third, or 31 percent, of offenders returning to New Jersey after incarceration return to either Camden County or Essex County, which have the highest proportion of African-Americans in the State. This data, and its source is set forth in detail in an amicus brief filed in the New Jersey state courts by the New Jersey Institute

[3] Travis, Keegan, Cadora, Solomon & Swartz, *A Portrait of Prisoner Reentry in New Jersey*, Urban Institute Justice Policy Center Research Report (2003). Precise figures in all these categories are difficult to come by because of discrepant accounting methods by the government agencies involved.
[4] *Id.* at 22.
[5] Bureau of Justice Statistics, Prison and Jail Inmates at Midyear, 2001, http://www.ojp.usdoj.gov/bjs.
[6] Travis, *Prison Reentry*.

for Social Justice attached as Exhibit A.

Like most states in the United States, New Jersey's Department of Corrections monitors the parole system on a local level with district offices throughout the state. Probation is supervised on a county level and serves as an alternative to prison for some offenders. A probationer is assigned to a probation officer who monitors the probationers' community supervision and ensures that the probationer adheres to the specific rules of conduct established by the court. In 2004, there were 85,186 disfranchised felony probationers in New Jersey.[7] And in 2001, the State of New Jersey Administrative Office of the Courts reported that of the 69,559 persons on probation at that time, more than 52 percent were African-American or Hispanic and 41 percent were non-Hispanic whites.

Unlike a probationer, a parolee is an offender who is released on parole after serving a prison term. The offender is required to be supervised upon his/her return to the community as part of his conditional release. If the parolee violates his/her conditional release, the parolee may be sent back to prison depending on the court's discretion or the parole officer's discretion. In 2004, the New Jersey Department of Corrections oversaw 14,180 parolees,[8] whose racial composition reflected the population of the prisons from which they were released.

Unlike in 19 other states and the District of Columbia, ex-offenders on parole or probation in New Jersey may not vote. The vastly disproportionate extent to which racial minorities are under the supervision of the criminal justice system – and thus denied the right to vote – results in large measure from the well-acknowledged discriminatory

[7] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy,* 9 (2006), Table A3.3, at page 249.
8 Travis, Prisoner Reentry.

application of the criminal laws. The wide latitude given to individual police officers, prosecutors, judges and juries to exercise discretion allows discriminatory animus and racial stereotypes to influence administration of the criminal laws of New Jersey to the detriment of African-Americans and Latinos.

In particular, African-Americans are substantially more likely to be stopped by the police while driving on New Jersey roads and highways than are whites - a disproportionate likelihood that has no other explanation than the conscious or unconscious decisions of police officers to especially target African-American motorists.[9] For example, statistics compiled by the New Jersey State Police between 1994 and 1998 show that four out of every ten stops made by State Police attached to the Moorestown and Cranbury stations involved a minority motorist.[10] Most significantly, the rate of traffic stops targeting minority motorists escalated substantially as police officers were allowed discretion as to whom to stop. The Radar Unit (which stops vehicles according to radar monitoring) issued 18 percent of its tickets to African-Americans, while the Patrol Unit (which exercises discretion in traffic stops) issued over 34 percent of its tickets to African-Americans. South of Exit 3 of the New Jersey Turnpike, the Radar unit issued 19.1 percent of its tickets to African-Americans, while the Patrol Unit issued 43.8 percent of its tickets to African-Americans. With the increase in discretion granted to police officers, the rate of traffic stops of African-Americans increased dramatically in comparison to stops based on neutral data such as radar readings. This demonstrates the prevalence of conscious or unconscious profiling in decisions by police about which persons to be subject to stops and investigations.

[9] Interim Report of the New Jersey State Police Review Team Regarding Alternatives of Racial Profiling, April 20, 1999 (hereinafter "Veniero Report") at 26, available at http://www.state.nj.us/lps/intm_419.pdf
[10] *Id.* at 33.

African-Americans and Hispanics are also substantially more likely to be subject to a consent search than whites. According to statistics compiled by the New Jersey State Police between 1994 and 1998, nearly eight out of every ten consent searches conducted by the New Jersey State Police from the Moorestown and Cranbury police stations involved minority motorists. A consent search is one where police officers ask permission to conduct a search. Such searches have been recently ruled unconstitutional by the New Jersey Supreme Court because they are inherently coercive.[11]

Similar race disparities exist throughout the New Jersey system, as officially acknowledged by the New Jersey courts, police and Attorney General's office:

(A) In *State v. Soto*, a New Jersey state court found that African American "defendants have proven at least a *de facto* policy on the part of the State Police out of the Moorestown Station of targeting blacks for investigation and arrest . . . The statistical disparities and standard deviations revealed are stark indeed . . . The utter failure of the [New Jersey] State Police hierarchy to monitor and control a crackdown program [….] or investigate the many claims of institutional discrimination manifests its indifference if not acceptance."[12]

(B) The findings of the Court in *Soto* were acknowledged and expanded upon in the Veniero Report. That Report found:

(1) "[T]he underlying conditions that foster disparate treatment of minorities have existed for decades in New Jersey . . . and will not be changed overnight."[13]

(2) "Despite these efforts and official policies to address the issue of racial

[11] State v. Steven J. Carty, 170 N.J. 632, 790 A.2d 903 (2002).
[12] 324 N.J. Super. 66, 84-85 (Law Div., Gloucester County, 1996).
[13] Veniero Report at 112.

profiling, based upon the information that we reviewed, minority motorists have been treated differently than non-minority motorists during the course of traffic stops in the New Jersey Turnpike. For the reasons set out in this report we conclude that the problem of disparate treatment is real not imagined."[14]

(3) "We are thus presented with data that suggest that minority motorists are disproportionately subject to searches (eight out of every ten consent searches conducted by troopers assigned to the Moorestown and Cranbury stations involved minority motorists)."[15]

(4) In the period from 1996 to 1998, the State Police from the Newark, Moorestown and Cranbury stations made a total of 2,871 arrests for "more serious offenses" (generally excluding traffic, including drunk driving arrests). Of these, 932 (32.5%) involved white persons; 1,772 (61.7%) involved black persons, and 167 (5.8%) involved persons of other races.[16] As the Report then noted: "The fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but that they were less likely to be suspected of being drug traffickers in the first place, and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search."[17]

(5) Despite efforts by the State Police to curb racial profiling, the practice continued into the 21st Century, according to the testimony of New Jersey Attorney General John Farmer before the Senate Judiciary Committee on April 3,

[14] *Id.* at 4.
[15] *Id.* at 6-7.
[16] *Id.* at 36.
[17] *Id.* at 32.

2001 ("Farmer Testimony"). For example, Farmer testified that a study of Troop D in early 2001 showed that white drivers were subjected to consent searches 19 percent of the time, while blacks were at 53 percent and Hispanics at 25 percent. "Thus, blacks and Hispanics were subjected to consent searches at rates higher than their presence on the road and higher than their stop rates."[18]

The *Soto* decision and New Jersey Racial Profiling Report acknowledged that the criminal justice system in New Jersey is racially biased. This racial bias is reflected starkly in the arrest and incarceration of drug offenders. Statistics show that police focus disproportionately on members of the minority community in making drug arrests. Drug arrests and convictions have had an especially disproportionate impact on African-Americans and Hispanics, even though African-Americans and Hispanics do not use illegal drugs any more frequently than whites. Figures indicate that in 1982, 12 percent of New Jersey's prisoners were drug offenders, and 31 percent of the inmates were white. In 2001, 34 percent of the New Jersey prison population was drug offenders and only 18 percent of the prison population was white. The New Jersey Department of Corrections attributes this disparity to the impact of the 1986 Comprehensive Drug Reform Act. The Act led to targeting of inner-city neighborhoods where the population is overwhelmingly minority. Between 1986 and 1999, the rate at which African-Americans were incarcerated for drug offenses increased by 475 percent, while the rate at which whites were incarcerated for drug offenses increased by only 112 percent.

National research shows that whites and African-Americans use illegal drugs at similar rates. By disproportionately excluding from the electorate so many African Americans and Latinos, felon disfranchisement significantly dilutes the political power of

[18] Farmer Testimony at 16.

those constituencies. According to the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), in 2002, 8.5 percent of whites, and 9.7 percent of African-Americans reported using illegal drugs in the preceding month, and 9.3 percent of whites, and 9.5 percent of African-Americans reported themselves to be dependent on an illicit substance. In New Jersey, a survey is conducted every three years by the New Jersey Division of Criminal Justice among high school students, leading to the publication of results under the title, "Drug and Alcohol Use Among New Jersey High School Students." Those reports have consistently found higher percentage rates of reported usage of illicit substances by white New Jersey high school students than by African American and Hispanic high school students. The 1999 report found that 46.7 percent of white high school students reported marijuana use compared to 40.1 percent of African American high school students, and 36.3 percent of Hispanic high school students. Similarly, 8.6 percent of white high school students reported cocaine use, compared to 2.4 percent of African American students and 6.4 percent of Hispanic students.[19]

Young people of color have particularly suffered from disparate incarceration for drug offenses. The rate of increase of imprisonment between 1986 and 1999 for African-American youth was 646 percent, compared to 186 percent for white youths. The result is that an entire generation of minority youths cannot participate in the democratic process. Moreover, it creates an underclass of disaffected and alienated

[19] Although white and minority youths sell and use drugs at about the same rate, black youths are 25 times more likely to end up being incarcerated for drug-related crimes. In at least 15 states, remarkably, black males in general were imprisoned on drug charges at rates anywhere from 25 to 57 times those of white men, thereby making up, nationwide, fully 74 percent of those incarcerated for drug offenses. Elizabeth A. Hull, The Disenfranchisement of Ex-Felons, at 25 (2006) (citing "U.S. Incarceration Rates Reveal Striking Racial Disparities," Human Rights Watch Worlds Reporter, Feb. 27, 2002, jttp://www.hrw.org/backgrounder/usa/race.

citizens who may never participate in the voting process.

Although recent reforms and judicial supervision of State Police practices have no doubt ameliorated the discriminatory implementation of the laws, it will take generations to undo the impact the unequal and unjustified incarceration rates have imposed on the minority community.

C. Disfranchisement of Ex-Offenders Released From Prison Is a National Problem in The United States

The disfranchisement of ex-offenders is not unique to the State of New Jersey. Currently, more than five million U.S. citizens are prohibited from voting because they have been convicted of a felony offense.[1] In nearly every state of the U.S., persons who are currently serving jail time for felony crimes are denied the right to vote.[2] In addition, over two million Americans who have already served their prison sentences continue to be disfranchised.[3] In Florida, Kentucky, and Virginia, ex-felons can never regain their right to vote.[4] People with felony convictions on parole cannot vote in thirty-six states, while felony probationers are denied the franchise in thirty-one states.[5] In several U.S. states, even the commission of a misdemeanor is a bar to voting.[6]

U.S. criminal disfranchisement policies stand in stark contrast to those of most other democratic nations, many of which allow prisoners to vote.[7] In fact, through its harsh felon disfranchisement laws, the United States "aligns itself with countries whose

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[1] The Sentencing Project, *Felony Disenfranchisement Laws in the United States,* 1, available at: http://www.sentencingproject.org/pdfs/1046.pdf (Aug. 2006).
[2] Maine and Vermont are the only two states that allow incarcerated felons to vote. *Id.*
[3] *Id.*
[4] *Id.* at 3.
[5] *Id.*
[6] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy,* 9 (2006).
[7] Elizabeth A. Hull, *The Disenfranchisement of Ex-Felons,* 81 (2006).

commitment to progressive values is less evident, such as Azerbaijan, Chechnya, Jordan, Libya, and Pakistan."[8]

Furthermore, U.S. felon disfranchisement laws have disproportionately and overwhelmingly impacted communities of color. Thirteen percent of all black males are currently deprived of the right to vote. This rate is "seven times the national average" rate of disfranchisement.[9] Over the last twenty years, the "war on drugs" has further exacerbated this trend. Despite similar rates of drug use, young black males "are twenty-five times more likely" than young white males to serve time for drug-related offenses.[10] If current incarceration rates continue, "three in ten of the next generation of black men can expect to be disfranchised at some point in their lifetime."[11]

Although several states have recently passed laws to restore voting rights to ex-felons[12], many of these initiatives require mandatory waiting periods of up to seven years and involve cumbersome and confusing application processes.[13] In many of these states, felons are never informed of their right to re-enfranchisement upon leaving prison.[14] In others, eligibility review is so understaffed and poorly administered that ex-felons have to wait years for a decision.[15] Worse still, while some states have moved in recent years to re-enfranchise ex-felons, probationers, and parolees, Utah and Massachusetts (through Constitutional Amendment) and Kansas (through legislation) have limited these groups' voting rights.[16]

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[8] *Id.* at 81-82.
[9] *Felony Disenfranchisement Laws in the United States* at 1.
[10] Hull at 25.
[11] *Felony Disenfranchisement Laws in the United States* at 1.
[12] *Felony Disenfranchisement Laws in the United States* at 2.
[13] *Hull* at 152.
[14] *Id.*
[15] *Id.* at 153.
[16] *Felony Disenfranchisement Laws in the United States* at 2.

D. Facts About the Petitioners

The two lead Petitioners, the New Jersey State Conference of the NAACP and the Latino Leadership Alliance of New Jersey, represent their respective communities.

Petitioner NEW JERSEY STATE CONFERENCE NAACP (hereinafter New Jersey NAACP), is an unincorporated, nonprofit affiliate of the national NAACP. Keith Jones is the New Jersey NAACP president. The NAACP is a voluntary association committed to the improvement of the status of minority groups, the elimination of discriminatory practices and the achievement of civil rights. The NAACP, founded in 1909, seeks to ensure political, educational, social, and economic equality of minority group citizens in the United States. As the oldest and largest civil rights organization in the United States, the NAACP has a long history of involvement in protecting the voting rights of African Americans and challenging racial discrimination. The disfranchisement of ex-felons on parole and probation impacts particularly harshly on the voting rights of black men, who constitute a significantly disproportionate percentage of prison inmates and released prisoners in New Jersey. The New Jersey NAACP brings this action on behalf of its members who are released felons who want to register to vote but are unable to do so under the current law, and on behalf of the entire African American community of New Jersey, whose ability to participate equally in the political process and to elect to public office candidates of their choice is hampered by the impact of the law.

Petitioner LATINO LEADERSHIP ALLIANCE OF NEW JERSEY (hereinafter "LLA") is a voluntary association whose purpose is to improve the status of Hispanic/Latino Americans, in part by working to end discriminatory practices. A part of its mission is the election of candidates, both Hispanic and non-Hispanic, with a

demonstrated track record of support for issues that matter to Hispanics. The LLA has local affiliation in Union County and throughout New Jersey.

Petitioner PATRICIA PERKINS-AUGUSTE is an African-American citizen of voting age actively involved in electoral and civic affairs in Union County, New Jersey. She is a member of the Elizabeth City Council. She has a strong interest in increasing voter registration and participation among African-Americans in Elizabeth, Union County, and New Jersey in order to advance and protect the ability of members of the African-American community to enjoy life, liberty, safety and happiness as promised by the Constitution of the State of New Jersey.

Petitioner CARLOS J. ALMA is an Hispanic citizen of voting age actively involved in electoral and civic affairs in Union County, New Jersey. He is currently in his fifth year as a member of the Elizabeth City Council. He has a strong interest in increasing voter registration and participation among Hispanics in Union County and New Jersey in order to advance and protect the ability of members of the Latino community to enjoy life, liberty, safety and happiness as promised by the Constitution of the State of New Jersey.

Petitioner MICHAEL MACKASON, is an African-American of lawful voting age, a citizen of the United States and a legal resident of New Jersey. He is currently on parole, and thus pursuant to N.J.S.A. 19:4-1(8), is not entitled to vote. Mr. Mackason has been on parole since his release from a rehabilitation center in 2002, and will remain on parole until 2008 with the possibility of early release. Mr. Mackason is a law-abiding citizen, employed as the Program Manager at Youth Build-Newark, an educational and trades program focusing on out-of-school youth. He is also a part-time computer literacy

instructor at Essex Community College and a board member of a local community development program. Mr. Mackason is seeking the right to vote because he would like to more fully participate in the political system. He wishes to address current and proposed legislation on issues that he believes need more vocal support than they presently receive. Re-enfranchisement would permit Mr. Mackason to share his support and dissent on issues that he feels strongly about through the voting process.

Petitioner DANA THOMPSON is an African-American of lawful voting age, a citizen of the United States, and a legal resident of New Jersey. Mr. Thompson was sentenced in 2001 to three concurrent sentences of 364 days and placed on three years probation. He was convicted of possession of a controlled dangerous substance and leaving the scene of an accident. Mr. Thompson's probation ended in 2005, making him recently eligible to vote pursuant to N.J.S.A. 19:4-1. He is gainfully employed as the sole proprietor of his own construction company in Piscataway. He is also a volunteer at the New Jersey Institute of Social Justice and "New Careers," a program providing job training to parolees in Essex County. Mr. Thompson also participates in Christian prison ministry. He is most interested in participating in the electoral process to support issues like incentives for start-up minority businesses, the rehabilitation of ex-offenders, local economic development initiatives, and the reform of the criminal justice system.

Petitioner CHARLES THOMAS is an African-American of lawful voting age, a citizen of the United States and a legal resident of the state of New Jersey. Mr. Thomas is currently serving parole and thus pursuant to N.J.S.A. 19:4-1 (8), is not entitled to vote. Mr. Thomas has been on parole from a life sentence since his release from both the Trenton and Rahway Prison in 2000. Mr. Thomas was 18 years old at the time of the

crime, and is on life-time parole. Thus, he was never eligible to vote, and, pursuant to his statue, he never will be. He is a law-abiding citizen, employed as a treatment coordinator for Volunteers of America, an organization based in Camden, N.J. Mr. Thomas seeks the right to vote because, as a homeowner, as a taxpayer, and as a member of the community, he believes in no taxation without representation. Re-enfranchisement would allow Mr. Thomas to share his opinion on issues about which he believes he should be concerned about as both a community member and father, such as how the local school is being managed.

Petitioner STACEY KINDT is an activist of lawful voting age, a citizen of the United States and a legal resident of New Jersey**.** She is currently on parole until December 27, 2007, and thus pursuant to N.J.S.A. 19:4-1(8), is not able to vote. She is a director at Redeem Her, an organization committed to helping woman who either are or have been imprisoned by changing the preconceptions that society has about women in prison in general, by providing positive role models to her sisters who are still incarcerated, and by providing a diversity of social services programs where the community and ex-offenders join together to meet the tangible, practical needs of incarcerated and recently-released women. Mrs. Kindt believes that disfranchisement inhibits women parolees to be reintegrated with society. She is actively involved in her community, but her inability to vote makes her feel that she is not good enough to be a member. Mrs. Kindt wants the right to vote to express her opinion on views such as political corruption and welfare reform. Exhibit D.

E. Procedural History

Petitioners' class complaint was filed on January 6, 2004 in the Superior Court of

New Jersey, Chancery Division, Union County, challenging New Jersey's practice of denying suffrage to convicted felons on parole and probation. The Complaint alleged that the practice denied Equal Protection of the Laws under the New Jersey Constitution because of its discriminatory and disparate impact on the African-American and Latino electorate in the State.

The Plaintiffs were the New Jersey State Conference/NAACP, the Latino Leadership Alliance of New Jersey, Elizabeth City Council members Patricia Perkins-Auguste and Carlos Alma, and ten New Jersey residents who at the time were on either parole or probation.

The trial court dismissed the Complaint for failure to state a claim on which relief could be granted, with a written opinion on July 12, 2004. The case was appealed. It was argued in the Appellate Division of the New Jersey Superior Court on September 27, 2005. The appeal was dismissed with a written opinion on November 2, 2005. Plaintiffs filed a timely Petition for Certification in the New Jersey Supreme Court on December 1, 2005. The Supreme Court denied the petition with an Order filed on March 16, 2006.

III.

ADMISSIBILITY

A. Petitioners Have Properly Exhausted Domestic Remedies.

Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights ("Commission") sets forth as a prerequisite for admissibility that the "remedies of the domestic legal system have been pursued and exhausted in accordance with the

generally recognized principles of international law."[20] Petitioners presented their claims that laws in the State of New Jersey denying suffrage to convicted felons on parole and probation violated Petitioners' right to equal protection of the laws under the State Constitution because of its discriminatory and disparate impact on the African-American and Latino electorate in the State. On July 12, 2004, the Chancery Division of the Superior Court dismissed the claims. Petitioners filed a timely appeal of the decision and on November 2, 2005, the Appellate Division of the Superior Court delivered an opinion, dismissing the appeal on largely the same grounds as the trial court. Petitioners sought review of this decision by the Supreme Court for the State of New Jersey, the state's highest appellate court. By Order filed March 16, 2006, the Supreme Court exercised its discretion not to review the lower court decisions. In denying review, the Supreme Court let the findings of the lower courts stand and ended the Petitioners' ability to challenge their disfranchisement. According to the U.S. Supreme Court, the U.S. Constitution grants the states the right to deny the vote to people with felony convictions. *Richardson v. Ramirez*, 418 U.S. 24 (1974). Petitioners have thus exhausted their domestic individual remedies. They cannot seek review in any court within the United States – state or federal. Accordingly, this Commission has jurisdiction to review this Petition.

B. Petitioners Have Filed This Petition Within Six Months From the Exhaustion of Domestic Remedies.

Petitioners also meet the terms of Article 32(1) of the Commission's Rules of Procedure, which require that petitions "are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that

[20] Rules of Procedure of the Inter-American Commission on Human Rights, approved 4-8 Dec. 2000, amended 7-25 Oct., 2002 and 7-24 Oct., 2003, art. 31 [hereinafter *Rules of Procedure*].

exhausted the domestic remedies."[21] As the six-month deadline on Petitioners state law constitutional claims will not expire until September 16, 2006 (six months after the State Supreme Court's denial to review the case) this petition meets the timeliness requirements of Article 32(1).

C. There Are No Parallel Proceedings Pending.

Article 33 of the Rules of Procedure renders a petition inadmissible if its subject matter "is pending settlement pursuant to another procedure before an international governmental organization . . . or, . . . essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization . . . ."[22] The subject of this petition is not pending settlement and does not duplicate any other petition in any other international proceeding.

D. The American Declaration of the Rights and Duties of Man Is Binding on the United States.

As the United States is not a party to the Inter-American Convention on Human Rights ("American Convention") it is the Charter of the Organization of American States ("OAS Charter") and the American Declaration on the Rights and Duties of Man ("American Declaration") that establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,[23] and the General Assembly of the OAS has repeatedly recognized the American Declaration as a source of

[21] *Rules of Procedure*, art. 32(1).
[22] *Rules of Procedure,* art. 33.
[23] Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also* I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶ 46.

international legal obligation for OAS member states including specifically the United States.[24] This principle has been affirmed by the Inter-American Court, which has found that that the "Declaration contains and defines the fundamental human rights referred to in the Charter,"[25] as well as the Commission, which recognizes the American Declaration as a "source of international obligations" for OAS member states.[26]

Moreover, the Commission's Rules of Procedure establish that the Commission is the body empowered to supervise OAS member states' compliance with the human rights norms contained in the OAS Charter and the American Declaration. Specifically, Article 23 of the Commission's Rules provides that "[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration of the Rights and Duties of Man,"[27] and Articles 49 and 50 of the Commission's Rules confirm that such petitions may contain denunciations of alleged human rights violations by OAS member states that are not parties to the American Convention on Human Rights.[28] Likewise, Articles 18 and 20 of the Commission's Statute specifically direct the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any OAS member state, and "to pay particular attention" to the observance of certain key

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[24] *See, e.g.*, OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to "set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man).
[25] I/A Court H.R., *Advisory Opinion OC-10/89, July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,"* Ser. A Nº 10, ¶43, 45.
[26] *See e.g.*, Report No. 74/90, Case 9850, Hector Geronimo Lopez Aurelli (Argentina), Annual Report of the IACHR 1990, ¶. III.6 (quoting I/A Court H.R., Advisory Opinion OC-10/89, ¶ 45); *see also Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, December 27, 2002, ¶ 163.
[27] *Rules of Procedure* , art. 23 (2000).
[28] *Rules of Procedure*, arts. 49, 50 (2000).

provisions of the American Declaration by states that are not party to the American Convention including significantly the right to life and the right to equality before law, protected by Articles I and II respectively.

Finally, the Commission itself has consistently asserted its general authority to "supervis[e] member states' observance of human rights in the Hemisphere," including those rights prescribed under the American Declaration, and specifically as against the United States.[29]

In sum, all OAS member states, including the United States, are legally bound by the provisions contained in the American Declaration. Here, Petitioners have alleged violations of the American Declaration and the Commission has the necessary authority to adjudicate them.

E. The Interpretative Mandate of the Commission

International tribunals, including the Inter-American Court and Commission, have repeatedly found that international human rights instruments must be interpreted in light of the evolving norms of human rights law expressed in the domestic, regional, and international contexts. Over thirty-five years ago, the International Court of Justice (ICJ) pronounced, "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."[30]

More recently, the Inter-American Court, in considering the relationship between the American Declaration and the American Convention, referenced this ruling in its

[29] Detainees in Guantánamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002) at 2. *See also* I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶¶ 46-49 (affirming that, pursuant to the Commission's statute, the Commission "is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights").

[30] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 21 June 1971.

finding that "to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948."[31] Again, in 1999, the Court reasserted the importance of maintaining an "evolutive interpretation" of international human rights instruments under the general rules of treaty interpretation established in the 1969 Vienna Convention.[32] Following this reasoning, the Court subsequently found that the U.N. Convention on the Rights of the Child, having been ratified by almost all OAS member states, reflects a broad international consensus (*opinio juris*) on the principles contained therein, and thus could be used to interpret not only the American Convention but also other treaties relevant to human rights in the Americas.[33]

The Commission has also consistently embraced this principle and specifically in relation to its interpretation of the American Declaration. For example, in the *Villareal* case, the Commission recently noted that "in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and

[31] I/A Court H.R., Advisory Opinion, *supra* note 159, ¶ 37.
[32] I/A Court H.R., *Advisory Opinion OC-16/99, October 1, 1999, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,"* Ser. A No. 16, ¶¶ 114-15 (*citing, inter alia*, the decisions of the European Court of Human Rights in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995)); *see also* I/A Court H.R., *Advisory Opinion OC-18/03, September 17, 2003, "Juridical Condition and Rights of the Undocumented Migrants,"* Ser. A No. 18, ¶ 120 (*citing* Advisory Opinion OC-16/99.).
[33] I/A Court H.R., *Advisory Opinion OC-17/2002, August 28, 2002, "Juridical Status and Human Rights of the Child,"* Ser. A No. 17, ¶¶ 29-30.

applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments."[34] Adopting this approach the Commission has looked to numerous international and regional treaties as well as decisions of international bodies to interpret rights under the American Declaration.[35]

IV.

HUMAN RIGHTS VIOLATIONS & LEGAL ANALYSIS

A. New Jersey Felon Disfranchisement Law Violates Article XX of the American Declaration.

Article XX of the American Declaration, as interpreted in light of universal and regional human rights law, as well as widespread state practice, establishes that individual Petitioners should be permitted to vote. As U.S. citizens with criminal convictions who have been judged fit to live in their communities (to complete the non-incarcerative portion of their sentences on parole or to serve their sentences on probation), they have a right to vote. As demonstrated further below, the State of New Jersey's felon disfranchisement laws and policies violate this right. Those laws and

[34] *Ramón Martinez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 821 (2002) ¶ 60 (*citing Garza v. United States*, Case Nº 12.243, Annual Report of the IACHR 2000, ¶¶ 88-89); *see also Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), ¶¶ 86-88; *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02,-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), ¶¶ 96-97.

[35] *See, e.g*., IACHR, *Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System*, Country Report, OEA/Ser.L/V/II.106, Doc. 40 rev., Feb. 28, 2000, ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada's responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community, supra* note 168, ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2001) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil's obligations under the American Declaration to effectively prosecute domestic violence-related crimes).

policies impose a blanket ban on individual Petitioners' rights to participate in popular elections, and thus impose restrictions that violate the American Declaration. The restrictions are neither legitimate nor proportional in view of the fundamental nature of the right of people of lawful capacity and age to vote in functioning democratic states.

1. Article XX Establishes Petitioners' Right to Participate in Popular Elections

Article XX of the American Declaration provides that:

> Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XX makes clear that the right to vote is fundamental to every citizen who is of lawful capacity. Article XX poses no restrictions to voting. While Article XX does not specifically refer to the right to vote for citizens with criminal convictions, its plain and absolute language makes clear that citizens do not surrender the franchise when they are convicted. No case has previously been brought before the Commission concerning the disfranchisement of people with criminal convictions, perhaps because as discussed herein, felon disfranchisement on the scale it occurs in the U.S. is unique to the U.S.

The Commission has repeatedly cited the importance of respect for political rights as a guarantee of the validity of the other human rights embodied in international instruments.[36] Moreover, in interpreting Article XX in other voting rights cases, the Commission has embraced a broad view of suffrage. In these cases, the Commission has consistently underscored the importance placed by the Inter-American system on participatory democracy generally, and on the right to vote as an element of participatory

[36] Report on the Situation of Human Rights in Paraguay, Inter-Am. C.H.R., OEA/Ser.L/V/II.71, Doc. 19 rev. 1, Chapter VII (A), 1987.

democracy specifically. Based on these findings, it is clear that felon disfranchisement violates Article XX.

For example, in *Statehood Solidarity Committee v. United States* (D.C. Voting Rights Case), the Commission noted that the right to vote protected by Article XX " . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives." The Commission also noted that "[n]either form of political life, nor institutional change, nor development planning or the control of those who exercise public power can be made without representative government."[37]

Similarly, in its Report on the Situation of Human Rights in El Salvador published in 1978, the Commission observed that:

> The right to take part in the government and participate in honest, periodic, free elections by secret ballot is of fundamental importance for safeguarding [] human rights…. The reason for this lies in the fact that, as historical experience has shown governments derived from the will of the people, expressed in free elections, are those that provide the soundest guaranty that the basic human rights will be observed and protected.[38]

The Commission has also taken the position that the exercise of political rights "implies participation by the population in the conduct of public affairs, either directly or through representatives elected in periodic and genuine elections featuring universal suffrage and secret ballot, to ensure the free expression of the electors' will."[39]

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[37] *Statehood Solidarity Committee v. United States*, [hereinafter *D.C. Voting Rights Case*] Case 11.204, Inter-Am. C.H.R., Report No. 98/03, OEA/Ser./L/V/II.114 Doc. 70 rev. 1 ¶85 (2003).
[38] Report on the Situation of Human Rights in El Salvador, Inter-Am. C.H.R., OEA/Ser.L/II.85, Doc. 28 rev., Chapter IX [A(1)], (1994).
[39] Report on the Situation of Human Rights in Paraguay, Inter-Am. C.H.R., (1987), *supra* note 25, at Chapter VII (A), cited in *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 ¶ 40 (1999).

As the Commission is well aware, the Inter-American human rights instruments consider representative democracy as a more important mechanism for the protection of human rights than universal human rights instruments. For example, the Charter of the Organization of American States, the system's foundational document, provides that "solidarity of the American states and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy."[40] And the Inter-American Democratic Charter recognizes that an essential element of such representative democracy is "universal suffrage as an expression of the sovereignty of the people."[41] By contrast, none of the United Nations' foundational human rights instruments goes this far.

Article XXXII of the American Declaration evidences the importance that the Inter-American system places on voting and participatory democracy. Article XXXII makes it "the *duty* of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so (emphasis added)."

When read in conjunction, it is clear that Article XX and Article XXXII are meant to ensure that every citizen in the Americas of lawful capacity be permitted to vote. Voting is a fundamental right that should not be stripped unnecessarily by any state. By preventing individual Petitioners (who have been deemed to be ready to integrate into their communities) from voting, the State of New Jersey is preventing them from being involved in the democratic process, as required by Article XX. Additionally, the State of

[40] Charter of the Organization of American States, *supra* note 22, Article 3(d).
[41] Inter-American Democratic Charter, OAS Doc. OEA/SerP/AG/Res.1 (2001); 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), 40 I.L.M. 1289, art. 3 (2001).

New Jersey is also depriving them of their fundamental duty to vote, guaranteed by Article XXXII.

Consistent with its interpretive mandate, the Commission, in interpreting the rights protected by Article XX may look to analogous provisions of the American Convention on Human Rights (the "Convention"). That provision, Article 23, provides:

1. Every citizen shall enjoy the following rights and opportunities:

    a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
    b. To vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
    c. To have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Although subsection (2) permits member states to regulate the right to vote on the basis of "sentencing by a competent court in criminal proceedings" (indicating that member states may impose certain restrictions on the voting rights of people with criminal convictions), no such restriction appears in the Declaration's equivalent. This Commission should refrain from interpreting Article XX to incorporate such a restriction for the following reasons. First and most importantly, it is the provisions of the Declaration, and not the Convention that are binding on the United States. Second, it is a long established principle of treaty interpretation that where two possible interpretations of a treaty provision are possible, one that is restrictive of rights and the other more protective, the interpretation that reflects the treaty's object and purpose should be

adopted. Because the overall purpose of the Declaration is to protect the right to vote, restrictions on the right should not be lightly inferred.[42] And, finally, despite the apparently restrictive language of subsection 2, the Commission has repeatedly interpreted its provisions to require states parties to respect and ensure the overarching right to vote protected by subsection 1 of Article 23.[43] Incorporating a condition that permits member states a broad mandate to restrict the voting right of parolees and probationers would be incompatible with such an interpretation.

In sum, Article XX of the American Declaration protects the right of everyone to vote including persons, such as the individual Petitioners here who have been convicted of a criminal offense and released on parole, or are serving their criminal sentences on probation. Because New Jersey disfranchisement law imposes a blanket ban on such persons, it violates Article XX of the American Declaration.

2. Any Restrictions on the Right to Vote Protected by Article XX Must Be Objective, Reasonable and Proportional.

Even if this Commission were to interpret Article XX to incorporate a restriction the equivalent of Article 23(2) of the American Convention, as the Commission has found, any restriction on the right to vote must be objective, reasonable and proportional. Additionally, the restriction must not have the effect of eviscerating the essence of the

[42] See e.g., Vienna Convention on the Law of Treaties, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980 (treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose."). The U.S. recognizes a similar interpretive principle in construing conflicting provisions of U.S. criminal statutes. See, e.g., U.S. v. RLC, 503 U.S. 291 (1992) (under so-called rule of lenity, the intended scope of an ambiguous criminal statute must be interpreted in favor of the accused).

[43] *See e.g., Mena v. Mexico*, Case 10.956, Inter-Am. C.H.R., Report No. 14/93 (1993) (reviewed alleged voting irregularities); *Andres Aylwin Azocar et al. v. Chile*, Inter-Am. C.H.R., (1999), (finding that the structure of the Chilean constitution denies the right to equality in voting without discrimination); and *D.C. Voting Rights Case*, Inter-Am. C.H.R., (2003) (finding a violation of the right to equal voting status for District of Columbia citizens).

fundamental right to vote. New Jersey disfranchisement law has precisely this impact on individual Petitioners' rights to vote. Accordingly, for this reason alone, New Jersey disfranchisement law violates Article XX. In interpreting Article 23, the Commission requires member states to demonstrate that any laws impinging on the right to vote comply with certain minimum standards or conditions that have the effect of preserving the essence of the right to vote. The Commission's role in evaluating the effectiveness of the right is to ensure that any differential treatment applied in relation to voting rights is both objective and reasonable.[44] Under this analysis, certain restrictions on voting rights are permissible. For example, member states may enact voting laws that draw distinctions between different situations so long as they are pursuing legitimate ends, and the classification is reasonably and fairly related to the ends pursued by the law in issue.[45] For example, it would not be discriminatory to impose, on the grounds of age or social status, limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.[46]

And, as with other fundamental rights, restrictions or limitations upon the right to participate in government must be justified by the need for them in the framework of a democratic society, as demarcated by the means, their motives, reasonableness and proportionality. The Commission permits states a certain degree of autonomy in making

[44] *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.
[45] 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.
[46] *Id*. ¶56. For another example, the Commission found that with respect to granting naturalization, the granting state may legitimately determine whether and to what extent applicants for naturalization have complied with the conditions deemed to ensure an effective link between them and the value system and interests of the society to which they wish to belong, and it would not be discriminatory for a state to establish less stringent residency requirements for those foreigners seeking to acquire nationality who, viewed objectively, share much closer historical, cultural and spiritual bonds with that nation. *Id*. ¶¶ 58-60.

these determinations, but will find a violation of the right to vote where the essence and effectiveness of the right is eviscerated.[47]

Here, restrictions on the Petitioners' fundamental right to vote are applied in blanket fashion to one and all parolee and probationer, and thus not objectively. They are also not reasonable. It cannot be reasonable to disfranchise people who are trying to reintegrate into society, who possess a right to rehabilitation under the American Declaration (as more fully explained in Part IV.C). Finally, the policies are not in service of legitimate government ends, for two reasons. First, racial discrimination cannot be a legitimate governmental aim. Second, once the State of New Jersey determines that a person is no longer a threat to the community and releases them from incarceration, there has been a determination that these individuals can rejoin their communities. Prohibiting these parolees and probationers from voting frustrates the legitimate governmental goals of reintegration and reformation of offenders.

3. The Right to Vote Protected by Article XX Should Be Interpreted in Light of Universal and Regional Human Rights Law Which Likewise Protect Parolees' and Probationers' Voting Rights.

Universal and regional human rights laws also support a finding that Article XX protects individual Petitioners' rights to vote from the State of New Jersey's felon disfranchisement laws. As in the Inter-American system, treaties and other international instruments have been broadly interpreted to protect the franchise. Universal and regional human rights instruments (analogous to Declaration Article XX) have been specifically interpreted to prohibit felon disfranchisement. The Commission should look

[47] *D.C. Voting Rights Case*, Inter-Am. C.H.R., ¶¶99, 101.

to these determinations to find that New Jersey's felon disfranchisement law violates Article XX.[48]

For example, the Universal Declaration of Human Rights provides broad suffrage protection in Articles 21(1 and 3),[49] and the International Covenant on Civil & Political Rights (ICCPR), ratified by the United States in 1995, provides for similar, albeit, more detailed protections in Article 25:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] 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; …[50]

In General Comment 25, the U.N. Human Rights Committee (HRC) considered application of Article 25 of the ICCPR specifically in relation to member state laws depriving citizens of their right to vote, requiring that "[t]he grounds for such deprivation [be] objective and reasonable. 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."[51]

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[48] Otherwise stated, they have been interpreted to prohibit laws that are unduly restrictive of the right, or unreasonable, disproportionate, lacking objectivity or which erode the essence of the right.

[49] "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ….3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Universal Declaration of Human Rights, GA Res. 217A(111), UN Doc. A/810 (1948), Article 21 (1, 3).

[50] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[51] Human Rights Committee, General Comment 25 (57), General Comments under article 40, ¶4, of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), ¶14, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument

In practice, the HRC has consistently required that member states limit the reach of criminal disfranchisement laws. For example, in 2001 after evaluating the United Kingdom's disfranchisement law, which barred all incarcerated prisoners from voting, in light of Article 25 of the ICCPR, the HRC concluded that it could not find justification for a general ban on voting by even *serving prisoners* in modern times.[52] More recently, and of direct relevance to this case, in its 2006 Concluding Observations on the United States Country Report, after considering information provided by the United States and non-governmental organizations, the HRC found that U.S. disfranchisement policies violate the ICCPR and called for the restoration of voting rights to U.S. citizens with criminal convictions upon their release from prison. As the HRC found:

> 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 or 26 of the Covenant, nor serves the rehabilitation goals of article 10 (3).

By definition, this would include persons on parole and probation such as the individual Petitioners here.[53]

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[52] In its post-review assessment of the United Kingdom in 2001, the HRC commented, with respect to the United Kingdom's blanket disfranchisement provision banning all serving prisoners from voting: "The Committee is concerned at the State party's maintenance of an old law that convicted prisoners may not exercise their right to vote. The Committee fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 of the Covenant. The State party should reconsider its law depriving convicted prisoners of the right to vote." Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UK (2001), ¶10, available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2153823041947eaec1256afb00323ee7?Opendocument

[53] Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), ¶35, available at http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf (If the Human Rights Committee's recommendations are implemented, 36 states would change their laws and nearly four million Americans would have their voting rights restored.)

Additionally, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which was ratified by the United States in 1994,[54] in a broad suffrage provision, also protects the voting rights of persons with criminal convictions while on parole and probation. Citing the general non-discrimination clause of Article 2,[55] Article 5(C) provides that "States Parties undertake to … guarantee the right of everyone … to equality before the law, notably in the enjoyment of the following rights: (c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage .. . . ."[56]

Regional human rights laws guaranteeing voting rights likewise prohibit blanket disfranchisement laws and policies or those that are not objective, reasonable or proportionate to the state aim pursued by the restriction, or that unnecessarily impede upon the essence of the right. The most comprehensive and recent analysis of disfranchisement laws and their impact on the right to vote has been conducted by the European Court of Human Rights in *Hirst v. United Kingdom* (*Hirst No. 2*).[57] In *Hirst No. 2*, the Court considered a U.K. law that banned prisoners from voting. John Hirst, a serving prisoner, invoked Article 3, Protocol 1 of the European Convention on Human Rights, which requires states parties "to hold free elections at reasonable intervals by

[54] 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, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.
[55] Article 2 requires governments to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." *Id.* Art. 2(2).
[56] *Id*. Art. 5(c). *See also, Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990)), ¶5, which requires that except for those limitations which are demonstrably necessitated by imprisonment, the human rights and fundamental freedoms in the ICCPR are to be retained by all prisoners. Basic Principles for the Treatment of Prisoners, Dec. 14, 1990, G.A. Res. 111, U.N. GAOR, 45th Sess., Supp. No. 49A, at 200, U.N. Doc. A/45/49, *available at* http://www.unhchr.ch/html/menu3/b/h_comp35.htm.
[57] *Hirst v.United Kingdom* (No.2), 681 Eur. Ct. H.R. (2005).

secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of their legislature."[58]

At the outset, the Court made clear that casting the ballot is a right, not a privilege, and that the presumption in democratic states must be in favor of inclusion; "universal suffrage," said the Court "has become the basic principle."[59] Following a comprehensive review of all relevant national and international law and jurisprudence on voting rights,[60] the Court found that although states are accorded a margin of appreciation in giving recognition to this right, in enacting voting laws, states are constrained by the following fundamental principles: (1) the conditions they impose may not curtail Convention rights to such an extent as to impair their very essence; (2) the aim of the restrictive legislation must be legitimate; and (3) the means employed to achieve that aim may not be disproportionate.[61]

The Court conceded that commission of certain criminal offences, such as the serious abuse of a public position or conduct that threatens "to undermine the rule of law or democratic foundations,"[62] may indeed warrant disfranchisement, and agreed with the U.K. submission that crime prevention was a legitimate purpose for any disfranchisement law. However, because it barred all prisoners from voting during their incarceration, the

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[58] Id., citing *Protocol to the European Convention on Human Rights* (also Convention for the Protection of Human Rights and Fundamental Freedoms), 213 U.N.T.S. 262, *entered into force* May 18, 1954, Art. 3. The African Convention on Human and Peoples' Rights is also apposite, providing for a broad right to participation in Article 13: (1). Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2). Every citizen shall have the right of equal access to the public service of his country. (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law. *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Art. 13.
[59] *Id.* ¶59
[60] *Id*. ¶¶ 6, 9.
[61] *Id.* ¶62.
[62] *Id.* ¶ 77.

Court did not find the ban proportional.[63] In this regard, the Court found it significant that 48,000 prisoners were disfranchised by the measure. That number included a wide range of minor and major offenders. The Court also noted, disapprovingly, that English courts do not advise prisoners that disfranchisement followed as a consequence of imprisonment.[64] 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" and was "incompatible with Article 3, Protocol 1."[65]

Similarly, the European Commission for Democracy through Law (the Venice Commission)[66] also requires any ban on prisoner voting to be proportional, limited to serious offenses, and explicitly imposed by sentencing courts.[67] In its Report on the Abolition of Restrictions on the Right to Vote in General Elections,[68] 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

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[63] *Id*. ¶71.
[64] *Id.* ¶ 71. 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.*
[65] *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).
[66] 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.
[67] The Commission's Code of Good Practice in Electoral Matters (2002) state*s*: "(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, 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).
[68] *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.

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."[69]

Universal and regional human rights laws therefore support an interpretation that the American Declaration's Article XX prohibits felon disfranchisement as practiced in New Jersey. Universal and regional human rights laws also require that any suspension of the right to vote be based on "objective and reasonable" grounds, and be proportionate to the offense and the sentence imposed. Like the law barring all incarcerated prisoners from voting which was struck down in *Hirst No. 2*, the New Jersey law bars all imprisoned persons from voting, but it goes much further and also bars all people serving out the remainder of their sentences in their communities – while on parole or probation. The New Jersey law sweeps into its ambit a great variety of offenders, some guilty of relatively minor offenses such as criminal mischief, forgery, and theft,[70] and affects nearly 100,000 parolees and probationers. That number is more than twice the number considered too many by the Court in *Hirst No. 2*.

Moreover, New Jersey courts and corrections officials do not advise people pleading guilty or being sentenced that they will lose this fundamental right to vote until they have fully served all portions of their sentence, even if a portion of their sentence is served while living in their communities. Such practice is contrary to that recommended by the European Court in *Hirst No. 2* and actually practiced by many democratic nations.

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[69] *Id.* ¶ 82.

[70] In New Jersey, there are no felonies as in other U.S. states, only crimes and petty offenses. New Jersey Code of Criminal Justice, N.J.S. Section 1. Any "crime" such as those just mentioned, is indictable and thus causes loss of voting rights. "Criminal mischief" is defined as "purposely or knowingly damag[ing] tangible property of another." N.J.S. 2(C), Section 17.

As discussed above, the essence of individual Petitioners' right to vote is thus seriously eroded by current New Jersey disfranchisement laws and accordingly violates Article XX.

4. Article XX Should Be Interpreted in Light of State Practice Which Also Protects Parolee and Probationer Voting Rights.

Recognizing the fundamental importance of universal suffrage in a functioning democracy, state practice too supports the position that there can be no blanket prohibitions on voting rights, and that when restrictions are imposed, they must be narrowly tailored to meet compelling state interests. First and most importantly, legislative and legal practice of OAS member states broadly supports voting by prisoners, parolees and probationers.

Available data on legislative restrictions on voting by people with criminal convictions in OAS states indicate that eight OAS member states permit some or all *prisoner* voting.[71] They are Belize, Canada, Costa Rica, Dominica, Jamaica, Paraguay, Saint Lucia, and Trinidad and Tobago. And, according to available research, 31 OAS states permit parolee and probationer voting. In addition to the aforementioned eight countries, the other 23 states are Antigua and Barbuda, Argentina, Bahamas, Barbados, Bolivia, Brazil, Columbia, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname and Venezuela.[73] This would

[71] *Dignity of the Individual, Evaluation of Prisons in the OAS*, Citizens United for the Rehabilitation of Errants, Third International Conference June 2006, available at http://www.curenational.org/new/image/oas_justice.pdf.
[72] *Id.*
[73] *Id.*; JEFF MANZA AND CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY, 9 (2006), Table A1.1, at page 235.

suggest that every OAS state except the United States, Cuba and Uruguay allow persons who have been released to vote, subject to certain restrictions in some cases.[74]

OAS member state jurisprudence also supports voting by prisoners, parolees and probationers. For example, in *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 S.C.R 519 *(Sauvé No. 2)*, a prisoner successfully challenged and invalidated an electoral provision of the Canadian Electoral Act disfranchising all prisoners serving sentences of more than two years. The prisoner argued that the disfranchisement law infringed upon his rights under Article 3 of the Canadian Charter of Rights & Freedoms. Like Article XX of the American Declaration, Article 3 provides broad suffrage protection:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The Supreme Court of Canada addressed whether the legislative provision at issue infringed this guarantee, and, if so, whether the infringement was justifiable under another section of the Charter. To be demonstrably justified, the Court wrote, the government would have to prove that its aims warranted the restriction on the franchise. The Canadian Supreme Court rejected all of the government's arguments justifying Canada's disfranchisement law. Specifically, the Court found that the government's arguments that the disfranchisement of prisoners serving sentences of over two years enhanced civic responsibility and respect for the rule of law, served as an additional punishment, and enhanced the general purposes of the criminal sanction, lacked merit.[75] The Canadian Supreme Court disagreed, underscoring that the framers of the Charter

[74] Chile bans voting for 10 years after release from prison. *Dignity of the Individual, Evaluation of Prisons in the OAS*, Citizens United for the Rehabilitation of Errants, Third International Conference June 2006, available at http://www.curenational.org/new/image/oas_justice.pdf.
[75] *Sauvé No. 2,* at 921.

signaled the special importance of the right to vote by Article 3's "broad untrammeled language."[76]

With respect to the government's "rule of law" argument justification for denying prisoners the vote, the Court referred to "the variety of offences and offenders covered by the prohibition," and concluded that the policy could not communicate a clear lesson to the nation's citizens about respect for the rule of law.[77] The Court also implied that it was denial of the vote that was inconsistent with any concept of the rule of law: "Denying a citizen the right to vote denies the basis of democratic legitimacy … if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disfranchise the very citizens from whom the government's power flows."[78]

Responding to the government's second, "punishment" argument, the Canadian Supreme Court disagreed that the government could impose the total loss of a constitutional right on a particular class of people for a certain period of time. Punishment, according to the Court, could not be arbitrary and must serve a valid criminal law purpose. Disfranchisement served no valid purpose whatever. Further, the Court found that punishment for breaking the social contract, where it concerns constitutional rights, must be constitutionally constrained.[79]

Finally, the Court was wholly unconvinced by the government's "seriousness of the crime" argument. It pointed out that the only other reason the government had supplied to explain why it now limited the disqualification to those serving less than two

[76] *Id.* ¶ 11.
[77] *Id.* ¶ 39.
[78] *Id.* ¶ 32.
[79] *Id.* ¶ 39.

years was "because it affects a smaller class than would a blanket disfranchisement."[80] The Court stated that the analysis as to "minimum impairment" of this right was not how *many* citizens were affected but whether the *right itself* was minimally impaired. In the context of this case, the Court explained that "[T]he question is *why* individuals in this class are singled out to have their rights restricted, and *how* their rights are limited."[81] The Court concluded that the effect of the provision was disproportionate to the harm the government sought to prevent.

In invalidating the disfranchisement law, the Supreme Court of Canada found that "[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] The deprivation of the right to vote, added the court, ran counter to the nation's commitment to the inherent worth and dignity of every individual.[83]

Additionally, the practice of Council of Europe member states overwhelmingly supports a broad concept of the right to vote. European states generally bar only incarcerated prisoners from voting if they bar any at all. Seventeen European countries allow all prisoners to vote.[84] They are 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. Eleven European countries permit some prisoners to vote; other prisoners may be denied

[80] *Id.* ¶ 55.
[81] *Id.*
[82] *Id.* ¶ 38.
[83] *Id.* ¶ 35.
[84] *Out of Step With the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies* ("Out of Step"), ACLU (2006), at 6.

the franchise, generally only by explicit order of the sentencing court, as an additional aspect of their prison sentence,[85] and for serious crimes only.[86] These countries are: Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Portugal and Romania. Legislation in these nations often makes clear that *courts* must impose the added penalty of disfranchisement in individual cases.[87] All but four of these nations disqualify prisoners convicted of sometimes specific but always serious offenses. These four states disqualify based on length of sentence, and are Belgium, Greece, Italy and Luxembourg.[88] Finally, twelve European countries disfranchise all prisoners.[89] These nations are Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Spain, the Ukraine and the United Kingdom. With two exceptions, the United Kingdom and Spain, these are all former Eastern Bloc states with limited histories of universal suffrage, constitutional rights, and independent courts.[90] And, it remains to be seen whether the very limited disfranchisement laws of these 12 countries will in fact survive, given the European Court of Human Rights' recent decision in *Hirst No. 2* striking down the United Kingdom's blanket disfranchisement.

The practice of other democratic nations likewise supports voting by prisoners, parolees and probationers. For example, the South African Constitutional Court concluded that prisoner disfranchisement was impermissible. In the first of two related

[85] *Id*. at 6.
[86] *Id*.
[87] *Id.* at 7. For example, the French Penal Code explicitly states: "No penalty may be enforced where the court has not expressly imposed it."
[88] *Id*.
[89] *Id.* at 8.
[90] In the case of Spain, one authority advises that disfranchisement in Spain "rarely happens." *Hirst No. 2,* ¶ 9. *See also Out of Step,* at 8 n.39.

cases, A*ugust and another v. Electoral Commission and others* (CCT 8/99 1999),[91] prisoners alleged that they had not been provided the means or mechanisms by which to vote from jail. Noting the historic importance of the franchise "both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood" and adding that "[t]he vote of each and every citizen is a badge of dignity and personhood,"[92] the Court flagged the issue as one the legislature should attend to. But, simultaneously, it ruled that the Electoral Commission, by not providing the means and mechanisms to allow prisoners to vote, had breached the prisoners' right to vote.

The legislature responded, amending its laws to bar from voting those prisoners serving a sentence of imprisonment without the option of a fine.[93] Just after the amendment took effect, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and two convicted prisoners serving sentences of imprisonment without the option of a fine filed *National Institution for Crime Prevention and the Re-Integration of Offenders (NICRO), Erasmus and Schwagerl v Minister of Home Affairs* (CCT 03/04 2004), an urgent application in the High Court for an order declaring that the amendment violated the constitution.[94]

The Court struck down the new law. In doing so, it outright rejected the arguments proffered by the government as to the propriety of the legislation. The Court rejected the government's argument that the *August* judgment had directed Parliament to

[91] 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC), *available at* http://www.constitutionalcourt.org.za/Archimages/1989.PDF.
[92] *Id*. ¶ 17.
[93] Electoral Laws Amendment Act 34 of 2003, s. 8(2)(f).
[94] *Minister of Home Affairs v. Nicro*, CCT 03/04, *available at* http://www.sentencingproject.org/pdfs/southafrica-decision.pdf. at ¶ 83.

enact disfranchisement law.[95] The Court also rejected the argument that prisoners serving sentences without the option of a fine was commensurate with the seriousness of the offenses they had committed. The Court also rejected the argument that allowing these persons to retain the vote would make the government appear soft on crime.[96] Finally, the Court rejected the argument that the provision of special ballots for all prisoners and the transportation of the ballots was a costly logistical exercise. Special ballots themselves, it argued, involved an inherent risk of tampering and voter interference.[97]

The South African Constitutional Court, in striking down the law found the government's arguments failed for lack of any rationale underpinning its stated objectives.[98] The government, said the Court, failed "to place sufficient information before the Court to enable it to know exactly what purpose the disfranchisement was intended to serve."[99] The government's concern about appearing soft on crime drew a particularly sharp response. The state, the Court ruled, may not "disenfranchise prisoners in order to enhance its image," nor "deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals."[100] And the Court refused to accept excuses concerning logistics and expense given the fact that there already existed mechanisms to register and facilitate voting by those prisoners who were awaiting trial or serving a sentence in lieu of a fine.

[95] *Id.* ¶ 125.
[96] *Id.* ¶ 139.
[97] *Id.* ¶ 108.
[98] *Id.* ¶ 108.
[99] *Id.* ¶ 65.
[100] *Id.* ¶ 56.

For similar reasons to those detailed in the South African cases, in the case of *Alrai v. Minister of the Interior et al,*[101] Israel's Supreme Court refused to disfranchise prisoner Yigal Amir, convicted of murdering Israeli Prime Minister Rabin. According to Article 5 of the 1958 Basic Law of the Knesset "[ev]ery Israeli national over the age of eighteen has the right to vote unless a court has deprived him of that right by virtue of any law…." Israeli courts are given oversight of the laws relating to disfranchisement. The right to vote is subsumed within the right of citizenship. The Minister of the Interior, however, holds the power to revoke the citizenship of "any person who has committed an act that contains an element of the breach of trust towards the State of Israel."[102]

A third party had petitioned the Supreme Court of Israel to review the decision of the Minister of the Interior not to deprive Amir of his citizenship. Refusing to disfranchise Amir, the Israeli court called the right to vote "a prerequisite of democracy." It cited the U.S. Supreme Court case *Trop v. Dulles*, 356 U.S. 86 (1958), for the proposition that:

> citizenship is not a license that expires upon misbehavior … [it] is not a weapon that the government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be…the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.

Trop, at 92-102.

The Israeli Supreme Court agreed with the Minister of the Interior that revocation of citizenship, because it included the right to vote and to be elected, was a "drastic and extreme step." The Court noted that society had rightly and in numerous forms – including in its judgment against Amir -expressed its revulsion at the murder. However,

[101] HCJ 2757/06 *Alrai v. Minister of the Interior* et al. [1996] lsr SC 50(2) 18.
[102] Clause 11b of The Law of Citizenship 5712-952.

said the Court, that "contempt for this act" must be separated from "respect for his right."[103] In specifically discussing the right to vote, the Court noted that the Knesset had the authority to pass laws restricting the right to vote but had not done so, continuing: "Although in Israel citizenship was not granted an honorary place as a Basic Law, there is no doubt that it is a basic right. Among other things, because it is the foundation of the right to vote for the Knesset, from which democracy flows."[104] The Israeli justices ruled that "[w]ithout the right to elect, the foundation of all other basic rights is undermined …." Thus, even in an embattled country under constant security threats, the Court treated criminal disfranchisement law as a question of *democracy*.[105]

Legislative and legal practice of OAS and non-OAS member states also supports voting by prisoners, parolees and probationers. Several OAS member states, and nearly one-half of all European states, and many other democracies with similarly mixed populations as present in the U.S., permit *all incarcerated* prisoners to vote. Very few European states engage in any post-incarceration disfranchisement, and when they do, it is only for the most serious offenses. Many New Jerseyans, like Petitioners, who are serving their sentences in their communities, have done no more than criminal mischief. Disfranchising anyone, let alone everyone, on parole or probation is far out of step with the practice of other democratic nations. Article XX should be read in the light of these practices to protect the voting rights of individual Petitioners and New Jersey disfranchisement law should be found in violation of Article XX.

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[103] Hilla Alrai, ¶ 5.
[104] *Id.* ¶ 4.
[105] Interestingly, though it had not faced the question of whether Amir should be disfranchised, the criminal court which initially sentenced Amir had also commented on the importance of elections to a democracy. That Court stated "those who treasure life do not change their leadership by an assassin's bullets, and that the only way to do so is via free, democratic elections … as is customary in a democratic state, this discussion must be conducted firmly, yet with mutual respect and tolerance … especially when unpopular opinions are voiced by a minority … " Crim C (TA.) *Israel v. Yigal Amir*, [1996].

Article XX of the American Declaration, as interpreted in light of universal and regional human rights laws on the right to vote as well as state practice in this area, embraces broad protections on the right. Any restriction on Article XX's right to vote must be legitimate and reasonable, as well as proportional to offense and sentence, and, most importantly, must not eviscerate the essence of this fundamental right. Felony disfranchisement, moreover, to comply with Article XX, in line with international law and widespread national practice, can only be imposed where the sentencing court explicitly incorporates disfranchisement as part of the sentence. Under these standards it is clear that the right of parolees and probationers, and in particular, the rights of the individual Petitioners here have been violated.

B. New Jersey Felon Disfranchisement Law Violates Article II of the American Declaration because it Disproportionately Impacts the Rights of African American and Latino Voters.

Under Article II of the American Declaration, universal human rights law, and state practice within and without OAS member states, any measure adopted by a state that is demonstrated to have a disparate impact on the rights of a specific group of individuals on grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, constitutes discrimination. As discussed throughout this petition, the State of New Jersey's disfranchisement laws disproportionately affect New Jersey's Black and Hispanic citizens. Thus they are discriminatory in nature and in violation of one of the most fundamental human rights protections: the right to be free from discrimination on basis of race. Accordingly, New Jersey's felon disfranchisement law and policies violate not only

individual petitioners' right to vote but also their right to be free from discrimination on the basis of race as protected by Article II of the American Declaration.

1. Article II Establishes An Effects-Based Standard for What Constitutes Prohibited Discriminatory Treatment.

Article II provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Article II has been defined as "the right of everyone to equal protection of the law without discrimination."[106] As the Commission has repeatedly highlighted, the right to equality before the law means not that the substantive provisions of the law will be the same for everyone, but that the application of the law should be equal for all without discrimination.[107]

In assessing whether a law is being applied in a discriminatory manner, the Commission examines the context in which alleged violations occur to determine if there is discrimination. The Commission, in examining protections under the American Declaration, "must interpret and apply Article[….] II in the context of current circumstances and standards."[108]

Where racially discriminatory treatment is alleged in cases before it, in assessing whether such discrimination is in fact present, the Commission has looked to evidence of racial profiling of minorities,[109] documented histories of minority populations being more

[106] Bjorn Stormorken and Leo Zwaak, Human Rights Terminology in International Law: A Thesaurus, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988).
[107] *William Andrews v. United States*, Case 11.139, Inter-Am. C.H.R., Report Nº 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 570 ¶ 173 (1997).
[108] *D.C. Voting Rights Case*, Inter-Am. C.H.R., ¶ 105, 95.
[109] Jailton Neri da Fonseca, Report Nº 33/04, Case 11.634, Brazil (2004), para. 35, available at Jailton Neri Da Fonseca v. Brazil**,** Case 11.634, Inter-Am. C.H.R., Report No. 33/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, ¶ 35 (2004).

likely to be suspected, arrested, prosecuted, and convicted than others.[110] This is precisely the kind of data Petitioners adduce here. As discussed in Part II, there have been official findings by the State of New Jersey that African-American and Latino citizens are targeted for investigation because of their race. These unlawful investigations lend to the disproportionate conviction and disfranchisement of people of color throughout the State. Such discrimination violates Article II of the American Declaration.

Racial profiling that leads to disfranchisement of people of color as is present in the State of New Jersey also violates the American Convention. The American Convention provides in its corresponding non-discrimination provision, Article 1, which states parties undertake to respect the rights and freedoms recognized in the Convention, and to guarantee their full and free exercise by all persons subject to their jurisdiction, without any discrimination. Also relevant is Article 24 which provides that "All persons are equal before the law…. they are entitled, without discrimination, to equal protection of the law." The Court has interpreted these provisions to incorporate an effects-based standard: In jurisprudence relating to the rights of undocumented migrants, the Court observed that "States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination."[111] And, the disparate impact that felon disfranchisement has on communities of color in New Jersey meets this standard.

[110] Id. ¶¶ 35-36.

[111] See e.g., Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, at para. 103 (Sept. 17, 2003).

2. Article II Should be Interpreted in Light of Universal and Regional Human Rights Laws Prohibiting Discrimination Which, Like Article II, Provide For An Effects-Based Standard For What Constitutes Racially Discriminatory Treatment.

Universal and regional human rights laws, including the ICCPR and ICERD also protect against effects-based racially discriminatory treatment.

As the HRC elaborates in General Comment 18(37) on Article 26 of the ICCPR,[112]Article 26 "…. prohibits discrimination in law or *in fact* in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof."[113] (emphasis added).

Significantly, this year, the HRC specifically considered application of Article 26 in relation to U.S. felon disfranchisement policies and expressed its concern that the widespread practice of denying voting rights to people with felony convictions in the United States violates Article 26 as it is disproportionately impacting the rights of minority groups and is counterproductive to efforts to reintegrate those re-entering society after prison.[114]

The ICERD also sanctions the use of an effects-based standard to determine whether discriminatory treatment is in evidence. Article 1 defines discrimination to mean "any distinction, exclusion, restriction or preference based on race, colour, descent or

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[112] 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).

[113] Article 26 provides " all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, *supra* note 36, at art. 26.

[114] Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), ¶35, available at http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf

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."[115] (emphasis added). ICERD's monitoring body, the Committee on the Elimination of Racial Discrimination, like the HRC, has raised concerns about U.S. felon disfranchisement policies and their incompatibility with Article 1. In Concluding Observations issued to the United States in 2001, the Committee highlighted its concern about "[t]he political disenfranchisement of a large segment of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices …."[116] The Committee called on the United States "take all appropriate measures … to ensure the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to the enjoyment of the rights contained in Article 5 [which provides for the right to political participation] of the Convention."[117]

Significantly, in ratifying both the ICCPR and ICERD, the U.S. made no reservation to their non-discrimination provisions. In fact, the U.S. Government, when it appeared before the Committee in 2001, indicated a willingness to confront the issue of racial disproportion in felon disfranchisement. During the review process, one

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[115] 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, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, at Art. 1 (1).

[116] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 397 (2001), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/001961f8a1ae7b29c1256aa9002ae228?Opendocument.

[117] *Id.* ¶ 398. Supreme Court Justice Ruth Bader Ginsburg, concurring in the affirmative-action case *Grutter v. Bollinger*, cited the ICERD to reveal international understandings of the issue: "The Court's observation that race-conscious programs must have a logical end point … accords with the international understanding of the office of affirmative action. [ICERD] … endorses 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms' … But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *See Grutter v. Bollinger,* 539 U.S. 306, at 344. (2003). Justice Ginsburg went on to cite Art. 1(4) similarly providing for temporally limited affirmative action.

Committee member expressed his concern that millions of African-Americans were deprived of their voting rights for penal reasons and wanted to know what measures were being taken by the U.S. to end the disparities between blacks and whites in that respect. He also expressed concern by apparent double standards in decisions handed down by the U.S. Supreme Court, which resulted in establishment of unequal rights among different ethnic and racial groups. He asked the United States delegation whether steps were being taken to address this situation and, in particular, to require states to implement Article 2 (1) (c) of the Convention [requiring States Parties to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists"].[118] The U.S representative acknowledged that the issue was serious and assured the members of the Committee that it would be given very serious consideration.[119]

As demonstrated above, the HRC revisited this issue this year and specifically found that felony disfranchisement as practiced in the U.S. states violated the ICCPR's race discrimination provisions. These findings are consistent with resolutions of other major human rights bodies, which support a prohibition on race discrimination in voting.[120]

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[118] U.N. CERD, 59th Sess., 1476th mtg. on Aug. 6 2001 at 3, U.N. Doc. CERD/C/SR.1476 (May 22, 2003), ¶ 57.
[119] *Id.*, ¶ 65.
[120] *See, eg.,* U.N. General Assembly resolutions, adopted each year since at least 1991. In Resolution 46/137, the U.N. affirmed that "the systematic denial or abridgement of the right to vote on grounds of race or colour is a gross violation of human rights and an affront to the conscience and dignity of mankind, and...the right to participate in the political system based on common and equal citizenship and universal franchise is essential for the exercise of the principle of periodic and genuine elections." G.A. Res. 46/137, art. 6, U.N. Doc. A/RES/46/137 (Dec. 17, 1991). The General Assembly has reiterated this call for universal and equal non-discriminatory suffrage regularly since that time. The Human Rights Council has taken similar actions recently. Its predecessor body, the Commission on Human Rights, also adopted

3. Article II Should Be Interpreted In Light of State Practice Which Also Recognizes An Effects-Based Standard for What Constitutes Racially Discriminatory Treatment

Like Article II and international law, state practice too, recognizes an effects-based standard for assessing when racially discriminatory treatment occurs amongst the voting populace.

For instance, in Canada, a country with a large, heterogeneous, disproportionately minority prison population, race has been an explicit part of the disfranchisement debate. Canadian government statistics portray that although Aboriginal adults comprise about 3 percent of the Canadian population they account for 18 percent of the federal prison population, 20 percent of the provincial prison population, and 27 percent of the female prisoner population.[121] And, in one region, Saskatchewan, Aboriginals are incarcerated at 35 times the rate of non-Aboriginals, and constitute 77 percent of the total prison population.[122]

In *Sauvé No.* 2, these disparities were taken into consideration by the Court in striking down a felon disfranchisement statute. The Court discussed the effect of disfranchisement on the minority population in Canada, noting that the policy had a "disproportionate impact on Canada's already disadvantaged Aboriginal population, whose over representation in prisons reflects a crisis in the Canadian criminal justice

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resolutions each year since 1999, which call for the right to "universal and equal suffrage" in periodic and free elections. *See, eg.,* "Promotion of the Right to Democracy," U.N. Commission on Human Rights, Res. 1999/57, at 2(d), U.N. Doc. E/CN.4/RES/1999/57 (Apr. 27, 1999); "Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy," U.N. Commission on Human Rights, Res. 2005/29, at 9, U.N. Doc. E/CN.4/RES/2005/29 (Apr. 19, 2005).

[121] Prison Facts & Statistics: Statistics for 2003-2004, Adult Prison Population and Costs, http://www.prisonjustice.ca/politics/facts_stats.html (last visited Sept. 12, 2006).

[122] *Id.*

system."[123] Thus, the Canadian Supreme Court embraced a disparate impact analysis that linked race discrimination to disfranchisement.

In non-OAS member states with populations similar to those in Canada, such as, Australia, New Zealand, and South Africa, governmental bodies and high courts have undertaken similar analyses of disfranchisement law and policies and arrived at similar conclusions: they have invalidated felon disfranchisement laws and policies because they have a discriminatory impact on minority groups**.**

In Australia, for instance, statistics reveal that while indigenous Australians constitute only about 2 percent of the Australian population, they are 16 times more likely to be in prison than non-indigenous persons, thus, indigenous Australians comprised 20 percent of all Australian prisoners in 2003.[124] Legislators considered this disparity in briefing papers discussing disfranchisement in the context of Australia's obligations under the ICERD; the paper concluded, "because of the disproportionate effect that prisoner disfranchisement has on indigenous Australians, it is arguable that such disfranchisement conflicts with Australia's obligations under the Convention."[125]

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[123] Additionally, Canadian elections authorities have also undertaken a number of initiatives since the 1990s to raise awareness among Aboriginal people of their right to participate in federal elections and referendums, and to make the electoral process more accessible to them.

[124] Jerome Davidson, *Inside Outcasts: Prisoners and the Right to Vote in Australia*, Laws and Bills Digest, Department of Parliamentary Services, Current Issues Brief No. 12 (May 24, 2004), at 2. Australia has a general population of 20,438,802, a prison population of 23,362, and a prison population per 100,000 of 117 (*See also* Australia's Population – Census 2001 Results, ACARANDA ATLAS (5th ed. 2001), *available at* http://www.jaconline.com.au/jacatlas5e/downloads/worksheets/JA5Wksheet0056.pdf#search=%222001%20australia%20census%22).

[125] In an "Issues Brief for Parliament," a section entitled "The Influence of International Instruments" traces Australian history and movements for reform concerning the vote. The brief also engages in an international law analysis, as part of which it notes that ICERD, to which Australia is a signatory, requires states to "rescind or nullify laws that have the effect of creating or perpetuating racial discrimination, or of strengthening racial division. Because of the disproportionate effect that prisoner disfranchisement has on indigenous Australians, it is arguable that such disfranchisement conflicts with Australia's obligations under the Convention." *Id* at 10. Australia has a general population of 20,438,802, a prison population of 23,362, and a prison population per 100,000 of 117. This brief also cites provisions of the ICCPR - not formally part of Australian domestic law - stating "it is at least arguable that international influences play

Similar conclusions were arrived at in a study conducted by the government of New Zealand, where Maoris comprise approximately 15 percent of the country's populace but over 50 percent of the prison population.[126] The official Electoral Commission, in seeking to remedy falling electoral participation by the Maori, concluded that: "The Maori population is growing, so the negative impact of Maori non-participation on the quality of New Zealand's democracy will compound quickly if things do not change . . ." The Commission added that they wanted "to help raise Maori participation in electoral matters . . . [and] particularly to influence those whose policies and programs can encourage greater Maori electoral participation."[127]

Finally, in South Africa, the estimated population is nearly 46 million, of which 79.4 percent is black, 9.3 percent is white, 8.8 percent is colored, and 2.5 percent is Indian/Asian.[128] In May 2001, its Africans comprised 77 percent of South Africa's prison population; of the rest, 20 percent were colored (mixed ancestry), 2 percent Asian, and 1 percent white.[129] In the *NICRO* decision, discussed above, that nation's highest court observed:

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an important part in the development of Australian constitutional law" and cites "the powerful influence [on Australian decisions] of the Covenant and the international standards it imports … the common law does not necessarily conform to international law but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights." *Id*. at 9 (internal citation omitted).

[126] Te Puni Kokiri: Maori in New Zealand - Maori Population, 2001 Census, http://www.tpk.govt.nz/maori/population/default.asp (last visited Sept. 12, 2006), and Corrections Department NZ – The Strategies, Department of Corrections, http://www.corrections.govt.nz/public/news/icpa/strategies.html (last visited Sept. 12, 2006).

[127] *Establishing a Maori Electoral Research Agenda*, HUI (November 26, 2004), http://www.elections.org.nz/uploads/maori_electoral_research_hui_26_nov_04.doc. *See also* http://www.elections.org.nz/maori-research-rfp-jan06.html (last visited June 2006).

[128] Mid-Year Population Estimates, South Africa 2005, p. 1, Statistics South Africa, http://www.statssa.gov.za/Publications/P0302/P03022005.pdf.

[129] Amanda Dissel and Jody Kollapen, *Racism and Discrimination in the South African Penal System* (2002), Centre for the Study of Violence and Reconciliation, (2002), *available at* http://www.csvr.org.za/papers/papadjk.htm.

> In light of our history where the denial of the vote was used to entrench white supremacy and to marginalize the great majority of the people of our country, it is for us a precious right, which must be vigilantly respected and protected. [130]

"[R]egardless of race," the same court declared in the *August* case, the vote "of each and every citizen is a badge of dignity and personhood."[131]

In sum, Article II of the American Declaration, in line with universal and regional human rights laws and widespread state practice in developed democratic states, recognizes an effects-based standard for the assessment of whether racially discriminatory treatment is evident. As demonstrated in detail throughout this petition, based upon this standard, statistics conclusively demonstrate that the State of New Jersey's disfranchisement law and policies disproportionately impact the voting rights of the State's African-American and Latino populace, including individual Petitioners. Accordingly, they violate Article II of the American Declaration.

C. New Jersey Felon Disfranchisement Law Violates Petitioners' Right to Rehabilitation Protected by Articles I and XVII of the American Declaration.

Taken together, Articles I and XVII of the American Declaration together with the overarching right of everyone to be treated with dignity recognized and protected by the Declaration,[132] guarantee individual Petitioners a right to rehabilitation. This right has long been recognized under universal and regional human rights law and state practice. Inherent in the right to rehabilitation is the right to vote. Research and official

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[130] *Nicro*, CCT 03/04, at 47.

[131] *August,*¶ 17, *available at* http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/vdGMzgHjnA/189490026/523/1472. In the United Kingdom, as Parliament debates changing the law disfranchising all prison inmates, advocates have pointed out that "minority ethnic groups are disproportionately affected … due to their over-representation in the prison population, black men are 8 times as likely to be barred from voting than their white counterparts" where whites form 92 percent of the total population, and blacks 2.0 percent. *See, eg.,* Marc Mauer & Tushar Kansal, "Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States," The Sentencing Project (2005), *available at* http://www.sentencingproject.org/pdfs/barredforlife.pdf.

[132] *See e.g.*, American Declaration at preamble (recognizing that: "The American peoples have acknowledged the dignity of the individual…).

pronouncements demonstrate that preservation of voting rights for those incarcerated or released on parole or probation may reduce recidivism and contribute to an offender's successful reintegration back into society. Moreover, awareness of political issues in the community and participating in voting is a positive pro-social endeavor, which has both the psychological and sociological effect of integrating the offender back into their communities. Participation in popular elections allows offenders to remain involved in community affairs that affect their families. As such New Jersey's law and policies disfranchising persons while on parole and probation constitute a violation of individual Petitioners' right to rehabilitation.

1. The American Declaration Requires that Incarceration Serve a Rehabilitative Function: Preserving Voting Rights Achieves Such a Goal.

The Commission has repeatedly emphasized the rehabilitative function of a prison sentence and the importance of rehabilitation to the individual's harmonious reintegration back into society.[133] For example, the Commission has noted that "[t]he prison system is intended to serve several principal objectives… [t]he "ultimate objective" being "the rehabilitation of the offender and his or her reincorporation into society;" and that, "[t]he exercise of custodial authority carries with it special responsibility for ensuring that the deprivation of liberty serves its intended purpose, and does not result in the infringement of other basic rights."[134]

[133] Report on the Situation of Human Rights in the Dominican Republic, Inter-Am. C.H.R., OEA/Ser.L/V/II.104, Doc. 49 rev. 1 Chapter VIII(I) (1999), citing United Nations Standard Minimum Rule 65 to support this contention.
[134] Report on the Situation of Human Rights in Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.111, Doc. 21 rev. Chapter VIII (2001).

The Commission has found that an individual's right to rehabilitation forms an integral component of the rights protected pursuant to Article 5 of the American Convention, which, in subsection (6) specifically requires re-adaptation to be a goal of prison:

> Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

According to the Commission, Article 5 establishes the right of every person to have his or her "physical, mental, and moral integrity respected"[135] and guarantees that everyone deprived of liberty "shall be treated with respect for the inherent dignity of the human person."[136] Included within the bundle of rights protected by Article 5 the Commission has highlighted the individual's right, following completion of sentence, to "social re-adaptation" and reintegration back into society.[137]

The right to rehabilitation recognized under Article 5, is similarly protected under Articles I and XVII of the American Declaration. Although Article I does not explicitly recognize a right to rehabilitation, it may be implied from the Commission and Inter-American Court's broad interpretation of the substance of the right to life protected under Article I. The Commission has repeatedly interpreted Article I to include similar protections to those rights protected under Article 5.[138] Thus, an individual's right to re-adaptation following incarceration, specifically protected by Article 5(6), should be read into Article I. The jurisprudence of the Inter-American Court supports such an

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[135] *Id*., Section A(2).
[136] *Id.*
[137] Report on the Situation of Human Rights in Brazil, Inter-Am. C.H.R., OEA/Ser.L/V/II.97, Doc. 29 rev.1 Chapter IV(27) (1997).
[138] Report on Terrorism and Human Rights OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, ¶ 155 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention) (citing Case 9437, Report Nº 5/85, Juan Antonio Aguirre Ballesteros (Chile), Annual Report of the IACHR 1984-1985.)

interpretation. In the *Castillo Paez Case*, for instance, the Court noted that the protections encompassed by Article 5 -- and hence Article I -- are much broader in scope than mere protection from physical mistreatment. Rather, they extend to any act that is "clearly contrary to respect for the inherent dignity of the human person"[139] Similarly, in the *Street Children Case*, the Court reiterated that position, noting that: the right to life "includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence."[140] This broad definition of the right to life should be read to include the guarantee of parolees and probationers' right to rehabilitation.

Article XVII of the American Declaration, which specifically guarantees humane treatment for persons under custody, likewise may be interpreted to include a right of prisoners to rehabilitation. This right tracks closely the guarantee in the American Convention that persons deprived of liberty "shall be treated with respect for the inherent dignity of the human person," which, in turn, and as noted above, is closely linked to the right under Article 5 (6) of the Convention to "re-adaptation."

2. Articles I and XVII of the American Declaration Should be Read in Light of Universal and Regional Human Rights Law Which Require that Incarceration Serve a Rehabilitative Function and Recognize that Preserving Voting Rights Achieves Such a Goal.

Articles I and XVII should be interpreted in light of universal and regional human rights law both of which protect an individual's right to rehabilitation and view preservation of their voting rights while serving a sentence as an integral part of that

[139] Inter-Am. Ct. H. R., Castillo Paez Case, Judgment of Nov. 3, 1997 (Ser. C) No. 35, ¶¶ 63, 66.
[140] Inter-Am. Ct. H.R., Villagran Morales et. al. Case (the "Street Children" Case), Judgment of Nov. 19, 1999 (Ser. C) No. 63, ¶ 144.

process. Importantly, the ICCPR incorporates an explicit provision guaranteeing an individual's right to "social rehabilitation" following a term of incarceration, and recognizing that such treatment arises out of the need to respect individual "dignity." Specifically, Article 10(3) provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person . . . The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

The HRC has considered this provision in relation to deprivation of voting rights, and emphasized the importance of voting as rehabilitative and that restrictions thereon are counterproductive to rehabilitation. For example, in its Concluding Observations on the United Kingdom's Country Report, issued in 2001, the HRC commented, with respect to the United Kingdom's blanket disfranchisement provision banning all serving prisoners from voting that the measure "….amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 of the Covenant." The HRC called upon the U.K. to reconsider its law depriving convicted prisoners of the right to vote.[141]

The U.N. Basic Rules for the Treatment of Prisoners (Basic Rules)[142] and the U.N. Standard Minimum Rules for the Treatment of Prisoners (SMR)[143] also underscore the rehabilitative function of incarceration. For instance, the Basic Rules require states to provide "favorable conditions [] for the reintegration of the ex-prisoner into society under

[141] Concluding Observations, United Kingdom of Great Britain and Northern Ireland, *supra.* note 41, ¶ 10.
[142] Basic Principles for the Treatment of Prisoners, Dec. 14, 1990, G.A. Res. 111, U.N. GAOR, 45th Sess., Supp. No. 49A, at 200, U.N. Doc. A/45/49, *available at* http://www.unhchr.ch/html/menu3/b/h_comp35.htm.
[143] Standard Minimum Rules for the Treatment of Prisoner, Aug. 30, 1955, E.S.C. res.663C, 24 U.N. Escor Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957) *available at* http://www.unhcr.ch/html/menu3/b/h_comp34.htm.

the best possible conditions."[144] And, four SMRs set forth the appropriate restrictions on the rights of prisoners to participate in civil society and political life. SMR 57 declares that imprisonment should not hinder reintegration into society after prison, and should not inflict punishment beyond the deprivation of liberty. SMR 60 requires the minimization of those differences between prison life and life outside prison which fail to respect prisoners' dignity as human beings, and SMR 61 elaborates:

> The treatment of prisoners should emphasize not their exclusion from the community but their continuing part in it … steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

And finally, SMR 65 provides:

> The treatment of persons sentenced to imprisonment …shall have as its purpose …to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

Regional human rights laws and policies also recognize a right to rehabilitation and how preservation of voting rights furthers this goal. For example, in 1958, the Council of Europe's Committee of Ministers – a decision-making body comprised of the foreign-affairs ministers of the member states, or their permanent diplomatic representatives – established the European Committee on Crime Problems, entrusting it with responsibility for overseeing and coordinating the Council's crime prevention and control activities. This body's recommendations urge states to foster prisoners' connections with society, in order to increase inmates' awareness of their stake in society

[144] Basic Principles, Principle 5.

– recommendations that support the retention of voting rights by prisoners, parolees and probationers.[145]

3. Articles I and XVII Should be Read in Light of State Practice Which Also Requires that Incarceration Serve a Rehabilitative Function and Recognizes that Preserving Voting Rights Achieves Such a Goal.

The practice of OAS and non-OAS member states also supports prisoner retention or post-incarceration restoration of the right to vote on grounds that voting is rehabilitative. In *Sauvé No. 2*, for example, Canada's highest court acknowledged that for a prisoner to be able to retain the right to vote sends the offender the message that becoming aware of political issues in the community and participating in voting is a positive pro-social endeavor: "'To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness..."[146] This message has both the psychological and sociological effect of weaving the offender back into the community -

[145] *Recommendation No. R (87)3,* for example, sets forth standards to be applied by member states in the conditions of imprisonment: "64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this." Council of Europe, Committee of Ministers, Recommendation 87(3) of the Committee to Member States on the European Prison Rules, adopted by the Committee on 12 February 1987 at the 404th Meeting of Ministers' Deputies, *available at* http://portal.coe.ge/downloads/European%20Prison%20Rules.pdf. Similarly, *Recommendation No. R(2003)23*, focusing on long-term prisoners, urges prison administrators "2. to ensure that prisons are safe and secure places for these prisoners … to counteract the damaging effects of life and long-term imprisonment … to increase and improve the possibilities of these prisoners to be successfully resettled and to lead a law-abiding life following their release." Council of Europe, Committee of Ministers, Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners *(Adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers' Deputies), available at http://www.prison.eu.org/article.php3?id_article=6715.* And as general principles concerning the same subject, the committee emphasizes "individualization," "normalization," and "responsibility:" "3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualization principle). 4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalization principle). 5. Prisoners should be given the opportunity to exercise personal responsibility in daily prison life (responsibility principle)." *Id.*

[146] *See, eg.,* Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002, SCC 68.

the very goal of rehabilitation. In it concluding analysis, the *Sauvé No. 2* court specifically addressed the rehabilitative power of voting:

> Denying prisoners the right to vote … removes a route to social development and rehabilitation … and it undermines the correctional law and policy directed towards rehabilitation and integration.

Importantly, the Court found that the deprivation of the right to vote ran counter to the nation's commitment to the inherent worth and dignity of every individual.[147]

This analysis linking the franchise to respect and dignity for everyone underpins the practice of many European nations that permit inmates to vote. In Europe, as noted *supra*, not only do many Council of Europe member states permit inmates to vote, but many senior correctional officials have publicly acknowledged that doing so is good policy – because it may increase public safety by enhancing the formative, rehabilitative effects of incarceration. Scotland's former Chief Inspector of Prisons, for example, has stated that inmates retain the right to vote in Scotland, because their loss of freedom should not deprive them of their "right to say something about the running of the country."[148] The current Chief Inspector of the U.K's Prison Service also supports prison voting, expressing the view that voting rights prepare prisoners for resettlement.[149] His predecessor, Sir David Ramsbotham, maintains that it is a right of citizenship that is unrelated to prison sentences, saying that prisoners "remain citizens … they've had their liberty removed, nothing else … 62,000 of them are going to come out as citizens and one of the jobs of prisons is to make them better citizens. …[150] All citizens of the United

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[147] *Id.*, ¶ 59.
[148] Tanya Thompson, *Prisoner's Legal Fight to Vote May Open Floodgates*, THE SCOTSMAN, Nov. 1, 2004, *available at* http://thescotsman.scotsman.com/index.cfm?id=1260252004.
[149] Mauer & Kansal, "Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States," 3.
[150] *Calls to give vote to prisoners*, BBC NEWS, Aug. 4, 2005, *available at* http://news.bbc.co.uk/1/hi/uk_politics/4406585.stm.

Kingdom have the vote by right — not moral authority. … Removing a citizen's right is an additional punishment to the deprivation of liberty."[151]

The views of these European officials, that preservation of voting rights serves a rehabilitative function, is supported by empirical research conducted here in the United States, by the written testimony of the individual Petitioners filed herewith, as well as by the findings of senior U.S. law enforcement and prison officials. For example, the American Bar Association and numerous social scientists and criminologists have also voiced the concern that not only is disfranchisement not rehabilitative, but that it operates as a barrier between the offender and society and counteracts the rehabilitative goal of preparing the offender to re-enter society.[152]

These concerns are not merely academic conjecture. Parolee interviews make it clear that disfranchisement impacts real human beings in a tangible, oppressive way. For example, in his affidavit, one of the individual Petitioners, Charles Thomas, states that disfranchisement makes him feel unworthy to be a member of his community. "It [disfranchisement] makes me feel as though what I think does not matter . . . When the government excludes an entire group of people, such as parolees or probationers, it

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[151] February 2004 - Barred from voting, Prison Reform Trust, http://www.prisonreformtrust.org.uk/subsection.asp?id=399 (last visited September 13, 2006).

[152] *See, eg.,* ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, American Bar Association (Aug. 2003), at R-7*, available at* http://www.abanet.org/leadership/2003/journal/101a.pdf; Jeremy Travis*, Invisible Punishment: the Collateral Consequences of Mass Imprisonment* 26, (Marc Mauer & Meda Chasey-Lind eds., The New Press 2002*), available at* http://www.urban.org/UploadedPDF/1000557_invisible_punishment.pdf ("It is hard to discern rehabilitative goals in these punishments. In fact they place barriers to successful rehabilitation and reintegration."); Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Non-incarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 502 (2004*), available at* http://www.soc.umn.edu/~uggen/Manza_Uggen_POP_04.pdf ("Denying voting rights to...felons living in their communities on probation and parole, undermines their capacity to connect with the political system and may thereby increase their risk of recidivism."); Howard Itzkowitz & Lauren Oldak, *Note: Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 A. Crim. L. Rev. 721, 732 (1973) ("The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement, a factor that may lead to recidivism.").

makes people believe that they are not worth anything to anybody." Furthermore, he believes that as a senior treatment coordinator, it inhibits him to treat the people he helps effectively. "When juveniles I help see that I do not vote come voting day, then they believe it is not important. This happens with my own children and relatives. Therefore, being disfranchised inhibits my ability to effectively help others in my community or send a positive message as a father." Exhibit C.

Petitioner Stacey Kindt believes that "the disfranchisement of parolees and probationers has inhibited my reintegration into society. Despite my community involvement, deep down, not being able to vote makes me feel that I am not good enough and that I will never be accepted by the community." Exhibit D. Furthermore, she notes that women parolees need to be re-enfranchised in order to be successfully reintegrated into society. "We [women parolees] can only be re-integrated into society if society accepts us. Barring us from voting is the ultimate sign of rejection from the community that we so desperately want to be a part of. It prohibits us from contributing to our communities in a positive way." [153]

Petitioner Dana Thompson stated in his affidavit that disfranchisement resulted in him feeling judged for his past while he attempted to reenter society from prison: "When I was on parole not being able to vote felt emotionally like I was still incarcerated. When I left prison I wanted my crimes to be behind me so that I could succeed and move on with my life. But I couldn't completely do that because that judgment still existed." Exhibit B.

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[153] *See also,* Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disenfranchised Felons*, *in* IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 165-204, 183 (Mary Patillo et. al. eds., Russell Sage Foundation, 2004), *available at* http://www.socsci.umn.edu/%7Euggen/Sagechap8.pdf ("You've already got that wound and it's trying to heal...[but] you telling me that I'm still really bad because I can't [vote] is like making it sting again.").

Petitioner Michael Mackason states in his affidavit that disfranchisement inhibits his effectiveness in the community. ". . . Imagine a person such as myself at a local political meeting or campaign rally. When I feel compelled at such an event to ask whether the politician will make choices that are beneficial for people re-entering into society after prison, I am cast aside because I represent a body that has no vote. . . I cannot take part in political conversations in my community without feeling like an outsider. It is like being in prison all over again." Additionally, Mackason states that disfranchisement leads to ex-felons' feeling powerless to effect change through means other than violence: "I see this as a part of what leads to the violent behavior of many of the ex-offenders over high school age with whom I work. . . It gives them a sense of hopelessness and rebellion. . . Violence is a consequence of young people not having the opportunity to express themselves or to change their communities." Exhibit A.

Voting, on the other hand, fosters rehabilitation and successful community re-entry. As noted, the goal of rehabilitation is "to return [the offender] to society so reformed that he will not desire or need to commit further crimes."[154] The right, and even the obligation, to vote is held out daily to members of American society as one of the privileges and proud duties of being an American. Disfranchisement, therefore, signals to offenders that they are not truly the same as the rest of us, and that they are second-class citizens even though they are simultaneously being told that the aim of their probation or parole is to help them become whole again. This conflicting message serves to frustrate, confuse, and alienate offenders who want to participate in society in a positive and meaningful way.

[154] Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Laws* § 1.5 (2d ed. 2003).

Research also demonstrates that offenders are less likely to re-offend if they vote. Among those who have been arrested, people who vote are only half as likely to be rearrested as those who do not; that is, voters recidivate one-half as often as non-voters. Restoring voting rights, therefore, is an important part of rehabilitation for those convicted of felonies. It gives such offenders a voice and a continuing stake in what happens in their communities.[155]

U.S. law enforcement officials and prison administrators also attest to the rehabilitative power of the vote, both for those incarcerated and those under supervision but living in their communities. In litigation before the United States Second Circuit Court of Appeals in which the issue was the disproportionate impact of New York's felon disfranchisement statute on the state's incarcerated and paroled Blacks and Hispanics, a group of prominent law enforcement officials wrote in an *amicus* brief of the "vital importance that the right to vote has on the health and future of this nation." In their considered opinion, "[t]he restoration of paroled or incarcerated felons' right to vote does not impinge upon the effective investigation or prosecution of criminal matters by state law enforcement officials," and, more to the point here

> to the extent that felon disenfranchisement laws are viewed as a punishment rather than as a means of voter qualification, these laws may, in fact, undermine the rehabilitative aims of incarceration and parole. Amici recognize that an important component of effective punishment is compelling incarcerated and paroled individuals to become law-abiding, productive citizens through rehabilitation…Thus law enforcement agencies spend substantial resources on programs pursuing a rehabilitative penological goal [citing examples of such programs]…The denial of the right to vote may, in fact, undermine these rehabilitative aims of punishment…To the extent that disenfranchisement distances the person from the community and serves no educational function, it

[155] Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime & Arrest: Evidence from a Community Sample,* 36 Colum. Human Rights L. Rev. 193 (2004), *available at* http://www.soc.umn.edu/%7Euggen/Uggen_Manza_04_CHRLR2.pdf.

> weakens the impact of rehabilitative correctional programs and parole upon the individual's reintegration as a law-abiding member of the correctional facility or community.[156]

Wesley E. Andrenyak, the current Chief Advocate for the Maine Corrections Department, one of the two U.S. states in which all prisoners may vote, supports voting rights for inmates given its rehabilitative function. Calling voting "one of the basic rights granted citizens," Mr. Andrenyak testified to legislators considering stripping Maine inmates' of their right to vote:

> One of the many goals of … the Department of Corrections is to return a prisoner to the community a better person…. An integral part of this process is the ability for prisoners to become productive citizens in their community upon release. One of the basic entitlements and responsibilities regarding civil responsibility is to exercise one's ability to vote. …While only a small number of prisoners traditionally have chosen to participate, the fact that they have this ability sends the message that the Department supports their successful return to the community as a productive citizen. While prisoners are serving sentences, regardless of the crime committed, it should not prohibit them from making personal choices in who will be representing them, their families and communities. …This serves to keep the individual involved in current affairs, and connected to the community and his or her family during their sentence.[157]

Articles I and XVII of the American Declaration, interpreted in light of analogous provisions of the American Convention, universal and regional human rights law as well as state practice, recognize that individuals serving sentences, including those on parole or probation have a right to rehabilitation. Inherent in this right is their right to vote. Maintenance of voting rights while under sentence promotes rehabilitation, may reduce recidivism, and leads to a greater likelihood of offenders' successful re-entry into their communities. This is a fact long recognized under universal and regional human rights

[156] *Muntaqim et al. v. Coombe et al.*, In Banc Brief of Amici Curiae Zachary W. Carter et al. In Support of Plaintiffs-Appellants and in Support of Reversal, 01-7260-cv/04-3886-pr (March 30, 2005) at 9-12.
[157] Testimony of Wesley E. Andrenyak, Chief Advocate, Maine Department of Corrections in opposition to LD 200 (on file with ACLU).

laws and one supported by state practice based upon research studies. The State of New Jersey's felon disfranchisement law and policies serve no rehabilitative function and accordingly violate individual Petitioners' right to rehabilitation protected under Articles I and XVII of the American Declaration.

V.

CONCLUSION AND PETITION FOR RELIEF

The facts stated above establish that the United States of America and the State of New Jersey have violated the rights of Petitioners under Articles I, II, XVII, and XX of the American Declaration. Individual Petitioners on parole and probation are disfranchised by the State of New Jersey's felon disfranchisement law. Additionally, the African-American and Latino communities of New Jersey are being denied equal protection of the laws because of the unjustified, disparate impact of the felon disfranchisement law on those communities which dilutes their political power. These laws thus violate Petitioners' right to vote, their right to be free from discrimination on the basis of race and their right to rehabilitation as protected by Articles I, II, XVII, and XX of the Declaration and other international human rights instruments.

Thus, the Petitioners ask that the Commission provide the following relief:

1. Declare this petition to be admissible;

2. Investigate, with hearings and witnesses as necessary, the facts alleged by Petitioners;

3. Declare the United States of America and the State of New Jersey in violation of Articles I, II, XVII, and XX of the American Declaration;

5. Recommend such remedies as the Commission considers adequate and

effective for the violation of individual Petitioners' fundamental human rights, including:

(a) Adoption by the United States and the State of New Jersey of measures ending felon disfranchisement, at least post-incarceration, in the State of New Jersey and throughout the country, in the states that still maintain felon disfranchisement laws that fail to comport with internationally recognized standards.

(b) Imposition of a requirement that courts and public defenders notify individuals pleading guilty to or being sentenced to a disfranchising offense when they will lose their right to vote and the procedures they should follow to restore their voting rights.

Dated: September 13, 2006

Respectfully submitted:

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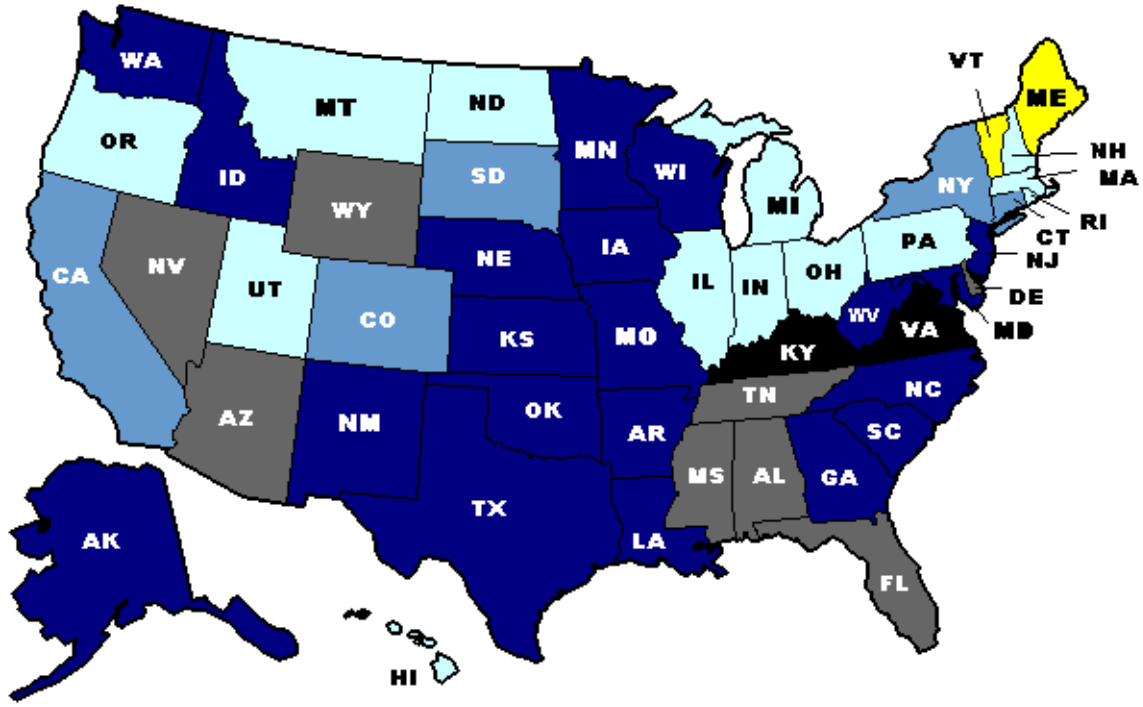
EXHIBIT B

CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES



Permanent disenfranchisement for all people with felony convictions, unless government approves individual rights restoration
KY, VA

Permanent disenfranchisement for at least some people with criminal convictions, unless government approves individual rights restoration
AL, AZ, DE, FL, MS, NV, TN, WY

Voting rights restored upon completion of sentence, including prison, parole, and probation
AK, AR, GA, ID, IA, KS, LA, MD, MN, MO, NE,* NJ, NM, NC, OK, SC, TX, WA, WV, WI

Voting rights restored automatically after release from prison and discharge from parole (probationers may vote)
CA, CO, CT, NY,* SD

Voting rights restored automatically after release from prison
DC, HI, IL, IN, MA, MI, MT, NH, ND, OH, OR, PA, RI, UT

No disenfranchisement for people with criminal convictions
ME, VT

* Nebraska imposes a two-year waiting period after completion of sentence.

Permanent disenfranchisement for all people with felony convictions, unless government approves individual rights restoration

Kentucky
Virginia

Permanent disenfranchisement for at least some people with criminal convictions, unless government approves individual rights restoration

Alabama: People with certain felony convictions involving moral turpitude can apply to have their voting rights restored upon completion of sentence and payment of fines and fees; people convicted of some specific crimes are permanently barred from voting.

Arizona: People convicted of one felony can have their voting rights restored upon completion of sentence, including all prison, parole, and probation terms and payment of legal financial obligations. People convicted of two or more felonies are permanently barred from voting unless pardoned or restored by a judge.

Delaware: People with felony convictions can have their voting rights restored five years after completion of sentence and payment of fines and fees. People who are convicted of certain disqualifying felonies are permanently disenfranchised.

Florida: Most people with felony convictions have their right to vote restored upon completion of sentence and payment of restitution. People with certain felony convictions, mostly violent crimes or sexual offenses, must individually apply for restoration of rights or complete a fifteen-year waiting period.

Mississippi: People who are convicted of any of ten types of disqualifying offenses, including felonies and misdemeanors, are permanently disenfranchised. Others never lose the right to vote.

Nevada: The right to vote is automatically restored to people convicted of first-time non-violent felonies upon completion of sentence. People with multiple felony convictions and those convicted of violent felonies cannot vote unless pardoned or granted a restoration of civil rights from the court in which they were convicted.

Tennessee: People convicted of some felonies after 1981 can have their voting rights restored if they have completed their full sentences, paid all restitution, and are current with child support payments. People convicted of certain felonies cannot regain the right to vote unless pardoned.

Wyoming: People convicted of a non-violent felony for the first time can have their rights restored five years after completion of sentence. People with multiple felony convictions and those convicted of violent felonies are permanently barred from voting, unless pardoned or restored to rights by the Governor.

Voting rights restored upon completion of sentence, including prison, parole and probation

Alaska
Arkansas[1]
Georgia
Idaho
Iowa
Kansas
Louisiana
Maryland
Minnesota
Missouri
Nebraska[2]
New Jersey
New Mexico
North Carolina
Oklahoma
South Carolina
Texas
Washington[3]
West Virginia
Wisconsin

Voting rights restored automatically after release from prison and discharge from parole (probationers may vote)

California
Colorado
Connecticut
New York[4]

[1] Under Arkansas law, failure to satisfy legal financial obligations associated with convictions may result in post-sentence loss of voting rights.

[2] In Nebraska, voting rights are restored two years after the completion of sentence.

[3] Under Washington law, failure to satisfy legal financial obligations associated with convictions may result in post-sentence loss of voting rights.

South Dakota

Voting rights restored automatically after release from prison

District of Columbia
Hawaii
Illinois
Indiana
Massachusetts
Michigan
Montana
New Hampshire
North Dakota
Ohio
Oregon
Pennsylvania
Rhode Island
Utah

No disenfranchisement for people with criminal convictions

Maine
Vermont

[4] In New York, individuals on parole may have their voting rights restored by a Certificate of Relief from Disabilities or a Certificate of Good Conduct.

EXHIBIT C

THE SENTENCING PROJECT

Barriers to Democracy

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

The Sentencing Project

and

The International Human Rights Law Clinic
Washington College of Law
American University

May 2007

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

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This report was written by Marisa Guevara and Dan O'Connor of the Washington College of Law and edited by Marc Mauer and Ryan S. King, executive director and policy analyst respectively, of The Sentencing Project, and Rick Wilson, director of the International Human Rights Law Clinic.

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

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

EXECUTIVE SUMMARY

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

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

LAWS IN THE AMERICAS

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

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

LAWS OUTSIDE THE AMERICAS

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

UNIVERSAL SUFFRAGE: INTERNATIONAL TREATY LAW

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

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

INTERNATIONAL CASELAW: APPLYING UNIVERSAL SUFFRAGE TO CRIMINAL DISENFRANCHISEMENT

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

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS STANDARDS

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

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

CALL FOR ACTION

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

INTRODUCTION

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

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

[1] *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886)
[2] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)
[3] Jeff Manza and Christopher Uggen, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY, Oxford University Press, 2006, at 250 (Table A3.3).
[4] Id.
[5] Id. at 253 (Table A3.4).

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

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

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

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

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

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

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

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

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

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[9] *Hirst v. United Kingdom (Hirst No. 2)*, [2004] ECHR 121 (Eur. Ct. H.R.) at ¶52.
[10] Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 512 (1997).
[11] *See* id. at 515.
[12] *See* id. at 595 ("The reasoning is straightforward: citizens will never attain sufficient power to advance their own welfare unless they possess a voice in the decisions of their government. One may conclude that human rights law does not favor elections to the exclusion or even subordination of other rights, but establishes participatory rights as a necessary [though certainly not sufficient] condition for the achievement of other human rights").
[13] *Andres Aylwin Azocar et al. v. Chile*, Case 11.863, Report No. 137/99 (1999)

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

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

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

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

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

Incarceration Disenfranchisement

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

The United States

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

[14] Only the states of Maine and Vermont do not practice incarceration disenfranchisement.
[15] *See* Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, BUREAU OF JUSTICE STATISTICS, NCJ 215092, (November 2006).

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

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

[16] THE SENTENCING PROJECT, Felony Disenfranchisement Laws in the United States, at http://sentencingproject.org/PublicationDetails.aspx?PublicationID=335, (last visited April 8, 2007).
[17] Manza and Uggen, *supra* note 3.
[18] Id. at 253 (Table A3.4).
[19] Id. at 190-197.

The Americas

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

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

TABLE A—ORGANIZATION OF AMERICAN STATES MEMBERS' DISENFRANCHISEMENT POLICIES

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

The World

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

Countries in Europe and elsewhere also incarcerate at much lower rates than the United States and other countries in the Americas. In Japan the rate of incarceration is 62 people per 100,000 and in Germany it is 93 per 100,000 but in the United States that number spikes to 737 per 100,000.[23] In addition to the United States, eight other American countries are among the top 20 countries ranked by the number incarcerated per capita.[24]

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

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[21] Fellner and Mauer, *supra* note 6.

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

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

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

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

Disenfranchisement During Probation

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

The United States

In the United States, there were approximately 4.1 million men and women on probation in the United States at the end of 2005.[26] Of the total 5.3 million United States citizens who are disenfranchised, 1.3 million of them are on probation.[27] These United States citizens are scattered in 30 states that require disenfranchisement of persons sentenced to felony probation.[28] In Texas and Georgia alone there are more than 450,000 people who are disenfranchised as a result of their probationary status.[29] As with the disenfranchisement of persons in prison, the denial of the right

[25] *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*, 2005 (3) SA 280 (CC) at ¶ 28, quoting *August v. Electoral Commission*, 1999 (3) SA 1 (CC) at ¶ 17.
[26] Lauren E. Glaze and Thomas P. Bonczar, *Probation and Parole in the United States, 2005*, BUREAU OF JUSTICE STATISTICS, NCJ 215091, (November 2006).
[27] Manza and Uggen, *supra* note 3.
[28] *See* THE SENTENCING PROJECT, *supra* note 16, at 3.
[29] Manza and Uggen, *supra* note 3.

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

The Americas

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

The World

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

Post-Incarceration Disenfranchisement

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

[30] Id. at 253 (Table A3.4).

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

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

The United States

The United States disenfranchises formerly incarcerated persons on a broad scale during parole. Parole is a period in which adults are conditionally released from prison into community supervision, whether by parole board decision or by mandatory conditional release after serving a prison term. Parolees are subject to being returned to jail or prison for rule violations or other offenses. In 35 U.S. states, the period of disenfranchisement continues through parole.[32] Recent estimates reveal that there were approximately 478,000 disenfranchised parolees in these states in 2005.[33] Forty-six percent (219,000) of those individuals disenfranchised while currently under parole supervision were African American.[34] This figure is nearly four times the proportion of the general population represented by African Americans.

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

[32] S*ee* THE SENTENCING PROJECT, *supra* note 16, at 3.
[33] Manza and Uggen, *supra* note 3.
[34] Id. at 253 (Table A3.4).

The Americas

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

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

The World

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

[35] GUYANA CONST. Art 159, § (4)
[36] CHILE CONST. Art 8

In the Philippines, persons sentenced to a prison term of one year or more are barred from voting for a period of five years after completion of sentence. After such a period, the right to vote is automatically restored. The Federated States of Micronesia also disenfranchise after a person is released from prison. The Micronesian states of Kosrae[37] and Yap[38] both prohibit individuals serving a parole period from voting.

Post-Sentence Disenfranchisement

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

The United States

There are currently 11 states in the United States that disenfranchise persons after completion of sentence.[39] In 10 of these states, some or all persons convicted of a felony are essentially permanently disenfranchised.[40] In total, post-sentence disenfranchisement denies the fundamental right to vote to 2.1 million people in the United States[41] In some states, this can include an 18-year old convicted of a first-time non-violent offense and sentenced to probation. For example, the state of Alabama disenfranchises all persons convicted of a crime involving "moral

[37] KOSRAE STATE CODE, Tit.3, Pt. I, Ch. 1, §3.102
[38] YAP STATE CODE, Title 7, §102(d)
[39] *See* THE SENTENCING PROJECT, *supra* note 16, at 3.
[40] In addition, the state of Nebraska imposes a two-year waiting period after completion of sentence.
[41] *See* THE SENTENCING PROJECT, *supra* note 16, at 3.

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

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

The likelihood of actually getting a pardon granted in jurisdictions that require executive pardon for restoration of voting rights like Virginia is extremely low. In Virginia, voting rights were restored to only 5,043 individuals out of 243,902 disenfranchised persons during the years of 1982-2004, or about 2%.[45] Nevada only restored voting rights to 50 formerly incarcerated persons out of an estimated 43,395 during 2004. In Florida, only 19% of requests were granted between 1999 and 2004.[46]

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

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

[44] Id.

[45] Id.

[46] Id.

The Americas

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

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

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

The World

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

LEGAL ANALYSIS

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

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

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[48] Law Of Election To The House Of Deputies*, Law No. 22 for the Year 1986*
[49] TONGA CONST, Art. 23

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

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

Customary International Law

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

[50] Richard Wilson, The Right to Universal, Equal, and Non-Discriminatory Suffrage As a Norm of Customary International Law: Protecting the Prisoner's Right to Vote (forthcoming 2007), citing Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179, Article 38(b) (1945).
[51] *E.g.*, *Kane v. Winn*, 319 F.Supp.2d 162, 167 (D. Mass. 2004).
[52] *See* Wilson, *supra* note 50, at 6.

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

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

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

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

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[53] Id., quoting Brownlie and Charney.
[54] Id. at 9, quoting Brownlie.
[55] Id. at 19, citing UN General Assembly, "Promoting and Consolidating Democracy," UN Doc. A/RES/55/96 (29 Feb. 2001), at Article 1(d)(ii) (guaranteeing "the right to vote freely…by universal and equal suffrage.").
[56] Id. at 9.
[57] Id., quoting Franck.
[58] Data gathered by students at the Washington College of Law, International Human Rights Clinic; sources include State Department Country Reports of 2003 and the State Constitutions of the OAS member states.

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

There has been a shift in regional documents toward the protection and enforcement of democracy,[61] which itself is grounded in universal and equal suffrage.[62] The American Convention on Human Rights,[63] the European Convention on Human Rights,[64] and the African Charter on Human and Peoples' Rights[65] all contain provisions that protect and promote democratic systems of government. Between the state practice and the treaty provisions, "democracy has achieved universal recognition as an international legal right."[66]

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

In the history of the United States, for example, this process has happened through constitutional amendments. The Fifteenth Amendment to the United States Constitution declared "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[67] In 1920 the Nineteenth Amendment granted

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[59] Id.
[60] *See* Wilson, *supra* note 50, at 16.
[61] Ezetah, *supra* note 10, at 512.
[62] *See* id. at 515.
[63] *See* American Convention on Human Rights, art, 23, Nov. 22, 1969.
[64] *See* First Protocol to the European Convention on Human Rights, art. 3, Mar. 20, 1952.
[65] *See* African Charter on Human and Peoples' Rights, art. 12, June 27, 1981.
[66] Wilson, *supra* note 50 at 14, quoting Cerna at 290.
[67] U.S. CONST. amend. XV, § 1.

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

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

Treaty Law

United Nations

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

[68] U.S. CONST. amend. XIX, § 1.

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

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

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

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

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

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

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

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

Inter-American System

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

[72] Id.
[73] U.N. CCPR, 87th Sess., 2395th mtg., U.N. Doc. CCPR/C/SR.2395 (2006)
[74] Id.
[75] Manza and Uggen, *supra* note 3, at 253 (Table A3.4).
[76] OAS Charter, Preamble
[77] OAS Charter, Art. 2(b) (stating that the purpose of the charter is to "promote and consolidate representative Democracy").
[78] OAS Charter, Art. 3(d) (reaffirming "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy").
[79] OAS Charter, Art 9 (excluding any government from participation in the OAS if such government has

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

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

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

overthrown a democratically elected government).
[80] Inter-American Democratic Charter, Art. 1
[81] Id. at Art. 6
[82] Decl. Of Principles on Freedom of Expression, Art. 1 (stating "freedom of expression in all its forms and Manifestations is a fundamental and inalienable right of all individuals" and is "an indispensable requirement for the very existence of democracy").
[83] American Declaration on the Rights and Duties of Man. May 2, 1948.
[84] Id.

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

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

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

1) Every citizen shall enjoy the following rights and opportunities:
    a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
    b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
    c. to have access, under general conditions of equality, to the public service of his country.

2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

[85] Id.

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

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

European Convention on Human Rights

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

[86] Rottinghaus, Brandon, *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform* 12 (July 1, 2003), *at* http://www.ifes.org/publication/4bbcc7feabf9b17 c41be87346f57c1c4/08_18_03_Manatt_Brandon_Rottinghaus.pdf (last visited April 12, 2007).
[87] European Convention on Human Rights, Prot. 1, Art. 3

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

African Charter

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

Cases

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

Canada

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

[88] *Mathieu-Mohin and Clerfayt v. Belgium*,9/1985/95/143, series A no.113 ¶ 51 (1987).
[89] *Sauvé v. Canada* (Attorney General) (*Sauvé No. 1*), [1993] 2 S.C.R. 438

Charter of Rights and Freedoms, which states: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[90] However, Canada's electoral law prohibited incarcerated persons from voting. The government of Canada argued that the policy was a reasonable limit that the Charter allowed in Section 1.[91] The Canadian Supreme Court disagreed with the government. It held that the electoral law was drawn too broadly in barring all incarcerated persons from voting.[92] The blanket ban failed to meet the proportionality test, as it did not minimally impair the right to vote to individuals who were entitled to do so.[93]

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

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

[90] Canadian Charter of Rights and Freedoms, Art 3.
[91] Canadian Charter of Rights and Freedoms, Sec. 1 "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (ital. added)
[92] *Sauvé No. 1* at 913
[93] Id.
[94] Canada Elections Act, S.C., c.9, Part 1 § 4, (2000).

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

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

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

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[95] *Sauvé No. 2* at ¶ 39
[96] Id. at ¶ 32.
[97] Id. at ¶ 48.
[98] Id. at ¶ 52.
[99] Id. at ¶ 59.

South Africa

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

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

[100] 414 U.S. 524, 532 (1973).
[101] *August* at ¶ 22.
[102] Sec. 19(3)(a) guarantees a right to vote in elections to "every adult citizen." S. AFR. CONST. (1996) § 19(3)(a).
[103] Id.
[104] *August* at ¶ 23.
[105] Id. at ¶ 33.
[106] *Minister of Home Affairs* at ¶ 2.

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

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

Israel

In this case, the petitioner requested that the right to vote be denied to Yigal Amir, who was imprisoned for assassinating Prime Minister Yitzhak Rabin. The case centered on a rule of the Knesset, which allowed for the right to vote to be denied by the court according to the law.[110] The Israeli court refused to honor the petitioner's request, reasoning, "Without the right to vote, the infrastructure of all other fundamental rights would be damaged. [citation omitted] Therefore, in a democratic system, the right to vote will be restricted only in extreme circumstances enacted clearly in law."[111] The Israeli court refused to alter its practices, and affirmed that limitation of the right to vote is based on only two criteria: citizenship and age of 18.[112]

[107] Id. at ¶ 28, quoting *August* at ¶ 17.
[108] Id. at ¶ 65.
[109] Id. at ¶ 73.
[110] Hila Alrai v. Minister of the Interior and Yigal Amir, H.C. 2757/96 (1996).
[111] Id. at 2.
[112] Id.

United Kingdom and the European Court of Human Rights

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

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

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

[113] *Hirst v. United Kingdom* (*Hirst No. 1*) 30.6.2004, Rep 2004
[114] Id. at ¶ 11.
[115] Representation of the People Act §3 (1983), *at* http://www.slough.info/slough/s29/s29s001.html#003, (last visited April 12, 2007).
[116] *Hirst No. 1* at ¶ 11.
[117] Id.
[118] Id. at ¶ 15-16

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

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

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

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

[119] Id. at ¶ 36
[120] Id.
[121] Id. at ¶ 46
[122] Id. at ¶ 47
[123] Id. at ¶ 49

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

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

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

[124] *Hirst No. 2* at ¶ 52.

[125] Id. at ¶ 77

[126] Id.

[127] Id. at ¶ 71

[128] Id.

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

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

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

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

[130] Id. at 6

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

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

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

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

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

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

The Proportionality Test

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

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

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[133] *Azocar*, *supra* note 11.
[134] *Statehood Solidarity Committee v. United States*, Case 11.204, Report No. 98/03 (2003) at ¶ 90, citing I/A Court H.R., Advisory Opinion OC-4/84 of January 19, 1984, at ¶ 57.
[135] Id. at ¶ 57.

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

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

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[136] Id. at ¶ 87.
[137] Id. at ¶ 89.
[138] *See* e.g. *Juan Raul Garza v. United States*, Case 12.243, Report No. 52/01, Annual Report of the IACHR 2000, ¶ 88, 89.
[139] Id.
[140] *Azocar* at ¶ 99, 100.
[141] *Statehood Solidarity Committee* at ¶ 90.
[142] *Azocar* at ¶ 102.
[143] *Statehood Solidarity Committee* at ¶ 90.

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

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

[144] *Washington v. State*, 75 Ala. 152, 585 (Dec. 1884)
[145] *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (D. Ga. 1971)

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

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

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

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

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[146] Id.

[147] 418 U.S. 24 (1974)

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

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

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

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

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

[150] *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (J. Marshall, Dissenting).
[151] Vargas, Theresa, *Judge Cuts Sentence in Flying Cup Case*, WASH. POST, Feb. 22, 2007, at B01.
[152] Id., section D1

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

RECOMMENDATIONS

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

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