LOSING THE VOTE

The Impact of Felony Disenfranchisement Laws in the United States

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Reynolds v. Sims, 377 U.S. 533 (1964)

Without a vote, a voice, I am a ghost inhabiting a citizen's space...I want to walk calmly into a polling place with other citizens, to carry my placid ballot into the booth, check off my choices, then drop my conscience in the common box.

Joe Loya, disenfranchised ex-felon

Our democracy is weakened when one sector of the population is blocked out of the voting process.

Rep. John Conyers, Jr., U.S. Congress

An eighteen-year-old first-time offender who trades a guilty plea for a nonprison sentence may unwittingly sacrifice forever his right to vote.

Andrew Shapiro, attorney

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I. OVERVIEW AND SUMMARY

The expansion of suffrage to all sectors of the population is one of the United States' most important political triumphs. Once the privilege of wealthy white men, the vote is now a basic right held as well by the

poor and working classes, racial minorities, women and young adults. Today, all mentally competent adults have the right to vote with only one exception: convicted criminal offenders. In forty-six states and the District of Columbia, criminal disenfranchisement laws deny the vote to all convicted adults in prison. Thirty-two states also disenfranchise felons on parole; twenty-nine disenfranchise those on probation. And, due to laws that may be unique in the world, in fourteen states even ex-offenders who have fully served their sentences remain barred for life from voting.

While felony disenfranchisement laws should be of concern in any democracy, the scale of their impact in the United States is unparalleled: an estimated 3.9 million U.S. citizens are disenfranchised, including over one million who have fully completed their sentences. That so many people are disenfranchised is an unintended consequence of harsh criminal justice policies that have increased the number of people sent to prison and the length of their sentences, despite a falling crime rate.

The racial impact of disenfranchisement laws is particularly egregious. Thirteen percent of African American men—1.4 million—are disenfranchised, representing just over one-third (36 percent) of the total disenfranchised population. In two states, our data show that almost one in three black men is disenfranchised. In eight states, one in four black men is disenfranchised. If current trends continue, the rate of disenfranchisement for black men could reach 40 percent in the states that disenfranchise ex-offenders.

Disenfranchisement laws in the U.S. are a vestige of medieval times when offenders were banished from the community and suffered "civil death." Brought from Europe to the colonies, they gained new political salience at the end of the nineteenth century when disgruntled whites in a number of Southern states adopted them and other ostensibly race-neutral voting restrictions in an effort to exclude blacks from the vote.

In the late twentieth century, the laws have no discernible legitimate purpose. Deprivation of the right to vote is not an inherent or necessary aspect of criminal punishment nor does it promote the reintegration of offenders into lawful society. Indeed, defenders of these laws have been hard pressed to justify them: they most frequently cite the patently inadequate goal of protecting against voter fraud or the anachronistic and politically untenable objective of preserving the "purity of the ballot box" by excluding voters lacking in virtue.

No other democratic country in the world denies as many people—in absolute or proportional terms—the right to vote because of felony convictions. The extent of disenfranchisement in the United States is as troubling as the fact that the right to vote can be lost for relatively minor offenses. An offender who receives probation for a single sale of drugs can face a lifetime of disenfranchisement. Restrictions on the franchise in the United States seem to be singularly unreasonable as well as racially discriminatory, in violation of democratic principles and international human rights law.

This report includes the first fifty-state survey of the impact of U.S. criminal disenfranchisement laws. Among the key statistical findings:

- An estimated 3.9 million Americans, or one in fifty adults, have currently or permanently lost the ability to vote because of a felony conviction.

- 1.4 million persons disenfranchised for a felony conviction are ex-offenders who have completed their criminal sentence. Another 1.4 million of the disenfranchised are on probation or parole.

- 1.4 million African American men, or 13 percent of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average. More than one-third (36 percent) of the total disenfranchised population are black men.

- Ten states disenfranchise more than one in five adult black men; in seven of these states, one in four black men is *permanently* disenfranchised.

- Given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their lifetime. In states with the most restrictive voting laws, 40 percent of African American men are likely to be *permanently* disenfranchised.

II. FELONY DISENFRANCHISEMENT IN THE UNITED STATES

In the United States, conviction of a felony carries collateral "civil" consequences apart from penal sanctions such as fines or imprisonment. Offenders may lose the right to vote, to serve on a jury, or to hold public office, among other "civil disabilities" that may continue long after a criminal sentence has been served. While both state and federal law impose civil disabilities following criminal conviction, state law governs removal of the right to vote even if the conviction is for a federal rather than state offense.[1]

Disenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe. In medieval Europe, "infamous" offenders suffered "civil death" which entailed "the deprivation of all rights, confiscation of property, exposure to injury and even to death, since the outlaw could be killed with impunity by anyone."[2] In England, civil disabilities intended to debase offenders and cut them off from the community were accomplished via bills of attainder: a person attained after conviction for a felony was subject to forfeiture of property, stripped of the ability to inherit or bequeath property and considered civilly dead—unable to bring suit or perform any other legal function. English colonists brought these concepts with them to North America.[3]

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[1]In the United States, state law establishes the electoral qualifications that determine who may vote in state and federal elections.

[2]Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, American Criminal L. Rev. (Spring 1973), pp. 721- 722. Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the Purity of the Ballot Box*, 102 Harv. L. Rev 1300, 1301 citations omitted (1989).

[3]Matthew Bodie, "The Disenfranchisement of Ex-Felons: An Argument for Change," A senior thesis presented to the faculty of the Woodrow Wilson School of Public and International Affairs at Princeton University, April 8, 1991.

With independence, the newly formed states rejected some of the civil disabilities inherited from Europe; criminal disenfranchisement was among those retained. In the mid-nineteenth century, nineteen of the thirty-four existing states excluded serious offenders from the franchise.[4] Convicted felons were not the only people excluded from the vote. Suffrage was extremely limited in the new country: women, African Americans, illiterates, and people without property were also among those unable to vote.

The exclusion of convicted felons from the vote took on new significance after the Civil War and passage of the Fifteenth Amendment to the U.S. Constitution, which gave blacks the right to vote. Southern opposition to black suffrage led to the decision to use numerous ostensibly race-neutral voting barriers—e.g., literacy and property tests, poll taxes, grandfather clauses and criminal disenfranchisement provisions—with the explicit intent of keeping as many blacks as possible from being able to vote. Although laws excluding criminals from the vote had existed in the South previously, "between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other voting qualifications, to increase the effect of these laws on black citizens."[5] Crimes that triggered disenfranchisement were written to include crimes blacks supposedly committed more frequently than whites and to exclude crimes whites were believed to commit more frequently. For example, in South Carolina, "among the disqualifying crimes were those to which [the Negro] was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man was as disposed as the Negro, were significantly omitted from the list."[6] In 1901 Alabama lawmakers—who openly stated that their goal was to establish white supremacy—included a provision in the state constitution that made conviction of crimes of "moral turpitude" the basis for disenfranchisement.[7]

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[4]Note, *Restoring the Ex-Offender's Right to Vote*, p.725.

[5]Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 540, November 1993.

[6]Ibid., 103 Yale L.J. at 541 (quoting Francis B. Simpkins, Pitchfork Ben Tillman).

[7]*Hunter v. Underwood*, 471 U.S. 222 (1985).

Table 1 provides a state-by-state breakdown of state disenfranchisement provisions. Four states (Maine, Massachusetts, Utah, Vermont) do not disenfranchise convicted felons.[8] Forty-six states and the District of Columbia have disenfranchisement laws that deprive convicted offenders of the right to vote while they are in prison.[9] In thirty-two states, convicted offenders may not vote while they are on parole, and twenty-nine of these states disenfranchise offenders on probation.

TABLE 1: Categories of Felons Disenfranchised under State Law

State	Prison	Probation	Parole	Ex-felons
Alabama	X	X	X	X
Alaska	X	X	X	
Arizona	X	X	X	X (2nd felony)
Arkansas	X	X	X	
California	X		X	
Colorado	X		X	
Connecticut	X	X	X	
Delaware	X	X	X	X
District of Columbia	X			
Florida	X	X	X	X
Georgia	X	X	X	
Hawaii	X			
Idaho	X			
Illinois	X			
Indiana	X			
Iowa	X	X	X	X
Kansas	X			
Kentucky	X	X	X	X
Louisiana	X			
Maine				
Maryland	X	X	X	X (2nd felony)
Massachusetts				
Michigan	X			
Minnesota	X	X	X	
Mississippi	X	X	X	X
Missouri	X	X	X	
Montana	X			

[8] Efforts are underway in two of these states to disenfranchise prisoners. In Massachusetts, state legislators have passed a constitutional amendment to strip prisoners of their voting rights; it must be voted on again in 1999. In Utah, voters in the November 1998 elections will vote on a proposed constitutional amendment to bar felons from voting, but prisoners would regain the right to vote upon discharge from prison.

[9] State disenfranchisement laws and laws governing other civil disabilities are summarized in U.S. Department of Justice, Office of the Pardon Attorney (DOJ/OPA), *Civil Disabilities of Convicted Felons: A State-by-State Survey* (Washington, D.C.: U.S. Department of Justice, October 1996).

Nebraska	X	X	X	
Nevada	X	X	X	X
New Hampshire	X			
New Jersey	X	X	X	
New Mexico	X	X	X	X
New York	X		X	
North Carolina	X	X	X	
North Dakota	X			
Ohio	X			
Oklahoma	X	X	X	
Oregon	X			
Pennsylvania	X			
Rhode Island	X	X	X	
South Carolina	X	X	X	
South Dakota	X			
Tennessee	X	X	X	X (pre-1986)
Texas	X	X	X	X (2years)
Utah				
Vermont				
Virginia	X	X	X	X
Washington	X	X	X	X (pre- 1984)
West Virginia	X	X	X	
Wisconsin	X	X	X	
Wyoming	X	X	X	X
U.S. Total	**47**	**29**	**32**	**15**

Most remarkably, in fourteen states, ex-offenders who have fully served their sentences nonetheless remain disenfranchised.[10] Ten of these states disenfranchise ex-felons for life: Alabama, Delaware, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia, and Wyoming. Arizona and Maryland disenfranchise permanently those convicted of a second felony; and Tennessee and Washington disenfranchise permanently those convicted prior to 1986 and 1984, respectively. In addition, in Texas, a convicted felon's right to vote is not restored until two years after discharge from prison, probation or parole.

Disenfranchisement of ex-felons is imposed even if the offender was convicted of a relatively minor crime or even if the felon was never incarcerated. For example, Abran Ramirez was denied the ability to vote for life in California because of a twenty-year old robbery conviction, even though he had served only three months in jail and had successfully completed ten years of parole.[11] Sanford McLaughlin was disenfranchised for life in Mississippi because he pled guilty to the misdemeanor of passing a bad $150 check.[12] As Andrew Shapiro, an attorney who has closely studied criminal disenfranchisement, points out,

[10]In an additional state, Texas, ex-offenders are disenfranchised for two years following the end of their sentence. In this report we use the terms "ex-offender" or "ex-felon" to refer to convicted felons who have completed their sentences and are no longer under criminal supervision.

[11]*Richardson v. Ramirez*, 418 U.S. 24 (1974). Ramirez's co-plaintiff was denied the vote because of a seventeen-year-old conviction for heroin possession; he had served two years in prison and two years on parole.

[12]Ruling in a suit brought by McLaughlin challenging his disenfranchisement, the court ruled that Mississippi's disenfranchisement provision did not apply to misdemeanor false pretense convictions. The court also ruled that a provision which disenfranchised persons convicted of misdemeanors was unconstitutional unless the state could show

"an eighteen-year-old first-time offender who trades a guilty plea for a lenient nonprison sentence (as almost all first-timers do, whether or not they are guilty) may unwittingly sacrifice forever his right to vote."[13] Federal Judge Henry Wingate aptly described the political fate of the disenfranchised:

> [T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box...the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.[14]

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the provision was "precisely tailored to serve some compelling governmental interest." *McLaughlin v. City of Canton, Mississippi*, 947 F. Supp. 954, 974-75 (S.D. Miss. 1995).

[13] Andrew L. Shapiro , "The Disenfranchised," *The American Prospect,* no. 35 (November-December 1997): 60-62.

[14] *McLaughlin v. City of Canton,* 947 F. Supp. at 971 (S.D. Miss. 1995).

In theory, ex-offenders can regain the right to vote. In practice, this possibility is usually illusory. In eight states, a pardon or order from the governor is required; in two states, the ex-felons must obtain action by the parole or pardons board. Released ex-felons are not routinely informed about the steps necessary to regain the vote and often believe—incorrectly—that they can never vote again. Moreover, even if they seek to have the vote restored, few have the financial and political resources needed to succeed. In Virginia, for example, there are 200,000 ex-convicts, and only 404 had their vote restored in 1996 and 1997.[15] In Mississippi, an ex-convict who wants to vote must either secure an executive order from the governor or get a state legislator to introduce a bill on his behalf, convince two-thirds of the legislators in each house to vote for it, and have it signed by the governor.[16] In Florida, an ex-felon must wait ten years after completion of sentence before being eligible to seek the gubernatorial pardon needed to restore the vote.

Most state disenfranchisement laws provide that conviction of any felony or crime that is punishable with imprisonment is a basis for losing the right to vote.[17] The crime need not have any connection to electoral processes, nor need it be classified as notably serious. Shoplifting or possession of a modest amount of marijuana could suffice.

Criminal disenfranchisement can follow conviction of either a state or federal felony. According to the Department of Justice, however, "not all states have paid consistent attention to the place of federal offenders in the state's scheme for loss and restoration of civil rights. While some state statutes expressly address federal offenses..., many do not. The disabilities imposed upon felons under state law generally are

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[15]Human Rights Watch telephone interview with Patricia Tucker, extradition/clemency specialist, Office of the Secretary, Commonwealth of Virginia, October 5, 1998. In Virginia, only the governor has the power to remove political disabilities, such as loss of the right to vote, that follow conviction of a crime. Va. Const. Art. V, §12 (1998). According to the Office of the Secretary, a person must wait five years after completion of sentence before he or she may apply to have those disabilities removed. DOJ/OPA, *Civil Disabilities of Convicted Felons,* p. 133.

[16]In 1990, twenty people in Mississippi tried to get the vote restored via legislation; two of the bills were vetoed. "1.46 Million Black Men Can't Vote," *Dayton Daily News*, Feb. 5, 1997.

[17]Some disenfranchisement provisions refer to "infamous" crimes or crimes of "moral turpitude." These have been interpreted as including any felony or crime punishable by imprisonment.

assumed to apply with the same force whether the conviction is a state or federal one."[18] In at least sixteen states, federal offenders cannot use the state procedure for restoring their civil rights. The only method provided by federal law for restoring voting rights to ex-offenders is a presidential pardon.[19]

[18]DOJ/OPA, *Civil Disabilities of Convicted Felons,* p. 2.

[19]Ibid., pp.2-3.

As a result of the considerable variation among the states, disenfranchisement laws form a national "crazyquilt."[20] Within the federal structure of the U.S. it may be appropriate that each state determine voting qualifications for local and state offices. But state voting laws also govern eligibility to vote in federal elections. Exercise of the right to vote for national representatives is thus subject to the arbitrary accidents of geography. In Massachusetts, a convicted burglar may vote in national elections while he is in prison, while in Indiana he cannot. A person convicted of theft in New Jersey automatically regains the right to vote after release from prison, while in New Mexico such an offender is denied the vote for the rest of her life unless she can secure a pardon from the governor. In some states an offender who commits a felony and receives probation can vote, while in other states an offender guilty of the same crime who receives probation cannot.

III. CURRENT IMPACT OF DISENFRANCHISEMENT LAWS

National Impact

The scale of the impact of criminal disenfranchisement laws is quantitatively different than at any time in the nation's history. Using national conviction and corrections on data, we estimate that 3.9 million Americans, including 1.4 million black men, cannot vote because of felony convictions.[21] These national figures mask wide disparities among the states. We have now undertaken the first-ever state-by-state analysis of the impact of criminal disenfranchisement laws, drawing on corrections data from the U.S. Bureau of Justice Statistics (BJS) and state-level data compiled by various law enforcement and court agencies. (A complete description of the methodology used can be found in the Appendix.)

Table 2 presents our findings on the current impact of voting restrictions, broken down by state. The figures reported here should be considered as estimates because complete data were not available for every state.[22] In addition, individual voting practices within the states may or may not conform to state law. This is a result both of inaccurate record-keeping in some instances and misinformation in others. In states that disenfranchise ex-felons, election officials do not always have ready access to felony conviction data, and some ex-felons may vote. In other states where ex-felons are permitted to vote, released prisoners are not necessarily informed of this right and often incorrectly believe that they can never vote again.

Our analysis reveals that the national rate of disenfranchisement, and particularly that of black men, remains at substantial levels. Not surprisingly, states that disenfranchise felons for life have far greater numbers of disenfranchised adults than other states. Our findings include:

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[20]DOJ/OPA, *Civil Disabilities of Convicted Felons,* p.1.

[21]These figures differ slightly from national estimates produced by The Sentencing Project in 1997 because we have now been able to undertake a more in-depth analysis of the number of ex-felons in the states that disenfranchise for life. See Marc Mauer, "Intended and Unintended Consequences: State Racial Disparities in Imprisonment," The Sentencing Project, January 1997. Figures in Table 2 for Kentucky and Nevada for both the total disenfranchised population and for black men represent low estimates due to the inability to obtain the data necessary to develop estimates for the number of ex-felons.

[22]Statistics on ex-felons are improving as states seek to meet requirements of federal gun registration legislation (the "Brady" law), but substantial gaps remain in many states.

- A total of 3.9 million adults, or 2.0 percent of the eligible voting population, is currently or *permanently* disenfranchised as a result of a felony conviction.

- Six states—Alabama, Florida, Mississippi, New Mexico, Virginia, and Wyoming—exclude from the vote more than 4 percent of their adult population, or more than one in twenty-five.

- Florida and Texas each disenfranchise more than 600,000 people.

- Alabama, California and Virginia each disenfranchise close to a quarter of a million persons.

Table 3 provides a breakdown of the number of persons disenfranchised for felony convictions who are in prison, on probation or parole or have completed serving their sentences. It reveals that:

- Nearly three-quarters (73 percent) of the disenfranchised are not in prison, but are on probation, or parole or have completed their sentences.

- 1.4 million of the disenfranchised are ex-offenders.

- Five states—Alabama, Florida, Mississippi, Texas, and Virginia—each disenfranchise more than 125,000 ex-felons. One-third of all disenfranchised ex-felons (436,900) are in Florida.

- One million people of the disenfranchised were only sentenced to probation and not to prison. Texas disenfranchises nearly a quarter of a million people (234,200) on probation.

Racial Impact

State disenfranchisement laws have a dramatically disproportionate racial impact. Thirteen percent of all adult black men—1.4 million—are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is seven times the national average. Election voting statistics offer an approximation of the political importance of black disenfranchisement: 1.4 million black men are disenfranchised compared to 4.6 million black men who voted in 1996.[23]

The racial impact in certain individual states is extraordinary:

- In Alabama and Florida, 31 percent of all black men are permanently disenfranchised.

- In five other states—Iowa, Mississippi, New Mexico, Virginia, and Wyoming—one in four black men (24 to 28 percent) is *permanently* disenfranchised. In Washington state, one in four of black men (24 percent) are currently or *permanently* disenfranchised.[24]

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[23]U.S. Census Bureau, *Voting and Registration in the Election of November 1996* (P20-504), (Washington, D.C.: U.S. Census Bureau, July 1998).

[24]In Washington, persons in prison, on probation or on parole are currently disenfranchised. In addition, persons convicted of a felony prior to July 1, 1984 are permanently disenfranchised.

- In Delaware, one in five black men (20 percent) is *permanently* disenfranchised.
- In Texas, one in five black men (20.8 percent) is currently disenfranchised.
- In four states—Minnesota, New Jersey, Rhode Island, and Wisconsin—16 to 18 percent of black men are currently disenfranchised.

TABLE 2: Disenfranchised Felons by State

State	Total Felons	Rate for Total*	Black Men	Rate for Black Men**
Alabama	241,100	7.5%	105,000	31.5%
Alaska	4,900	1.2%	500	6.3%
Arizona	74,600	2.3%	6,600	12.1%
Arkansas	27,400	1.5%	10,700	9.2%
California	241,400	1.0%	69,500	8.7%
Colorado	15,700	0.6%	3,500	6.1%
Connecticut	42,200	1.7%	13,700	14.8%
Delaware	20,500	3.7%	8,700	20.0%
District of Columbia	8,700	2.0%	8,100	7.2%
Florida	647,100	5.9%	204,600	31.2%
Georgia	134,800	2.5%	66,400	10.5%
Hawaii	3,000	0.3%	100	0.9%
Idaho	3,800	0.5%	100	2.7%
Illinois	38,900	0.4%	24,100	4.5%
Indiana	16,800	0.4%	6,800	4.6%
Iowa	42,300	2.0%	4,800	26.5%
Kansas	7,800	0.4%	2,800	5.6%
Kentucky	24,000	0.8%	7,000	7.7%
Louisiana	26,800	0.9%	19,600	4.8%
Maine	0	0.0%	0	0.0%
Maryland	135,700	3.6%	67,900	15.4%
Massachusetts	0	0.0%	0	0.0%
Michigan	42,300	0.6%	22,700	5.4%
Minnesota	56,000	1.6%	7,200	17.8%
Mississippi	145,600	7.4%	81,700	28.6%
Missouri	58,800	1.5%	20,100	11.3%
Montana	2,100	0.3%	0	2.9%
Nebraska	11,900	1.0%	2,100	10.2%
Nevada	16,800	1.4%	4,000	10.0%
New Hampshire	2,100	0.2%	100	3.8%
New Jersey	138,300	2.3%	65,200	17.7%
New Mexico	48,900	4.0%	3,700	24.1%
New York	126,800	0.9%	62,700	6.2%
North Carolina	96,700	1.8%	46,900	9.2%
North Dakota	700	0.1%	0	1.1%
Ohio	46,200	0.6%	23,800	6.2%
Oklahoma	37,200	1.5%	9,800	12.3%
Oregon	7,300	0.3%	900	4.5%
Pennsylvania	34,500	0.4%	18,900	5.2%
Rhode Island	13,900	1.8%	2,800	18.3%
South Carolina	48,300	1.7%	26,100	7.6%
South Dakota	2,100	0.4%	100	3.5%

Tennessee	97,800	2.4%	38,300	14.5%
Texas	610,000	4.5%	156,600	20.8%
Utah	0	0.0%	0	0.0%
Vermont	0	0.0%	0	0.0%
Virginia	269,800	5.3%	110,000	25.0%
Washington	151,500	3.7%	16,700	24.0%
West Virginia	6,700	0.5%	900	4.4%
Wisconsin	48,500	1.3%	14,900	18.2%
Wyoming	14,100	4.1%	400	27.7%
U.S. Total	**3,892,400**	**2.0%**	**1,367,100**	**13.1%**

* Percentage of adult population who are disenfranchised.
**Percentage of black men who are disenfranchised.

TABLE 3: Disenfranchised Felons by State and Correctional Status

State	Disenfranchised Population				
	Prison	**Probation**	**Parole**	**Ex-felons**	**Total**
Alabama	21,100	21,300	5,200	193,500	241,100
Alaska	2,300	2,100	600	0	4,900
Arizona	21,600	23,800	3,800	25,400	74,600
Arkansas	9,000	13,200	5,100	0	27,400
California	144,400	0	97,100	0	241,400
Colorado	12,400	0	3,300	0	15,700
Connecticut	10,300	30,800	1,100	0	42,200
Delaware	3,100	9,100	1,000	7,300	20,500
District of	8,700	0	0	0	8,700
Florida	63,700	137,200	9,200	436,900	647,100
Georgia	34,300	79,300	21,100	0	134,800
Hawaii	3,000	0	0	0	3,000
Idaho	3,800	0	0	0	3,800
Illinois	38,900	0	0	0	38,900
Indiana	16,800	0	0	0	16,800
Iowa	6,300	8,500	2,200	25,300	42,300
Kansas	7,800	0	0	0	7,800
Kentucky	12,900	6,400	4,600	n/a	24,000
Louisiana	26,800	0	0	0	26,800
Maine	0	0	0	0	0
Maryland	21,000	38,800	16,200	59,700	135,700
Massachusetts	0	0	0	0	0
Michigan	42,300	0	0	0	42,300
Minnesota	5,200	48,400	2,400	0	56,000
Mississippi	13,600	5,500	1,500	125,000	145,600
Missouri	22,000	24,600	12,200	0	48,800
Montana	2,100	0	0	0	2,100
Nebraska	3,200	8,000	700	0	11,900
Nevada	8,200	5,400	3,200	n/a	16,800
New Hampshire	2,100	0	0	0	2,100
New Jersey	27,500	69,200	41,500	0	138,300
New Mexico	4,500	4,900	1,400	38,000	48,900
New York	69,700	0	57,100	0	126,800
North Carolina	27,900	56,400	12,400	0	96,700
North Dakota	700	0	0	0	700
Ohio	46,200	0	0	0	46,200
Oklahoma	19,600	15,400	2,200	0	37,200
Oregon	7,300	0	0	0	7,300
Pennsylvania	34,500	0	0	0	34,500
Rhode Island	2,000	11,200	600	0	13,900
South Carolina	19,800	23,100	5,400	0	48,300
South Dakota	2,100	0	0	0	2,100

Tennessee	15,600	20,600	8,900	52,700	97,800
Texas	132,400	234,200	112,600	130,800	610,000
Utah	0	0	0	0	0
Vermont	0	0	0	0	0
Virginia	27,100	16,300	9,900	216,600	269,800
Washington	12,500	68,900	600	69,500	151,500
West Virginia	2,700	3,100	900	0	6,700
Wisconsin	11,900	28,400	8,100	0	48,500
Wyoming	1,500	1,900	400	10,400	14,100
U.S. Total	**1,032,30**	**1,016,00**	**452,600**	**1,391,00**	**3,892,40**

Note: Columns and rows may not always sum exactly due to rounding.

- In nine states—Arizona, Connecticut, Georgia, Maryland, Missouri, Nebraska, Nevada, Oklahoma, and Tennessee—10 to 15 percent of black men are currently disenfranchised.

IV. CRIME, CRIMINAL JUSTICE POLICIES AND INCARCERATION

As one might expect, the number of people disenfranchised reflects to some extent the number of people involved in criminal activity. But the proportion of the population that is disenfranchised has been exacerbated in recent years by the advent of harsh sentencing policies such as mandatory minimum sentences,[25] "three strikes" laws[26] and truth-in-sentencing laws. Although crime rates have been relatively stable,[27] these laws have increased the number of offenders sent to prison and the length of time they serve.

[25] See, for example, Michael Tony, *Sentencing Matters,* (Oxford University Press, New York, 1995). Human Rights Watch, "Cruel and Usual: Disproportionate Sentences for New York Drug Offenders," *A Human Rights Watch Short Report*, vol. 9, no. 2, March 1997, analyses the impact of mandatory minimum sentences for drug offenders in New York state.

[26] California Department of Corrections, "Count of Prisoners Sentenced for Third and Second Strike Cases," June 30, 1998.

[27] Between 1972 to 1996, crime rates fluctuated but the incarceration rate quadrupled. Overall, the rate of violent crime was 60 percent higher in 1996 than in 1971(in large part due to changes in reporting of aggravated assaults, according to some experts), and property crimes were only 18 percent higher. Tonry "Crime and Punishment in America, 1971-1996," *Overcrowded Times*, vol. 9, no. 2, April 1998. See also DOJ/BJS, *Sourcebook of Criminal Justice Statistics*, (Washington, D.C.: USGPO, 1997), Table 3.106, p.306.

In California, for example, more than 40,000 offenders have been sentenced under the state's "three strikes" law as of June 1998. As a result of the law, 89 percent of these offenders had their sentences doubled, and 11 percent received sentences of twenty-five years to life. Only one in five of these were sentenced for crimes against persons; two-thirds were sentenced for a nonviolent drug or property crime. Seventy percent of the sentenced offenders were either African American or Hispanic.

The impact of changed sentencing policies is readily apparent from Department of Justice data. For example, persons arrested for burglary had a 53 percent greater likelihood of being sentenced to prison in 1992 than in 1980, while those arrested for larceny experienced a 100 percent increase. The most dramatic change can be seen for drug offenses, where arrestees were almost five times as likely to be sent to prison in 1992 as in 1980.[28] In addition, since the number of drug arrests nearly doubled during this period, the impact was magnified further.[29] Over this same twelve-year period, the rate of incarceration in prisons rose from 139 to 332 per 100,000 U.S. residents.[30] Eighty-four percent of the increase in state prison admissions during this period was due to incarceration of nonviolent offenders.[31]

The rate of incarceration has continued to soar. In 1997 the combined prison and jail rate reached 645 per 100,000 residents, the second-highest known rate of incarceration in the world (only Russia's is known to be higher). At mid-year 1997 (the latest available figures), there were 1.7 million U.S. residents incarcerated, two-thirds of them in state or federal prisons and the remainder in jails. One in every 117 men and one in every 1,852 women were under the jurisdiction of state or federal correctional authorities. Fifty-three percent of state inmates were sentenced for nonviolent offenses.[32]

If these incarceration rates remain unchanged, Department of Justice data indicate that an estimated one in twenty of today's children will serve time in a prison during his or her lifetime and will be disenfranchised for at least the period of incarceration.[33] The total number of disenfranchised will be substantially greater because it will also include felons on probation in the twenty-nine states that disenfranchise those on probation.

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[28]U.S. Department of Justice, Office of Justice Programs (DOJ/OJP), "Prisoners in 1994," Bulletin NCJ-151654, (Washington, D.C.: DOJ, August 1995).

[29]U.S. Department of Justice, Federal Bureau of Investigation (DOJ/FBI), *Uniform Crime Reports*, (Washington, D.C.: USGPO, *various years*). See statistics from the reports published annually for 1980 through 1992.

[30]DOJ/BJS, *Sourcebook of Criminal Justice Statistics 1996,* Table 6.21, p. 518.

[31]Marc Mauer, "Americans Behind Bars: The International Use of Incarceration, 1992-1993," The Sentencing Project, September 1994.

[32]U.S. Department of Justice, Office of Justice Programs, "Prisoners in 1997," Bureau of Justice Statistics Bulletin NCJ 170014, August 1998. The prison incarceration rates of some states were considerably higher than the national average: e.g., Texas has a rate of sentenced prisoners per 100,000 state residents of 717, Louisiana has a rate of 672, Oklahoma has a rate of 617. Ibid., Table 5, p.5.

[33]U.S. Department of Justice, Office of Justice Programs (DOJ/OJP), "Lifetime Likelihood of Going to State or Federal Prison," Special Report NCJ-160092, March 1997. The number of disenfranchised would not, however, include those incarcerated in the four states that permit inmates to vote.

Racially Disproportionate Incarceration Rates

The strikingly disproportionate rate of disenfranchisement among African American men reflects their disproportionate rate of incarceration. The rate of imprisonment for black men in 1996 was 8.5 times that of white men: black men were confined in prison at a rate of 3,098 per 100,000 compared to a white rate of 370.[34] Even more strikingly, in the past ten years the black men's rate increased ten times the white men's increase.[35]

[34]DOJ/OJP, "Prisoners in 1997," Table 14, p.11. These rates may differs lightly from previous reports due to the estimation and classification of Hispanic inmates. Twelve states and the District of Columbia incarcerate blacks at a rate more than ten times that of whites. Marc Mauer, "Intended and Unintended Consequences." If persons held in local jails are included, the rate of incarceration jumps: 6,926 black men per 100,000 are held in prison or jail compared to 919 white men. DOJ/OJP, *Sourcebook of Criminal Justice Statistics*, Table 6.12.

[35]Michael Tonry, "Crime and Punishment in America, 1971-1996," *Overcrowded Times*, April 1998, Volume 9, No. 2, p.15 (citing data from DOJ/OJP, *Sourcebook of Criminal Justice Statistics 1996,* Table 6.12, p. 510).

If current rates of incarceration remain unchanged, 28.5 percent of black men will be confined in prison at least once during their lifetime, a figure six times greater than that for white men.[36] As a result, nearly three in ten adult African American men will be temporarily or permanently deprived of the right to vote. But the total numbers of disenfranchised will be greater because, as noted above, it will include a substantial percentage of those convicted of a felony but not receiving a prison sentence (e.g., sentenced to probation). In states that disenfranchise ex-felons, we estimate that 40 percent of the next generation of black men is likely to lose permanently the right to vote.[37]

We have not developed estimates of the number and racial composition of disenfranchised women. The rates for black women are also likely to be quite disproportionate, though on a smaller scale than black men. This is a result both of increasing rates of criminal justice supervision of women, in general, and higher rates overall for black women, in particular. Although women represent 15 percent of all persons under correctional supervision, their numbers have been growing at faster rates than for men in recent years. Among sentenced prisoners the rate of incarceration for women grew by 182 percent in the period 1985-1995, compared to an increase of 103 percent for men.[38] Since black women are incarcerated at a rate eight times that of white women, the effect of these increases is magnified for them.

[36]DOJ/OJP, "Lifetime Likelihood of Going to State or Federal Prison."

[37]As of 1994, more than half (55 percent) of persons convicted of a felony were sentenced to jail or probation, but not to prison. Some of these offenders have been imprisoned in the past or will be imprisoned in the future, but if we assume that a relatively modest proportion will not be imprisoned, the number of these offenders added to those imprisoned at some point are likely to be in the range of 40 percent. DOJ/OJP, "Felony Sentences in State Courts 1994," Table 2, p. 2.

[38]Bureau of Justice Statistics, "Correctional Populations in the United States 1995," U.S. Department of Justice, NCJ-163916, May 1997.

The increased rate of black imprisonment is a direct and foreseeable consequence of harsher sentencing policies, particularly for violent crimes, and of the national "war on drugs." Although the black proportion of arrestees for violent crimes has remained relatively stable over the past two decades, blacks nonetheless continue to constitute a disproportionately large percentage of those arrested for violent crimes (43 percent in 1996); their incarceration rate in part reflects the longer sentences imposed for those crimes.[39] But drug control policies that have led to the arrest, prosecution and imprisonment of tens of thousands of African Americans represent the most dramatic change in factors contributing to their disproportionate rate of incarceration. Although drug use and selling cuts across all racial, socio-economic and geographic lines, law enforcement strategies have targeted street-level drug dealers and users from low-income, predominantly minority, urban areas. As a result, the arrest rates per 100,000 for drug offenses are six times higher for blacks than for whites.[40] Although the black proportion of all drug users is generally in the range of 13 to 15 percent, blacks constitute 36 percent of arrests for drug possession.[41] Under harsh drug sentencing policies, convictions for drug offenses have led to predictable skyrocketing in the numbers of blacks in prison. In 1985 there were 16,600 blacks in state prisons for drug offenses; by 1995 the number had reached 134,000.[42] Between 1990 and 1996, 82 percent of the increase in the number of black federal inmates was due to drug offenses.[43]

V. DISENFRANCHISEMENT LAWS CANNOT BE JUSTIFIED

The practice of disenfranchising felons is a political anomaly in the United States. It may not have been so inconsistent with prevailing political culture when the vote was a privilege from which most Americans were barred on grounds of property, race, education or sex. Over the past 150 years, however, restrictions on voting in the United States have been eliminated—by legislative action or by the courts—and the principle of universal suffrage has been progressively realized. Voting is now a basic right possessed by all mentally competent adults except those convicted of felonies.[44]

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[39]See Tonry, "Crime and Punishment in America," Fig. 5.

[40]See, Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743-60; Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995). See also Human Rights Watch, "Race and Drug Law Enforcement in the State of Georgia," *A Human Rights Watch Short Report*, vol. 8, no. 4, July 1996 which provides a case study of racially disparate arrest and imprisonment rates for drug offenses.

[41]DOJ/FBI, *Uniform Crime Reports 1996*, (Washington, D.C.: USGPO, 1997).

[42]DOJ/OJP, "Prisoners in 1996," Table 13.

[43]DOJ/OJP, "Prisoners in 1997."

[44]Disenfranchisement may also have been less controversial when it affected relatively few people. Available data indicate that in 1850 the incarceration rate in the U.S. was 29 per 100,000, and in 1870 it was only 85.3. Indeed, the rate of incarceration remained below 130 per 100,000 until the late 1970s. Department of Justice, Bureau of Justice Statistics (DOJ/BJS), *Historical Corrections Statistics in the United States, 1850 - 1984,* (Rockville, MD: Westat, Inc., December 1986).

Depriving citizens of a political right should only be undertaken for compelling reasons and only to the extent necessary to further those interests. But as we discuss below, felony disenfranchisement laws in the United States are not necessary to further any substantial state interests. The fact that disenfranchisement laws have long historical roots is, of course, an inadequate justification for retaining them: as standards of moral decency or political rights evolve, societies continually reject practices that were formerly acceptable. As one court has pointed out, disenfranchisement "doubtless has been brought forward into modern statutes without fully realizing the effect of its literal significance or the extent of its infringement upon the spirit of our system of government."[45]

Denying the Vote to Ex-Offenders

There is little good to be gained from disenfranchising ex-felons who have served their time. As Supreme Court Justice Thurgood Marshall stated:

[45] *Byers v. Sun Savings Bank*, 41 Okla. 728 (1914), quoted by Justice Marshall in his dissent in *Richardson v. Ramirez*.

> It is doubtful...whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. [Ex-offenders] have fully paid their debt to society. They are as much affected by the actions of government as any other citizen, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.[46]

Supporters of disenfranchisement have been hard pressed to identify the state interests furthered by denying the vote to ex-offenders. The most frequently cited interests are: 1) protection against voter fraud or other election offenses; 2) prevention of harmful changes to the law, and 3) protection of the "purity" of the ballot box. But there are severe problems with each one of these putative interests.

Protection against voter fraud is clearly an insufficient rationale for statutes that are triggered by crimes having nothing to do with elections, where laws criminalizing voter fraud exist, and where there is no evidence that ex-felons are more likely to commit voter fraud than anyone else.[47]

The second alleged state interest is equally inadequate as justification for disenfranchisement.[48] There is no reason to believe that all or even most ex-offenders would vote to weaken the content or administration of criminal laws. More important, the Supreme Court has ruled that states may not "fence out" a class of voters because of concerns about how they might vote.[49] Conditioning the right to vote on the content of the vote contradicts the very principle of universal suffrage.

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[46] *Richardson v. Ramirez,* 418 U.S. at 78 (Marshall J. dissenting, citations omitted).

[47] See *Richardson v. Ramirez,* 418 at 79-80 (Marshall, J. dissenting); Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 Stan. L. Rev 845 (1973); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'the Purity of the Ballot Box,'"* 102 Harv. L Rev. 1300 (April 1989).

[48] The most famous articulation of the fear that former felons might vote in ways contrary to the interests of law-abiding society is *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968) in which the court upheld New York's ex-felon disenfranchisement provision. The New York legislature then repealed the law. N.Y. Election Law Sec. 152 (Supp. 1973-74).

[49] *Carrington v. Rash,* 380 U.S. 89, 94 (1965); See also *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) (state may not limit the vote to those with "a common interest"); *Cipriano v. City of Houmac*, 395 U.S. 701, 705-06 (1969)

(differences of opinion cannot justify excluding any group from the franchise).

The prohibition on "content-based" voting restrictions also dooms the related argument that in order to preserve the "purity" of the ballot box ex-offenders should be excluded from the franchise. Some courts have argued, for example, that ex-offenders should not be able to vote because they have shown themselves to be lacking in virtue and the "requisite judgment and discretion,"[50] needed to be able vote "responsibly."[51] It is, however, "unclear why convicted felons are any less capable of making sound political decisions than anyone else."[52] Looked at closely, the "purity of the ballot box" argument is no more than a moral competency version of the idea that the franchise should be limited to people who "vote right."[53] Moreover, in the late twentieth-century United States, it is risible to think that the virtue and judgment of the national electorate is protected by excluding ex-offenders.

Some might argue that disenfranchisement of ex-felons is simply another penalty the state chooses to impose in addition to incarceration, although there is little historical basis for this view.[54] It is questionable

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[50] *Washington v. State*, 75 Ala. 582 (1884).

[51] *Shepherd v. Trevino*, 575 F. 2d 110, 115 (5th Cir. 1978); *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

[52] Alice Harvey, Comment, *Ex-Felons Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look,"* 142 U. Pa. L. Rev. 1145, 1162 (January 1994).

[53] In the course of U.S. history, those with political power have frequently used self-serving ascriptions of moral worth and civic virtue as arguments against the extension of that power to others, e.g., women and minorities. See Frank Michelman, *The Republican Civic Tradition: Law's Republic*, 97 Yale L.J. 1493, 1495 (1988) (acknowledging the unfortunate tradition of "excluding from the political community all those whose voices would—by reason of supposed defect of understanding, foreignness of outlook, subservience of position, or corruption of interest—threaten disruption of" the community's unity.)

[54] Note, *Disenfranchisement of Ex-Felons: A Reassessment,* 25 Stan. L. Rev. 845, 856-57 (1973).

whether a state may punish offenders by depriving them of any right it chooses. Would a state be able to punish felons by forever denying them the right to go to court or to petition the government? But even if one assumes that deprivation of the right to vote is a legitimate punishment, then such punishment must conform to the fundamental principles governing criminal sanctions. It should, for example, be imposed by a judge following trial, and it should be proportionate to the offense. Yet none of the states require that disenfranchisement be imposed by a judge as part of a criminal sentence. And disenfranchisement laws operate without regard to the seriousness of the crime or the severity of the sentence. As noted above, for example, a person convicted of a single relatively minor crime who never serves any prison time can be turned into a political "outcast" for life. Decades after the crime was committed and the sentence served, regardless of however exemplary the ex-offender's subsequent life may have been, he or she is still denied the ability to exercise the most basic constitutive act of citizenship in a democracy: the right to vote.[55]

[55]Some have argued that criminals have repudiated society by breaking the "social contract" and society is therefore justified in repudiating them. We have not been able to find any cogent argument, however, for why a single criminal transgression should necessarily and invariably be deemed a repudiation of the "social contract". See Note, *The Disenfranchisement of Ex-Felons*, 102 Harv. L. Rev. at 1304-06.

Denying the vote to ex-offenders accomplishes little of value. Indeed, it may do more harm than good. Disenfranchisement contradicts the promise of rehabilitation. "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...[Denying him the vote] is likely to reaffirm feelings of alienation and isolation, both detrimental to the reformation process."[56] As the National Advisory Commission on Criminal Justice Standards and Goals observed, "If correction is to reintegrate an offender into free society, the offender must retain all attributes of citizenship...."[57]

Representative John Conyers, Jr., a member of Congress who has unsuccessfully championed federal legislation that would restore the franchise to ex-felons, has cogently summarized his reasons for permitting them to vote: "If we want former felons to become good citizens, we must give them rights as well as responsibilities, and there is no greater responsibility than voting."[58]

Denying the Vote to Incarcerated Citizens

The widespread and historical practice in the United States of denying the vote to convicted citizens while they are in prison—or even while on probation or parole—has received little scrutiny. To many people the practice may seem an inevitable concomitant of incarceration or a legitimate additional punishment for a crime. It is neither.

A sentence of imprisonment does not strip a person of all his or her rights. One loses the right to liberty—which is why incarceration is such a severe punishment—but retains all other rights subject only to those reasonable restrictions that promote the safe, orderly and secure functioning of prisons. Common sense indicates that the unfettered exercise in prison of the rights of freedom of movement and association would jeopardize the ability of prison authorities to maintain control. There is no plausible argument, however, that permitting inmates to vote, e.g., by absentee ballot, would interfere with prison operations or administration.[59]

Viewed as additional punishment, the disenfranchisement of incarcerated felons suffers the same problems as the disenfranchisement of ex-felons , e.g., lack of proportionality and absence of participation by a judge. In addition, given that incarcerated offenders are suffering all the losses and hardships that

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[56]Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments,* 11 American Criminal L. Rev. 721, 732 (Spring 1993).

[57]Cited in *Richardson v. Ramirez,* 418 U.S. 24, 85 (Marshall, J. dissenting). Similarly, the President's Commission on Law Enforcement and the Administration of Justice Task Force Report asserted: "[R]ehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote." Ibid.

[58]H. Weinstein, "1 in 7 Black Men are Kept From Voting, Study Finds," *Los Angeles Times*, January 30, 1997, p.20.

[59]The feasibility of inmate voting is demonstrated in the four states and many countries that respect the right to vote of citizens behind bars. Where large prisons are placed in small towns, the towns might resent being overwhelmed by a comparatively large number of prison voters. That problem could be avoided, however, if prisoners were able to register to vote at their former place of residence.

necessarily attend life behind bars, a state's interest in inflicting even more punishment can scarcely be weighty enough to justify deprivation of another fundamental right.

VI. DISENFRANCHISEMENT IN OTHER COUNTRIES

The United States may have the world's most restrictive criminal disenfranchisement laws. We know of no other democracy besides the United States in which convicted offenders who have served their sentences are nonetheless disenfranchised for life. A few countries restrict the vote for a short period after conclusion of the prison term: Finland and New Zealand, for example, restrict the vote for several years after completion of sentence, but only in the case of persons convicted of buying or selling votes or of corrupt practices. Some countries condition disenfranchisement of prisoners on the seriousness of the crime or the length of their sentence. Others, e.g., Germany and France, permit disenfranchisement only when it is imposed by a court order.

Many countries permit persons in prison to vote. According to research by Penal Reform International,[60] prisoners may vote in countries as diverse as the Czech Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania, Sweden and Zimbabwe. In Germany, the law obliges prison authorities to encourage prisoners to assert their voting rights and to facilitate voting procedures. The only prisoners who may not vote are those convicted of electoral crimes or crimes (e.g., treason) that undermine the "democratic order," and whose court-imposed sentence expressly includes disenfranchisement.[61]

VII. CONSTITUTIONALITY OF CRIMINAL DISENFRANCHISEMENT

[60]Research by Penal Reform International may be obtained from CURE (Citizens United for Rehabilitation of Errants) in Washington, D.C. Also on file at Human Rights Watch.

[61]The American Series of Foreign Penal Code: Federal Republic of Germany, Title I, § 45 (5). A judge may bar a convicted offender from voting only if the offense is punishable by more than one year of imprisonment and if the crime falls within enumerated sections of the Penal Code covering such crimes as treason, electoral fraud, espionage, membership in an illegal organization.

Despite the scant justification for U.S. criminal disenfranchisement laws, they have withstood constitutional challenge. Ordinarily, the courts carefully scrutinize state restrictions on the right to vote to assess their constitutionality under the equal protection clause of Section 1 of the Fourteenth Amendment to the U.S. constitution.[62] States must show that the restriction is necessary to a legitimate and substantial state interest, is narrowly tailored and is the least restrictive means of achieving the state's objective.[63] In *Richardson v. Ramirez*,[64] however, the U.S. Supreme Court exempted criminal disenfranchisement laws from such strict scrutiny. It construed Section 2 of the Fourteenth Amendment as granting states an "affirmative sanction" to disenfranchise those convicted of criminal offenses,[65] and therefore reversed the California Supreme Court's ruling that the disenfranchisement of ex-felons was unconstitutional as a violation of equal protection guarantees.[66]

Eleven years later, in *Hunter v. Underwood*,[67] the Supreme Court unanimously declared that Section 2 did not protect disenfranchisement provisions that reflected "purposeful racial discrimination" that otherwise violated the equal protection clause.[68] The court held unconstitutional a provision of the Alabama constitution that disenfranchised offenders guilty of misdemeanors of "moral turpitude" after finding that the

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[62]Section 1 of the Fourteenth Amendment reads in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[63]See, e.g., *Dunn v. Blumstein,* 405 U.S. 330 (1972).

[64]418 U.S. 24 (1974)

[65]Section 2 reads, in relevant part: "When the right to vote...is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." The majority's interpretation of the history of Section 2 has been strongly criticized by many. In his dissent, Justice Marshall insisted that Section 2 was not intended to exempt felons from equal protection coverage but was created as a special remedy of reduced representation to cure the disenfranchisement of blacks at a time when an explicit grant of suffrage to African Americans was not politically possible. Section 2 "put southern States to a choice—enfranchise Negro voters or lose congressional representation...[But simply] because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by Section 2 does not necessarily imply congressional approval of this disenfranchisement." *Richardson v. Ramirez*, 418 U.S. at 75-76 (Marshall J. dissenting).

[66]California law was subsequently amended to permit ex-felons to vote, while continuing to disenfranchise those in prison or on parole. See, *Flood v. Riggs*, 80 Cal. App. 3d 138 (1978). *Richardson v. Ramirez,*418 U.S. 24 (1974) involved disenfranchisement of persons convicted of felonies. In *McLaughlin v. City of Canton, Mississippi*, 947 F. Supp. 954 (S.D. Miss. 1995), the court ruled that strict scrutiny was required where disenfranchisement was based on a misdemeanor rather than a felony conviction.

[67]*Hunter v. Underwood*, 471 U.S. 222 (1985).

[68]Under U.S. law, a racially disparate impact is not sufficient to establish a violation of equal protection guarantees; a discriminatory intent or purpose is also required.

intent of the provision had been to prevent blacks from voting and that it continued to have a racially disproportionate impact.[69]

Criminal disenfranchisement laws may also be vulnerable under the Voting Rights Act of 1965, 42 U.S.C. 1973, which was adopted to remedy persistent racial discrimination in American voting. As amended in 1982, the legislation bars voting qualifications, practices, etc. that result in a denial or abridgment of the right to vote on account of race or color regardless of whether such a provision was

[69]Alabama continues to disenfranchise persons convicted of certain enumerated offenses as well as any crime punishable by imprisonment, i.e., any felony. Alabama Const., Art. VIII, § 182.

enacted with racist intent[70] It is an unsettled question in the federal courts, however, whether the Voting Rights Act can be used to strike down criminal disenfranchisement laws.[71]

VIII. U.S. CRIMINAL DISENFRANCHISEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

[70]Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3. The Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), interpreted the original act as requiring a finding of discriminatory purpose before state action could be prohibited. Congress amended the act to clarify its determination that discriminatory results sufficed to invalidate state practice without regard to discriminatory intent. In contrast to the Voting Rights Act, a finding of discriminatory racial intent as well as impact is required to establish a constitutional violation.

[71]In *Baker v. Pataki*, 85 F. 3d 919 (2d Cir. 1996), inmates claimed New York laws denying the franchise to incarcerated and paroled felons violated the Voting Rights Act because of their racially disproportionate impact. The court, sitting en banc, divided evenly on whether Section 2's "results only" test could be applied to state criminal disenfranchisement laws. For a discussion of the Voting Rights Act and black disenfranchisement, see Shapiro, *Challenging Criminal Disenfranchisement*; Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. Pa. L. Rev. 1145 (January 1994).

International law sets out basic principles for electoral democracy, including the right of citizens to vote. Under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), for example, every citizen has the right to vote and that right may not be subject to discrimination on the basis of race, sex, religion and other enumerated categories or to "unreasonable restrictions."[72] As a party to the ICCPR, the United States has accepted its provisions as binding on both federal and state governments as the law of the land.[73]

[72]Article 25 reads, "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country." The legislative history of Article 25 indicates that the ICCPR's framers considered voting restrictions based on age, mental capacity, and minimum residency requirements to be reasonable. Criminal disenfranchisement was hardly mentioned. At the time the ICCPR was drafted, electoral democracy was not practiced by many countries, and barriers to voting that today are widely considered illegitimate were prevalent—e.g., exclusion of ethnic groups, women, illiterates. Interestingly, the U.S. delegate mentioned the exclusion of illiterates in the U.S. as an example of a legitimate restriction—a practice which is now unconstitutional in the U.S. and which undoubtedly would no longer be deemed reasonable under a contemporary understanding of democracy. E/CN.4/SR.364, at 14.

[73]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 March 23, 1976, Art. 25. The U.S. ratified the ICCPR on June 8, 1992.

The U.N. Human Rights Committee, which reviews adherence to the ICCPR, has affirmed that Article 25 "lies at the core of democratic government based on the consent of the people" and that restrictions on the right to vote should only be based on grounds that are "objective and reasonable."[74] Acknowledging the existence of criminal disenfranchisement laws, the committee has stated that "[i]f conviction for an offence is the basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence."[75] It has consistently frowned on and tried to limit the reach of criminal disenfranchisement laws that it has reviewed.[76]

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[74]General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the ICCPR, CCPR/C/21/Rev.1/Add.7, August 27, 1996, Annex V (1).

[75]Ibid.

[76]During the committee's consideration of a report from Senegal, for example, a member expressed concern that the country's laws were "excessively strict" because persons sentenced to "personal restraint or penal servitude" were deprived of the right to vote. He also pointed out that "rights contained in article 25...could not be withdrawn for life." Consideration of Report by Senegal to the Human Rights Committee, CCPR/C/37/Add.4, April 7, 1987. In reviewing the periodic report of Luxembourg, the committee suggested that the country "consider abolishing the deprivation of the right to vote as part of legitimate punishment." Consideration of Report by Luxembourg to the Human Rights Committee, CCPR/C/79/Add.11, December 28, 1992, D (10). Addressing voting restrictions in laws in Hong Kong, the committee expressed concern "that laws depriving convicted persons of their voting right for periods of up to ten years may be a disproportionate restriction of the rights protected by Article 25." See, Human Rights Committee, Comments on United Kingdom of Great Britain and Northern Ireland (Hong Kong), U.N. Doc. CCPR/C/79/Add.57 (1995), para. 19.

Although the Human Rights Committee has not addressed itself to criminal disenfranchisement laws in the United States,[77] there is little doubt it would conclude that laws excluding ex-convicts from voting for life are unreasonable and disproportionate. A strong argument can also be made on similar grounds that laws depriving all persons of the right to vote while in prison, on probation or on parole—regardless of the underlying offense—are also inconsistent with Article 25. The international law scholar Karl Josef Partsch, for example, flatly rejects blanket criminal disenfranchisement provisions, asserting that an exclusion from the vote may be reasonable only if it "has been pronounced by a judge for a certain time, in connection with punishment for some particular offense, for instance those connected with elections or for high treason...."[78]

[77]The existence of such laws was noted in the U.S. report to the Human Rights Committee. Initial report of the U.S. to the Human Rights Committee, CCPR/C/81/Add.4, August 24, 1994. In its brief discussion of U.S. compliance with Article 25, the committee focused on other aspects of U.S. elections, e.g. campaign financing costs, and did not analyze the disenfranchisement provisions. Consideration of the U.S. Report to the Human Rights Committee: Comments of the Human Rights Committee, CCPR/C/79/Add.50, April 7, 1995.

[78]Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms," in Louis Henkin, ed., *The International Bill of Rights: The International Covenant on Civil and Political Rights*, (1981).

The racially disproportionate impact of disenfranchisement laws in the United States is also inconsistent with the principles of non-discrimination contained in the ICCPR and in the Convention on the Elimination of All Forms of Racial Discrimination (CERD), an international treaty adopted for the purpose of more effectively combating race-based discrimination that the United States ratified in 1994.[79] Article 25 of the ICCPR specifically enjoins racial discrimination with regard to electoral rights.[80] CERD also requires states parties to guarantee, without distinction as to race, color or national or ethnic origin, "[p]olitical rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage,..."[81] CERD wisely does not impose the requirement of discriminatory intent for a finding of discrimination. It requires states parties to eliminate laws or practices which may be race-neutral on their face but which have "the purpose ***or*** effect" of restricting rights on the basis of race. Regardless therefore, of whether they were enacted with racial animus, U.S. criminal disenfranchisement laws appear to be precisely the kind of laws condemned by CERD: they unnecessarily and unjustifiably create significant racial disparities in the curtailment of an important right.[82]

IX. CONCLUSION AND RECOMMENDATIONS

Felony voting restrictions in the U.S. are political anachronisms reflecting values incompatible with modern democratic principles. At the edge of the millennium these laws have no purpose. To the contrary, they arbitrarily deny convicted offenders the ability to vote regardless of the nature of their crimes or the severity of their sentences, they create political "outcasts" from taxpaying, law-abiding citizens who are ex-offenders, they distort the country's electoral process and they diminish the black vote, countering decades of voting rights gains.

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[79]International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, Art. 5(c). The United States ratified CERD on October 21, 1994.

[80]Article 2 of the ICCPR also obliges states parties to respect recognized rights "without distinction of any kind, such as race...".

[81]See CERD, Art.5 (c).

[82]See CERD, General Recommendation XIV (42) on article 1, paragraph 1, of the Convention. See also, Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 American Journal of International Law, American Society of International Law, Washington, D.C., April 1985, pp. 283, 287-88.

The impact of felony disenfranchisement laws has been exacerbated in the past quarter century as more offenders are convicted of felonies, more convicted felons are sent to prison, and prison sentences have grown longer. These trends reflect the adoption of public policies that emphasize incarceration and punishment as the principal means of crime control. While debate continues about the wisdom and efficacy of such policies, it is clear that they have had many unintended consequences—one of which is the significant increase in the disenfranchised population.

Given the major impact of felony disenfranchisement laws on the voting population, and in particular their strikingly disproportionate impact on African Americans, policymakers should consider alternative policies that will better protect voting rights without injury to legitimate state criminal justice interests. We believe the best course of action would be to remove conviction-based restrictions on voting rights. At the federal level, Congress should enact legislation to restore voting rights in federal elections to citizens convicted of a felony, so that the ability to vote in federal elections is not subject to varying state laws. State legislatures should also eliminate state laws that curtail the franchise for persons with felony convictions within their states.

To the extent that legislators believe that incarcerated offenders should be excluded from the franchise, any legislation in this area should a) identify the important state interests served by such disenfranchisement; b) specify the crimes for which disenfranchisement is a reasonable and proportionate response; and c) require that imprisoned offenders only be excluded from voting if loss of the vote is imposed by a judge as part of a criminal sentence. Such legislation should also specify that restoration of the right to vote following release from prison is automatic and immediate.

We also urge the U.N. Human Rights Committee and the Committee on the Elimination of Racial Discrimination to consider more comprehensively the issues raised by disenfranchisement laws. In particular, we recommend the Human Rights Committee study the consistency of felony disenfranchisement with the electoral rights affirmed in the ICCPR and that both committees carefully assess whether disenfranchisement provisions that have a severe racially disparate impact, such as those in the United States, are consistent with the anti-discrimination principles of the ICCPR and CERD.

APPENDIX
Methodology

In order to determine the total population and total black male population who are disenfranchised due to felony status in each state we utilized the 1996 Department of Justice publication, *Civil Disabilities of Convicted Felons* as a reference for the states' criteria for disenfranchisement. The criteria for disenfranchisement are not always precise in each state and sometimes are defined by offense. In a few states where a number of common felonies were listed as disqualifying offenses, it was assumed that all felons would generally be subject to these restrictions in practice. In Mississippi, for example, the state Constitution defines a number of specific felonies as voting disqualifications. In 1996 two prison inmates who contended that their crimes were not covered by the ban were turned down by the Department of Corrections in their request to vote by absentee ballot. In response to the challenge, a constitutional amendment was introduced in the state legislature to add additional crimes to the disqualifying offenses.[83]

The data presented in this report, particularly for those states with lifetime disenfranchisement policies, should be considered as estimates. In many cases, necessary data at the state level were only available for selected years or were incomplete. In other instances estimates of felony conviction rates were based on national data from the early 1990s. The degree to which these data reflect practices in different states over a period of time may vary. Also, migration between states may affect the estimates of disenfranchised populations depending on such factors as the degree to which individuals with a felony record move from one state to another.

The estimates of disenfranchisement were developed in two stages of data collection. First, the number of disenfranchised persons was tabulated for the 47 jurisdictions which exclude various categories of felons currently under correctional supervision. For the fifteen states which disenfranchise some or all ex-felons, it was necessary to estimate the total number of people in each state whose prior convictions qualify them as disenfranchised. Most of these states disenfranchise all ex-felons. However, in Tennessee and Washington disenfranchisement depends on the year of conviction, in Arizona and Maryland only the second conviction disqualifies one from voting for life, and in Texas ex-felons are disenfranchised for two years after their release from supervision.

We selected 1996 as the year for analysis because it was the most recent year for which the Bureau of Justice Statistics (BJS) has published state-level data on prison, probation and parole populations. For probationers, the national figure of 55 percent was used to estimate the number of probationers in each state serving a sentence of felony probation.

Racial composition data were available by state only for 1995. In order to estimate the number of disenfranchised black males in 1996 we first estimated the share of each appropriate category (prison, probation, or parole) in 1995 who were black males, and then applied those

[83]Beverly Pettigrew Kraft, "Legislators to address inmates' right to vote," *Clarion Ledger*, January 26, 1997, p. 1A.

proportions to the 1996 totals. Racial breakdowns were reported for the majority of states based on counts or estimates. When states reported some offenders of an unknown racial category, the black share was estimated whenever possible. For example, in some states the number of "unknowns" was known to represent the number of Hispanics. In other cases the "unknown" cases were virtually identical to the number of Hispanics, and so it was assumed that these categories were synonymous. For these states, it was estimated that 5 percent of the Hispanics were black, derived from national figures for the total population. The black male proportion of the correctional population for 1996 was estimated using a base of only those whose race was known or could be reasonably estimated for 1995. The number of black males in each category was obtained by multiplying the estimate for all blacks by the portion of the national population in each category who were male.

Some states (Alabama, Kentucky, Rhode Island, and West Virginia) did not report racial breakdowns for probation and/or parole. The share who were black was estimated by assuming that the ratio of the portion of blacks in those correctional categories to the portion in prison was the same for the state as it was for the nation as a whole. Establishing these ratios allowed us to estimate the portion who were black in each case of non-reporting.

The next stage involved the fifteen states that disenfranchise some or all ex-felons no longer under correctional supervision. Law enforcement agencies in three states—Florida, Virginia, and Wyoming— were able to furnish estimates and race/gender breakdowns of the number of ex-felons in their states. Based on the information available for the remaining states we analyzed data on total arrests, felony filings, and felony convictions for the years 1970 through 1995 to develop estimates on the number of ex-felons in each state. The year 1970 was selected as a beginning point with the knowledge that it would omit felons convicted prior to 1970 but overcount felons convicted after 1970 who had since died. These data were used to estimate the number of persons convicted of a felony in each state by year. In order to avoid double-counting those convicted multiple times it was necessary to estimate the number of offenders who had no prior felony convictions. This percentage, 55.8 percent, was the average of three national semiannual estimates conducted by the Bureau of Justice Statistics. The total number of ex-felons for Tennessee was the sum of felony convictions for the years 1970-1986. Convictions after those years do not involve lifetime forfeiture of voting rights with the exception of the offenses of first degree murder, aggravated rape, treason, and voter fraud. In Washington state, felony convictions for the years 1970-1984 result in disenfranchisement. It is likely that there is a relatively modest number of individuals in Tennessee and Washington who are double-counted. This group is composed of individuals who had a felony conviction in the period 1970-1986 and 1970-1984, respectively, who are currently under correctional supervision. We lacked sufficient data with which to develop estimates of the number of ex-felons in Kentucky and Nevada and therefore, the totals for these states represent low estimates.

The laws concerning disenfranchisement in Arizona and Maryland necessitated a slightly different method of estimating persons with felony convictions. In these states one becomes disenfranchised only after a second felony conviction. In order to avoid counting those with no prior convictions and those who had already received a second felony conviction, it was necessary to estimate for each year the proportion of offenders convicted of a second felony. The national figure derived from the three BJS estimates described above is 17.6 percent. To obtain the total disenfranchised population for these states it was necessary to add the total number of second

time felons to the number of first-time felons currently under correctional supervision. The share of first time parolees, probationers, and prisoners was based on national data on sentencing of felony offenders broken down by the number of prior felony convictions.

A special estimate was also developed for Texas, which disenfranchises ex-felons for two years after release from supervision, in order to determine the number of felons who have been released from correctional supervision for two years or less and have not been reconvicted. After recording data on the number of people unconditionally released from prison and successfully completing parole and probation in 1995 and 1996, we used data on arrest and recidivism rates nationally to estimate the number of these ex-felons who were not convicted of a new felony in the two-year period.

After estimating the total number of disenfranchised ex-felons, we computed the share who were black males. We determined that 1986 represented the mid-point year for total felony convictions during the period 1970-1995 in the nine states for which data were available. The proportion of the correctional population for that year that was black represented 89.7 percent of the black proportion for 1995. Therefore, for each state which disenfranchised ex-felons, we calculated the portion who were black males as 89.7 percent of the black male portion of the correctional population of that state in 1995.

Note for Tables: Data in the tables displayed in the text are all rounded to the nearest hundred and so totals may not always exactly match the sum of each row or column.