



OUT OF STEP WITH THE WORLD:

An Analysis of Felony Disfranchisement in the U.S. and other Democracies

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The ACLU’s voting rights work focuses on ensuring that the political process is open and accessible to all, by implementing at every level of the political process the equal voting rights guarantees of the Fourteenth and Fifteenth Amendments and acts of Congress designed to ensure equality in voting such as the Voting Rights Act of 1965, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002. The ACLU attempts to advance this goal through litigation, public education, participation in the administrative pre-clearance process under Section 5 of the Voting Rights Act and legislative reform.

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Foreword

“People who falter in their efforts deserve a chance to get back on their feet. Those who break societal rules warrant not just punishment but also the opportunity for redemption,” aptly note the authors of the Opportunity Agenda’s *“The State of Opportunity in America.”* Today’s “get tough” policies deny people this opportunity by undermining their prospects of rehabilitation. They include policies that deny the vote to offenders and ex-offenders. Felony disfranchisement policies also run counter to our obligations under international human rights laws. According to the International Covenant on Civil & Political Rights, “the penitentiary system shall comprise the treatment of prisoners the essential aim of which shall be their reformation and rehabilitation.”

American disfranchisement policies bar over 5 million U.S. citizens - many of whom have fully served their sentences - from the polls in nearly all 50 states. This nation that prides itself on free and fair elections and voting shuts out more citizens from the democratic process than any other nation in the world. Our disfranchisement policies also disproportionately affect African Americans and other minorities. While these policies have been in effect for many years, they affect a growing segment of the population, as the United States’ criminal justice system continues to convict and imprison more people than ever before, and now has the world’s highest rate of incarceration.

Our peer democracies part ways with us here. As this report shows, in Europe the disfranchisement debate ends at the prison walls. Almost half of Europe’s states allow all incarcerated people to vote, and those who do not, disqualify only a small number of *prisoners* from the polls. European disfranchisement policies are also more narrowly targeted and more visible in their application than in the United States. We hope this and the other findings of this report will enrich the debate over disfranchisement law in the United States - a democracy that has very unusual policies in this area.

As President Bush said in his 2003 State of the Union address, “America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.” We agree.

A handwritten signature in black ink, appearing to read "A. Romero". The signature is stylized and written in a cursive-like font.

ANTHONY D. ROMERO
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I. Introduction and Executive Summary

Well over 100 years ago, the Supreme Court concluded in *Yick Wo v. Hopkins* that the right to vote is “fundamental” because it is “preservative of all rights.”¹ Even the most basic civil rights, the Court has said, “are illusory if the right to vote is undermined.”² Foreign courts examining voting rights cases frequently cite American voting rights jurisprudence. Yet, the United States bars from the vote nearly 5.3 million American citizens on the grounds that they committed a crime, although most committed nonviolent offenses and only a quarter are in prison or jail, with three-quarters either on probation or parole or having completed sentences.³

Particularly since the contested presidential election of 2000, American laws barring people with criminal convictions from voting have come under considerable public scrutiny. In the United States, each state has its own criminal disenfranchisement law. In two states people retain the right to vote even while incarcerated, but policies in the other 48 states and the District of Columbia range from disqualification for incarcerated felons to lifetime bans on voting: 48 states bar prison inmates from voting; 36 bar convicted felons from voting while on parole, 31 of these states also excluding felony probationers from voting; 3 states prohibit all ex-felons from voting even after they have fully completed their sentences, and another 9 states permanently restrict from voting those convicted of specific offenses, or require a post-sentence waiting period for some offenders.⁴

While disenfranchisement policies have been in effect for many years, they are affecting a growing segment of the population, as the United States’ criminal justice system continues to convict and imprison more people than ever before. The United States now incarcerates over 2 million people, at a rate of 702 per 100,000. (Including those on parole or probation, or housed in jails, the U.S. has more than 6 million people under some form of criminal supervision.) This incarceration rate is 5-8 times that in comparable industrialized nations, western Europe (e.g., Germany: 97; England & Wales: 144 and Canada: 107). If current trends continue, black males would have a 1 in 3 chance of going to prison during their lifetimes; Hispanics, 1 in 6, and whites, 1 in 17. And though American disenfranchisement policies keep a large segment of the entire population from the voting booth, they have a disproportionate impact on African Americans and other minorities. While disenfranchisement policies prevent 2.5% of the total population from voting, they prevent 13% of the total population of African American men from casting a ballot.⁵

States have begun to alter their disenfranchisement rules in the last few years, motivated by concerns about the policy’s uneasy relationship with modern American ideas about the right to vote, its ill-defined punitive purposes, or its linkages to the racial inequities of the U.S. criminal-justice system.

As citizens, lawmakers, and judges in the United States and elsewhere consider the wisdom of laws barring people with criminal convictions from voting, relatively little detailed information has been

available about similar policies – or the *lack* thereof – in other democracies. This report has been written in the hope of improving our understanding of disenfranchisement law in the twenty-first century, with a particular eye towards enriching the ongoing discussion of disenfranchisement law in the United States – a democracy that has very unusual policies in this area.

This report offers the first in-depth analysis of the criminal disenfranchisement policies of the world’s democracies, with a focus on Europe. (We do also examine, though perhaps not in the same depth, other developed democracies’ policies and precedents, namely those of Israel, Canada, Australia, New Zealand and South Africa.) Simply describing these laws accurately has proven a surprisingly difficult task; a few previous authors have attempted to do so, focusing their attention mostly on documents such as constitutions and election-law statutes.⁶ We have drawn on their important work here, but have found that constitutions and statutes alone often fail to deliver a full understanding of a given country’s disenfranchisement policies and practices. In addition to such formal legal sources, this report benefits from exhaustive research into legislative materials, judicial proceedings, advocacy reports, and numerous other sources, including information from original surveys and interviews with governmental and non-governmental officials of several countries. No previous publication has synthesized so much country-by-country disenfranchisement data, decisions of high courts, and international legal instruments.

Following this Introduction, Section II of

¹ 118 U.S. 356, 371 (1886).

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

³ About 39 percent have concluded their sentences entirely. JEFF MANZA AND CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 77 (Oxford University Press, 2006).

⁴ *Felony Disenfranchisement Laws in the United States*, The Sentencing Project at <http://www.sentencingproject.org/pdfs/1046.pdf> (last updated November 2005).

⁵ International Centre for Prison Studies, *available at* <http://www.prisonestudies.org>. See also Comparative International Rates of Incarceration: An Examination of Causes and Trends, Presentation to the U.S. Commission on Civil Rights, June 20, 2003.

⁶ LOUIS MASSICOTTE ET AL., *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 18-26* (University of Toronto Press 2004). Brandon Rottinghaus, *Incarceration and Enfranchisement: International Practice, Impact and Recommendations for Reform*, International Foundation for Elections Systems, (Jan. 1, 2003), *available at* www.ifes.org/publications-detail.html?id_276. MANZA & UGGEN, *supra* note 3, at 37-39 and Table A1.1 (relying on Rottinghaus, *supra* note 6, and authors’ updates). ELIZABETH HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* (Temple University Press 2006).

the report describes the policies of European nations, and Section III offers detailed summaries of the decisions rendered by various countries' constitutional courts in the last decade. Section IV examines mechanisms used in various democracies to implement prisoner voting, and Section V considers treaties and other legal instruments, both binding and advisory, which bear on the voting rights of people with criminal convictions.

These are among the central findings of this study:

- Almost half of European countries allow *all* incarcerated people to vote while others disqualify only a small number of prisoners from the polls. As we explain below, almost all of the countries that disqualify all inmates are in Eastern Europe.
- In most countries where disfranchisement does exist, the policy is both more narrowly targeted and more visible in its application than in the United States.
- A number of treaties and other types of international instruments support either the abolition of criminal disfranchisement law, or considerably narrower restrictions than those employed by most American states.
- All foreign constitutional courts that have evaluated disfranchisement law have found the automatic, blanket disqualification of prisoners to violate basic democratic principles. In countries where courts have called for enfranchisement of inmates, the legislative and executive branches have complied without significant resistance.
- Where prisoners are allowed to vote, they do so either in the correctional facilities themselves – with no threat to security – or by some version of absentee ballot, in their town of previous resi-

dence, in all cases with government entities facilitating the voting. In no country do prisoners vote in a manner that allows them to shape the politics of the prison locality.

Readers will have different responses to this evidence. Some will deduce from the widespread and unproblematic fact of prisoner voting elsewhere that the United States should promptly overhaul its policies. Others may scoff, perhaps having already concluded that the ideas and policies of other countries are and should remain irrelevant to the American political context.

We believe no less an authority than the American Declaration of Independence counsels against the latter conclusion. As Jefferson famously wrote, “a decent respect to the opinions of mankind requires” that we be able to explain the reasons for our policies to others. While it is not our view that the international setting alone justifies a change in American law, we do argue that the evidence compiled here should induce greater skepticism about the wisdom of disfranchisement law in the United States.

In our view, this evidence, coupled with the serious and extensive problems these laws pose for both the officials administering them and those affected by them, counsels in favor of rethinking the broad bans and replacing them with rational, tailored bans, or none at all. Given the relative ease (and low cost) of administering absentee ballot voting in prisons, states may want to seriously consider the examples of Maine, Vermont and Puerto Rico. Or, following the example of some European democracies, consider barring only those it makes sense to bar – for example, those convicted of election fraud. Another possibility would be to enfranchise all except the incarcerated, with no documentary requirement com-

plicating reinstatement on the rolls after release from prison. Although such a policy now survives only in the most regressive European nations, it would constitute a significant movement forward for most American states, given how far out of step the United States is on this issue. Moreover, inmate-only disfranchisement – if you are able to appear physically at the polls and meet age and residency requirements, you are eligible to vote – would solve the multitude of problems now bedeviling the administration of disfranchisement policies in the U.S.⁷

II. Europe⁸

Introduction & Summary

As we explain below, European nations differ in their criminal disfranchisement policies.⁹ But it is important not to lose the forest for the trees. There are disagreements and debates within European nations over disfranchisement – but the debate is over *which prisoners* should be barred from voting. In almost all cases, the debate stops at the prison walls. Seen in this context, the U.S. is an outlier: In other democracies, many inmates vote, and it is extremely rare for anyone who is not in prison to lose the right to vote.

First, as Table 1 illustrates, many European states have no ban at all on prisoner voting. In most nations, the government even facilitates prison voting; voting occurs without incident, and in some cases with high rates of participation. There is also voter education in many European prisons, provided either by the state or by non-governmental organizations.

Second, a smaller number of European countries allow courts to impose a ban on voting for a limited period of time, but generally only for a few, discrete categories of prisoners – those serving long sentences

⁷ For detailed discussions of these administrability problems, see Laleh Ispahani and Nick Williams, *Purged!* (October 2004), and Alec Ewald, *A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law* (November 2005).

⁸ The ACLU surveyed 70 countries, requesting information on their voter disfranchisement laws. To the extent the surveys were returned, we rely on them. In the absence of a survey, we based our classification of the country's policies on an analysis of all available sources. In a few instances, where these sources conflict, we indicate as much.

⁹ The European nations we include in our analysis are drawn from this list; we exclude only those countries with populations below 200,000: World Population Prospects Population Database, available at <http://esa.un.org/unpp/definition.html#Europe>.

for certain serious crimes. A few countries – Belgium, Greece, Italy, and Luxembourg – tie disfranchisement to length of sentence, and permit limited post-incarceration disfranchisement of some offenders.

Third, a number of European states impose an automatic ban on voting by all serving prisoners. They are, with two exceptions, former Eastern Bloc states, and their prohibitions may not survive the European Court of Human Rights' recent ruling in *Hirst v. United Kingdom (No. 2)*, which is discussed in Section III, below. The *Hirst No. 2* decision strongly suggested that automatic, blanket bans on prisoner voting are unacceptable "in light of modern day penal policy and of current human rights standards."¹⁰ States in this third category – and states that permit but do not facilitate prison voting for eligible inmates – may now be an endangered species.

So, in broad brush, the range of policies in Europe is (1) no ban (17 countries); (2) limited, targeted and explicitly penal bans (12 countries); and (3) bans on voting by all serving prisoners (11 countries).

Two sharp differences emerge between European and American disfranchisement laws. First, in the United States, 48 states have blanket bans that bar entire classes of people from the polls, precisely the kinds of policies condemned by *Hirst No. 2*. The "felony" classification – the most common disfranchisement threshold in U.S. law – includes virtually everyone who is in prison, so it differs dramatically from the narrow, targeted policies employed in some European nations. And in all but 16 states, these American voting bans affect not only people in prison, but also those living in the community – on probation or parole, or after completing all aspects of their sentences.

A second important difference between American and European laws concerns whether bans on voting by people with criminal convictions are technically "punishments" at all. In Europe, most countries that do bar some prisoners from voting make clear that the disqualification is, in fact, designed and delivered as a form of punishment: The sanction is usually considered and publicly imposed by a judge, often based on the nature of the offense and the offender. Without in any way conceding the legitimacy of disfranchisement as a valid punishment, we note that in the United States, disfranchisement's defenders tend to shy away from explicitly defining disfranchisement as an additional punishment – this despite its clear punitive effects, as certain critics of this policy have also noted.¹¹ As numerous authorities have noted, it is not at all clear that disfranchisement is an effective punitive policy.¹²

Not only do many European countries allow inmates to vote, but European correctional officials have argued publicly 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, believes that inmates should retain the right to vote, opining that "[e]ven if you lose your freedom you should still have the right to say something about the running of the country."¹³ The chief inspector of the United Kingdom's prison service also supports prison voting, believing that voting rights prepare prisoners for resettlement.¹⁴ His predecessor, Sir David Ramsbotham, still argues 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. ...¹⁵ All citizens of the United Kingdom have the vote by right – not moral authority. ... Removing a citizen's right is an additional punishment to the deprivation of liberty."¹⁶

Such views are not entirely alien to this side of the Atlantic. The American Correctional Association, the largest organization of U.S. corrections professionals, supports restoration of the right to vote only after full completion of sentence – of course, a quite modest critique of some states' policies, but a laudable engagement with the issue. The Chief Advocate for the Maine Corrections Department, however, supports voting rights for inmates. Calling voting "one of the basic rights granted citizens," he 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

¹⁰ *Hirst v. United Kingdom (No.2)*, 681 Eur. Ct. H.R. (2005).

¹¹ See Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753 (2000); Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 1045 Wisc. L. Rev. at 1057 (2002).

¹² Brief for Criminologists as Amici Curiae Supporting Plaintiffs, *New Jersey State Conference v. Peter C. Harvey*, No. A-6881-0375 (N.J. Super. Ct. App. Div. Dec. 15, 2004).

¹³ Tanya Thompson, *Prisoner's Legal Fight to Vote May Open Floodgates*, THE SCOTSMAN, (Nov. 1, 2004), available at www.thescotsman.com/index.cfm?id=1260252004.

¹⁴ *Barred From Voting: The Right to Vote for Sentenced Prisoners*, p. 3, Unlock and Prison Reform Trust, February 2004.

¹⁵ *Calls to Give vote to Prisoners*, BBC NEWS, (Aug. 8, 2005) available at www.bbc.co.uk/1/hi/uk/3523231.stm.

¹⁶ *Id.*

serves to keep the individual involved in current affairs, and connected to the community and his or her family during their sentence.¹⁷

Restoring voting rights is an important part of rehabilitation for those convicted of felonies. It gives people a voice and a stake in what happens in their communities. Studies have shown that, among those who have been arrested, people who vote are only half as likely to be re-arrested as those who don't; that is, voters recidivate one-half as often as non-voters.¹⁸

There is no practical way that voting bans protect the public – as, for example, does the revocation of the drivers' licenses of dangerous drivers. Deprivation of the right to vote should only be a response to abuse of the electoral process, not to other forms of crime. As explained above, a few other nations disqualify some people from voting after their sentences are over, but post-incarceration disfranchisement in the United States is simply on a completely different scale. In those few European countries that permit limited post-prison disqualification, the sanction is purposefully and narrowly targeted, and the number of disfranchised people is probably in the dozens or hundreds. In the United States, the disqualification is automatic, pursues no defined purpose, and affects millions. While comparable in terms of the written law, these practices are completely different in terms of politics, policy, and social impact.

TABLE 1: Prisoner Voting in Europe¹⁹

Countries that allow all prisoners to vote	Countries that allow some prisoners to vote	Countries that disfranchise all prisoners
Austria	Belgium	Belarus
Albania	Bosnia and Herzegovina	Bulgaria
Croatia	France	Estonia
Czech Republic	Greece	Hungary
Denmark	Italy	Kosovo
Finland	Luxembourg	Latvia
Germany	Malta	Moldova
Iceland	Norway	Russia
Ireland	Poland	Slovakia
Lithuania	Portugal	Spain
Macedonia	Romania	Ukraine
Montenegro		United Kingdom
Netherlands		United Kingdom
Serbia		
Slovenia		
Sweden		
Switzerland		

a) Many European states allow prisoners to vote

Seventeen European states have no ban whatever on voting by anyone, serving prisoners included. Albania, Austria, Croatia, the Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Lithuania, the Former Yugoslav Republic of Macedonia, Montenegro, the Nether-

lands, Serbia, Slovenia,²⁰ Sweden, and Switzerland do not deny the vote to any serving prisoner.²¹ In Slovakia, while there is no legal bar to voting in prison, there is now no mechanism to effectuate it. Until very recently, Ireland was in a similar predicament, but the Irish legislature responded swiftly to the decision in *Hirst No. 2*, and passed legislation that provides for postal voting, with the votes

¹⁷ Testimony of Wesley E. Andrenyak, Chief Advocate, Maine Department of Corrections in opposition to LD 200 (on file with author).

¹⁸ Christopher Uggen and Jeff Manza, *Voting & Subsequent Crime & Arrest: Evidence from a Community Sample*, 36 Colum. Human Rights L. Rev. 193 (2004).

¹⁹ Surveys conducted by ACLU (on file with author) for Austria, Finland, Lithuania, the Netherlands, Slovenia and Switzerland. For Albanian, Croatian, Czech, Danish, Icelandic, Macedonian and Swedish law, we rely principally on the Election Process Information Collection Project [hereinafter EPIC Project], available at www.epicproject.org. For Irish law, we rely on original legislation and communications with the Irish Penal Trust. For the law of Montenegro, we rely on the description in the European Court's Hirst decisions and Rottinghaus, *supra* note 6 at 22 (Table 1). The Serbian Constitution, at Article 42, declares suffrage universal and free, and we rely on this law, available at http://www.srbija.sr.gov.yu/cinjenice_o_srbiji/ustav_odredbe.php?id=218. Note the conflict in sources on Serbian law, one stating that all prisoners vote in Serbia and another that they were either barred from voting or unable to vote. Compare Rottinghaus, *supra* note 6, at 22, with Hirst No. 1, Hirst v. United Kingdom, 121 Eur. Ct. H.R. (2004) at 8. For Germany, we rely on Demleitner, *supra* note 11, at 760-61. Although Germany and Austria permit all prisoners to vote while in prison, they do have limited post-sentence disfranchisement policies. In Germany, courts have the authority to impose disfranchisement as an additional sentence for certain serious offenses that involve imprisonment for six months or more, but such disfranchisement is effective only after they have completed their sentences and are back in their communities — in part, so that prisoners are not deprived of more than their liberty while incarcerated or further alienated from society. Offenses must be attacks that target the integrity of the state or electoral fraud, and disfranchisement can last no longer than five years. A miniscule number of people are actually disfranchised: In 1984, e.g., 11 people were disfranchised. Demleitner, *supra* note 11, at 760-61. Austria's policy pursuant to which courts may exclude only those convicted of crimes of intent and sentenced to over one year in prison, permits revocation of the right to vote for six months, which as in Germany, begins upon release from incarceration. The right is not lost for suspended sentences and is automatically restored after the six-month period. The Austrian Constitution provides that "[e]xclusion from the right to vote and from eligibility can only ensue from a sentence by the courts." Constitution of Austria, Ch. 1, Article 26 (5).

²⁰ In Slovenia, until the mid 1950s, there was lifetime disfranchisement but only for counter-revolutionaries or those who collaborated with occupied forces. Survey conducted by ACLU.

²¹ See *supra* note 19.

counted in prisoners' home districts.²²

b) Some European States Disfranchise Certain Prisoners in a Limited, Targeted and Explicitly Penal Manner

In 11 European countries, some prisoners can vote while others may be denied the franchise, generally only by explicit order of the sentencing court, as an additional aspect of their prison sentence²³ – and for serious crimes only. These countries are Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland and Portugal and Romania.²⁴ Legislation in these nations often makes clear that *courts* must impose the added penalty in individual cases. For example, the French Penal Code explicitly states: “No penalty may be enforced where the court has not expressly imposed it.”²⁵ In France, judges may reinstate the right to vote themselves, particularly where a prisoner is deemed rehabilitated. Portugal’s electoral law provides that only the following are not granted “active electoral capacity”: “Those deprived of political rights through a judge’s order imposed by a court of law.”²⁶ Norway’s prohibition on voting also makes clear that the court must impose disfranchisement: “Any per-

son who is convicted of [crimes against the Constitution and Head of State, such as treason and electoral fraud] may, when it is so required in the public interest, be sentenced to loss of the right to vote in public affairs . . . for a period not exceeding 10 years.”²⁷ While hard figures are elusive, such disqualifications appear to be very rarely imposed.

All but four of these nations disqualify prisoners convicted of sometimes specific but always serious offenses. The remaining states – Belgium, Greece, Italy and Luxembourg – disqualify based on length of sentence.

As to these nations’ disfranchisement policies, disfranchisement is “very rare” in Norway.²⁸ Poland permits courts to disfranchise those convicted of intentional crimes and sentenced to more than three years in prison.²⁹ France only disqualifies from voting those convicted of offenses involving crimes of moral turpitude or crimes against the public such as corruption, forgery or embezzlement.³⁰ (As explained above, all others may be deprived of the right to vote only if sentenced to a punishment that deprives them of some or all of their civil rights.) Bosnia

and Herzegovina only disqualify those accused or indicted of serious violations by an international tribunal. Malta disfranchises only those convicted of serious crimes warranting prison terms of more than a year.³¹ If, however, the individual registered and was then incarcerated and an election occurred based on that register, that person could vote.³² In Portugal, only those specifically deprived of political rights by a court may not vote. As a Portuguese official explained, if “it is a horrendous crime or serious crime – someone that held a sentence for 8 to 10, or 15 years, disfranchisement will probably be a punishment issued on top of his or her sentence.”³³ In Romania, if sentenced to over 2 years in prison, a court has the discretion to revoke, but only where warranted by all the facts, the right to vote, or if convicted for life. The term is the period of the sentence. (Survey on file with the ACLU)

Belgium, Greece, Luxembourg and Italy restrict prisoners from voting based on the length of their sentences; in these countries, some of those sentenced to particularly long terms of incarceration may not have the right to vote restored automatically upon release.³⁴ Belgium disfranchises for six years those sen-

²² Jamie Smyth, *Prisoners in Irish Jails to Get Postal Vote*, IRISH TIMES, Feb. 4, 2006, available at <http://www.iprt.ie/ireland/1664>. The Fine Gael Party had introduced the bill, which allows 3,000 prisoners the mechanism to vote from prison – by a postal vote that is counted in the prisoner’s last county of residence. Gene McKenna, *3,000 in Jails May Get Right to Vote in New Daily Plan*, IRISH INDEPENDENT, Nov. 4, 2005, available at http://www.unison.ie/irish_independent/stories.php3?ca=9&si=1499271&issue_id=13219.

²³ Many states, including Germany and the Netherlands, clearly treat deprivation of the vote as an “additional sentence.” See, for examples, the Dutch Penal Code, Article 54, and German Criminal Code (Strafgesetzbuch at S45 (5)).

²⁴ Surveys conducted by ACLU and communications (on file with author) for Belgium, France, Italy, Luxembourg, Malta, Poland and Portugal. For Bosnia and Herzegovina, we rely on the EPIC Project, *supra* note 19; for Greece, sources conflict: compare Rottinghaus, *supra* note 6, at 4 with the description by the European Court in *Hirst No. 2*, ¶ 33. We rely on the *Hirst* court’s description. For Norway, we rely on original legislation supplied by the EPIC Project, *supra* note 19; Rottinghaus, *supra* note 6, at 21; *Hirst No. 2*, ¶ 33. For Poland, though our survey was not returned, our communications concerning applicable law with government officials were consistent with the description by the court on *Hirst No. 2*, at ¶ 33, as well as the more general findings of the EPIC Project, *supra* note 19, and the Project on Political Transformation and the Electoral Process in Post-Communist Europe, based in the Department of Government at the University of Essex, UK, part of the ESRC ‘One Europe or Several?’ research program [hereinafter “Essex”], available at <http://www.essex.ac.uk/elections/>. Other sources have drawn different conclusions: compare Louis Massicotte et al., *supra* note 6 (no disfranchisement) with Rottinghaus, *supra* note 6, at 23 (total disfranchisement).

²⁵ C. PÉN. Article 132-17.

²⁶ “Electoral Law for the Portuguese Parliament Election, Law. No.14/79 of May 16 (original law),” in Article 2.

²⁷ See Norway’s General Civil Penal Code, Part I, Ch. 2, §31.

²⁸ *Hirst No. 1*, at n.10.

²⁹ E-mail from Pawel Bogdziewicz, II Secretary, Acting Head of Consular Division, Embassy of Poland in Washington DC, Consular Division, to Rachael Devaney of the ACLU (Mar. 30, 2006, 14:41 EST) (on file with author), citing Article 40, Clause 2 of the Polish Criminal Code.

³⁰ This disqualification is, however, automatic, and went into effect when French law changed, on March 1, 1994. For people sentenced before March 1, 1994, the loss of the right to vote remains automatic in the case of conviction of a crime, a prison sentence of more than one month with a suspended sentence for certain misdemeanors such as petty theft, indecent behavior or petty fraud/swindling, punishment of more than three months’ jail time without a suspended sentence, or more than six months’ jail time with a suspended sentence. (Survey on file with the ACLU.) We tried to gauge the frequency of French disfranchisement by calling the French Prison Service but we were unable to do so.

³¹ Survey on file with the ACLU. Constitution of Malta, Article 58 and General Elections Act of 1991, Article 20. There is no provision in the Constitution or other law with respect to the applicability of disfranchisement for those on probation. See also Isobel White & Anwen Rees, *Convicted Prisoners and the Franchise*, p. 4, Parliament and Constitution Centre, SN/PC/1764 (Jan. 24, 2005).

³² Survey on file with the ACLU.

³³ Survey on file with the ACLU; Telephone Interview by Rachael Devaney with Ana Freitas, Political Department, Embassy of Portugal to the United States, in New York, NY (Feb. 3, 2006).

³⁴ As with France, we attempted to determine the frequency with which these countries apply their disfranchisement policies. Despite repeated efforts to obtain this data, we were unsuccessful either because they didn’t keep such data or because our calls were not returned. For Belgium, we contacted the Direction Générale d’Administration Pénitentiaire. In Luxembourg, we contacted the Direction Générale de l’Administration Pénitentiaire. For Italy, we contacted the office of external relations (with the department of prison administration, office of public relations, the General Directorate of Statistics, General Directorate of Penal Affairs).

tenced to over four months, and disqualifies for 12 years those sentenced to between three and five years. For criminal convictions with sentences of more than five years, which are awarded rarely and only for extremely serious crimes, disenfranchisement may be lifelong. According to the Consul at the Belgian Embassy to the United States, a sentence of, for example, 15 years would be exceptional, and life sentences are extremely rare. Greece restricts those who are sentenced to terms of over 10 years, but courts have the discretion to also disqualify for up to five years those convicted to terms of one to 10 years, if their conduct shows moral perversity. A person sentenced to a term of life loses the right to vote for life. In Italy, if convicted of a serious crime and sentenced to a term of over three years, one may lose the right to vote for five years. Certain offenders – those persons sentenced to five years or more, convicted of multiple crimes of intent in a given period of time, or living off the profits of their crimes – can be disenfranchised for life. In Luxembourg, if convicted for an offense for which the sentence is less than five years, a court may suspend the right to vote for between five and 10 years; if it does not, voting rights remain intact and such prisoners may leave the prison on voting days to cast their ballots. If imprisoned for between five and 10 years in Luxembourg, a person’s voting rights may be suspended by the court for between 10 and 20 years, or for life. A person sentenced to over 10 years, automatically loses the right to vote for life.³⁵ It is important to note that Luxembourg combines these relatively restrictive policies with other practices *facilitating* voting by inmates: As explained in their response to our survey, eligible prisoners may leave the prison to vote with or without an escort, and prisoners are educated about their voting rights. In Belgium, Lithuania and Romania over 60 percent of the

inmates vote, in Italy and the Netherlands between 20 and 60 percent vote.³⁶

c) The Broadest Disfranchisement in European States is a Bar on All Incarcerated Prisoners

The 12 European countries that ban voting by all serving prisoners are Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Spain, the Ukraine and the United Kingdom.³⁷ With the exception of the United Kingdom and Spain, these are all former Eastern Bloc states with limited histories of universal suffrage, constitutional rights, and independent courts. In the case of Spain, one authority advises that disenfranchisement in Spain “rarely happens.”³⁸

It remains to be seen whether the constitutional provisions and electoral laws of these countries will survive, given the European Court of Human Rights’ decision in *Hirst No. 2* condemning the United Kingdom’s blanket ban, which is now being reconsidered by its Parliament. The court expressly disapproved of restrictions on the right to vote which have not been the subject of considered legislative debate and which derive from “a passive adherence to an historic tradition.”³⁹ In some of these countries, there are nevertheless institutionalized arrangements for voting by pretrial detainees and those convicted of relatively minor offenses, discussed further below.⁴⁰

III. “The Achievement of the Franchise”: Criminal Disfranchisement Law in Constitutional Courts

Introduction & Summary

In examining criminal disenfranchisement statutes, the judiciaries of several nations

have taken an appropriately vigorous role in assuring that the legislative and executive branches do not arbitrarily infringe upon the right to vote. American courts, of course, share the obligation of protecting the rights of individuals against encroachment.⁴¹ And as U.S. lawmakers, citizens, and judges inquire into the purposes and permissibility of disenfranchisement law, they should take note of how courts elsewhere have reasoned through the questions posed by the policy. As we explain below, each court that has evaluated laws disenfranchising inmates has rejected the policy.

As we will show, the decisions of the world’s courts seriously weaken the case for criminal disenfranchisement. Each court has taken a principle Americans of all political persuasions have long held dear – that the state may not deprive its citizens of basic rights without showing what important, practical objective it will achieve by doing so – and ruled that disenfranchisement policies fall short. None has found purely theoretical arguments about the nature of voting, however well-supported by references to our shared Western philosophical tradition they may be, to suffice. Most have explicitly stated that the restriction achieves no penal purpose, and at least three high courts have condemned American-style blanket disenfranchisement policies as disproportionate penalties. Governments around the world have complied with their high courts’ rulings, in many cases compiling and publishing turnout rates among inmates. These facts further underscore just how unusual American disenfranchisement policies are – and how incompatible with modern ideas about voting and punishment they appear to be.

First, however, we must note where American constitutional law now stands on this issue. In a decision that has been

³⁵ Survey on file with the ACLU.

³⁶ Surveys on file with the ACLU.

³⁷ Surveys (or other communication) conducted by ACLU, or other communication, (on file with author), for Romania, Slovakia, Spain and the United Kingdom. For Belarus, we rely on the EPIC Project, *supra* note 19. For Bulgaria, Estonia, Latvia, Moldova, Russia, and the Ukraine, we rely on Essex, *supra* note 24, and original legislation. For Hungary, we rely on the EPIC Project, *supra* note 19. For Kosovo, we rely on Rottinghaus, *supra* note 6, at 21.

³⁸ *Hirst No. 2*, ¶ 9. See also White & Rees, *supra* note 31, at 4.

³⁹ *Hirst No. 2*, ¶ 23. At least some of these nations return the vote after incarceration. In the U.K., the right to vote is automatically restored on release from prison as it is in Slovakia. (Surveys for UK, Romania and Slovakia on file with ACLU.)

⁴⁰ Romanian Electoral Law, Art. 87 (2), Art. 59, available at http://www2.essex.ac.uk/electjp/ro_el92.htm.

⁴¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“The province of the court is, solely, to determine the rights of individuals.”).

roundly criticized by scholars, the U.S. Supreme Court in 1974 upheld disfranchisement's constitutionality.⁴² Plucking a phrase from a constitutional passage so obscure and so long ignored by the American courts that many lawyers thought it a "dead letter," the court held that policies barring people with criminal convictions from voting have an explicit constitutional warrant. But the ruling makes no mention whatsoever of any reason why disfranchisement might be good policy. Indeed, the court simply ignored the question of whether there is any sound reason at all for it – let alone a "substantial" goal or "compelling" purpose, as the court demands of virtually every other voting restriction in modern American law.

Obviously, this decision makes disfranchisement an anomaly in American voting-rights law. Its somewhat curious nature also underlines a simple truth: that the court has said states *may* disfranchise has no bearing at all on whether they *should* do so. As Americans evaluate disfranchisement law, then, they will find more thoughtful and substantial reflection on the policy in the decisions of other countries' constitutional courts – ironically, courts applying standards and ideas drawn partly from *American* constitutional law.

Legislators, judges, and scholars in the United States are now engaged in a rich debate over how much attention U.S. courts should pay to the work of courts abroad. Clearly, neither the legal texts nor the judicial decisions of other countries should *control* the reasoning and outcomes

of cases in American courts, with the exception of binding treaties. But as Justice Stephen Breyer argues, it is a fact that the practice and substance of law are increasingly international matters, in areas ranging from torts and contracts to human rights.⁴³ Legal systems in developed countries deal regularly with similar questions of voting rights and criminal justice; the constitutional courts of other nations frequently cite one another's work on such questions. Whether they find the reasoning of such authorities abroad persuasive or not – and whether they reach results similar to those of other countries' courts – judges in the United States will find much useful information in the work of their peers in other nations.⁴⁴

Such an approach is perfectly consistent with the work of the U.S. Supreme Court. The court has always taken heed of changes in society's values as it interprets the law, and increasingly, the court defines that society – or "civilization," or "political community" – in a way that assays similar policies in other developed democracies. As the late Chief Justice William Rehnquist said in 1989, "[n]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."⁴⁵

In *Thompson v. Oklahoma* (1988), the court noted:

The conclusion that it would offend civilized standards of decency to exe-

cute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.⁴⁶

More recently, the court has looked to international evidence in resolving several important cases: in a headline 2002 decision, *Atkins v. Virginia*, where the court held unconstitutional the execution of mentally retarded people because it constituted a "cruel and unusual" punishment – and reached that conclusion after citing a brief filed by the European Union which documented the rejection of such executions by the rest of the world.⁴⁷ Striking down state laws criminalizing homosexual conduct in 2003, the Court held in *Lawrence v. Texas* that "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest ... is somehow more legitimate or urgent."⁴⁸ Justice Kennedy's majority opinion focused mostly on U.S. law, but also pointed to an English statute of 1967 and a 1981 ruling by the European Court of Human Rights in arguing that such discrimination against homosexuals cannot be supported by "values we share with a wider civilization." Also in 2003, in connection with cases challenging the University of Michigan's undergraduate and law school affirmative-action programs, Justice Ruth Bader Ginsburg in

⁴² *Richardson v. Ramirez*, 418 U.S. 24 (1974). For a recently published summary of criticisms of the decision written by a leading voting-rights scholar, see Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *Stan. L. Rev.* 1147 (2004).

⁴³ Debate between U.S. Supreme Court Justices Stephen Breyer and Antonin Scalia, on the "Constitutional Relevance of Foreign Court Decisions" at American University, January 13, 2005.

⁴⁴ Of course some nations believe otherwise. The South African constitution provides in Section 39: "When interpreting the Bill of Rights, a court ... must consider international law; and may consider foreign law." Among others, India's and Spain's constitutions have similar provisions. Justice Ruth Bader Ginsburg, A Decent Respect to the Opinions on [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address before the Constitutional Court of South Africa, Feb. 7, 2006.

⁴⁵ Chief Justice William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989) reprinted in *Germany and its Basic Law: Past, Present and Future: A German-American Symposium*, at 411-12 (Paul Kirchof & Donald P. Kommers eds. 1993).

⁴⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 830-831 (1988).

⁴⁷ See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting that "within the world community the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

⁴⁸ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) citing the 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and subsequent European Court decisions affirming the protected right of homosexual adults to engage in intimate, consensual conduct. On the question of the dynamic nature of constitutional interpretation, the court stated: "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Grutter v. Bollinger, in separate opinions, looked to two United Nations Conventions, one on gender and the other on race discrimination saying that “[b]oth Conventions distinguish between impermissible policies of oppression or exclusion, and permissible policies of inclusion, ‘temporary special measures aimed at accelerating *de facto* equality.’”⁴⁹

International law played the most significant role in Supreme Court decisions to date in the court’s 2005 decision in *Roper v. Simmons*, which held unconstitutional state laws permitting the execution of juveniles. Justice Kennedy’s opinion for the court “acknowledge[d] the overwhelming weight of international opinion” against such executions, stating that the opinion of the world community provides “respected and significant confirmation of our own conclusions,” resting those conclusions in part on the content of international agreements such as the International Covenant on Civil and Political Rights and the U.N Convention on the Rights of the Child.⁵⁰ “It does not lessen our fidelity to the Constitution” to recognize “the express affirmation of certain fundamental rights by other nations and peoples.”⁵¹

As the previous section of this report demonstrates, an inquiry into the voting-rights laws of what the *Thompson* court called “the Western European community” shows that in most Western European states, all inmates retain the right to vote. Similarly, the study of disfranchisement law in the constitutional courts of the world yields an even clearer result: Every decision has rejected the disfranchisement of people in prison. In the last decade, courts in Canada, South Africa, Israel and the regional European Court of

Human Rights have all struck down voting prohibitions for incarcerated persons.

The second section of this part of the report details each decision, with particular attention to a few crucial common themes. First, each decision upheld the right to vote, often in eloquent and philosophical terms. Second, no government succeeded in convincing its court that any *practical purpose* was served by disfranchisement. Third, several of these decisions cite each other, as these constitutional courts look to the work of their peers in addressing a common problem. (Indeed, at least one high court – that of Israel – cited the United States Supreme Court as an important authority on citizenship law.) Fourth, three of the rulings declared the disqualification of all incarcerated persons to be a disproportionate penalty.

While some public criticism has followed each ruling, no government has refused to comply, and several have done so quite comprehensively; Canada and South Africa, for example, tally registration and turnout figures for inmates. We describe these governmental responses in the third and final part of this section. Given current critical attention in the United States to “activist” court rulings that overturn statutes, this fact of unproblematic compliance is striking.

⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306, 342–43 [2003] (Ginsburg, J., concurring) [“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. The International Convention on the Elimination of All Forms of Racial Discrimination ... 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 also Art. 1(4) [similarly providing for temporally limited affirmative action]; Convention on the Elimination of All Forms of Discrimination against Women ... [authorizing ‘temporary special measures aimed at accelerating *de facto* equality’ that ‘shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’] ”].

⁵⁰ *Roper v. Simmons*, 543 U.S. 551, 578 [2005].

⁵¹ Perhaps less directly, foreign and international legal sources have also figured in the court’s recent decisions concerning the application of due process principles to enemy combatants and Guantanamo Bay detainees, the president’s authority to establish a military commission to try Guantanamo Bay detainees for war crimes, and the availability of *habeas corpus* as a means to determine Guantanamo Bay detainees’ rights under the 1949 Geneva Convention. See, respectively, *Hamdi v. Rumsfeld*, 542 U.S. 507 [2004]; *Rasul v. Bush*, 542 U.S. 466 [2004], and *Hamdan v. Rumsfeld*, 415 F. 3rd 33 [cert. granted Nov. 7, 2005].

TABLE 2: Major Disfranchisement Cases

COURT	CASE	DECISION
Supreme Court Of Canada	Sauvé v. Canada [2002] 3 S.C.R. 519	<p>”Depriving 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.” (citation omitted)</p> <p>“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.”</p>
Constitutional Court of South Africa	August and another v. Electoral Commission and Others (CCT 8/99 1999)	<p>”The achievement of the franchise has historically been important 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 . . . The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says everybody counts.”</p>
Supreme Court of Israel	Hilla Alrai v. Minister of the Interior HC2757/06 P.D. 50(2) 18 (1996)	<p>The Israeli Supreme Court stated: “Without the right to elect, the foundation of all other basic rights is undermined . . . Accordingly, every society should take great care not to interfere with the right to elect except in extreme circumstances.”</p> <p>In upholding Yigal Amir’s citizenship rights, including the right to vote, the court stated, “We must separate our contempt for his act from respect for his right.”</p> <p>Discussing the assassination of Prime Minister Yitzhak Rabin, the trial court stated: “[Y]ou cannot change leadership with bullets but rather only 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 . . . “</p>
European Court of Human Rights	Hirst v. United Kingdom (Hirst No. 2)	<p>Discussing a U.K. law which proscribed all prisoner voting, the court stated: “Such a general, automatic, and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.” [Article 3 of the European Convention on Human Rights obliges all parties “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 their legislature.]</p>

Case Summaries

I. CANADA

Sauvé v. Canada (Attorney General), [1993] 2 S.C.R. 438⁵² (*Sauvé No. 1*)

Following the implementation of the Canadian Charter of Rights and Freedoms in 1982 (the “Charter”), Rick Sauvé, a Canadian prisoner, challenged the legality of the country’s blanket ban on prisoner voting. Sauvé’s challenge focused on Article 3 of the charter, 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.

Section 1 of the charter guarantees the rights and freedoms set out in the charter “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵³ Prior to this litigation, Canada’s electoral law made ineligible to vote “every person undergoing punishment as an inmate in any penal institution for the commission of any offence.”⁵⁴ The state argued that the policy qualified as one of the “reasonable limits” Section 1 of the charter allowed, and set out to prove to the Canadian Supreme Court that the policy was “demonstrably justified.”

The judgment of the Supreme Court in this case was handed down orally and the available text states that the Court unanimously agreed that:

The Attorney General of Canada has properly conceded that s. 51(e) of the Canada Elections Act, R.S.C., 1985, c. E-2, contravenes s. 3 of the

Canadian Charter of Rights and Freedoms but submits that s. 51(e) is saved under s. 1 of the Charter. We do not agree. In our view, s. 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component thereof.⁵⁵

The Canadian Parliament responded to *Sauvé No. 1* by amending the Elections Canada Act and replacing the offending section with new language limiting the voting disqualification to “every prisoner who was in a correctional institution *serv-ing a sentence of two years or more ...*”⁵⁶

The litigation in *Sauvé No. 1* thus extended the franchise – but only to prisoners serving sentences of less than two years. Despite his successful litigation, at the time of the 2000 General Election in Canada, Sauvé and other prisoners serving sentences of more than two years remained disfranchised. Sauvé commenced his second litigation on this basis.

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

Sauvé argued that the new electoral provisions still infringed the guarantee to vote as enshrined in Article 3 of the charter. He also claimed that enfranchising prisoners serving sentences of less than two years infringed his Article 15(1) rights under the charter:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

The court addressed whether the Canadian Electoral Act infringed the guarantee of the right of all citizens to vote, and, if so, whether the infringement was justifiable under Section 1 of the charter. In addressing whether the relevant provision of the Canadian Electoral Act infringed the equality guarantee in Article 15 of the charter, the Canadian government argued that the disfranchisement of prisoners serving sentences of over two years was justified by the ‘notwithstanding clause’ in Section 33 of the charter. The notwithstanding clause allows certain fundamental rights to be limited by Parliament. The charter’s equality guarantee is among those rights subject to the “notwithstanding” limitation, but the right to vote is not.⁵⁷ The state argued that disfranchisement enhanced civic responsibility and respect for the rule of law, served as an additional punishment, and enhanced the general purposes of the criminal sanction.⁵⁸

Once again, the Canadian Supreme Court disagreed. The court underscored that the framers of the charter signaled the special importance of the right to vote “not only by its broad untrammelled language but by exempting it from legislative override under section 33’s notwithstanding clause.”⁵⁹

The court stated that it would only therefore consider justifications for limitations on the right under the “demonstrably justified” provision in Section 1, which applies to all rights in the charter without exception. Applying the test established in a case called *R v. Oakes*, the court stated that to be “demonstrably justified” the government’s arguments would have to prove that its aims warranted the restriction. Thus the government had to reveal the harm it was trying to remedy by the provision, or a

⁵² *Sauvé v. Canada*, [1993] 2 S.C.R. 438 (*Sauvé No. 1*), available at http://www.lexum.umontreal.ca/csc-ccc/en/pub/1993/vol2/html/1993scr2_0438.html.

⁵³ *Canadian Charter of Rights and Freedoms*, Part 1 § 1, available at <http://laws.justice.gc.ca/en/charter/index.html#garantie>.

⁵⁴ Section 51 (e) of the Canada elections Act, R.S.C. 1985, c. E-2.

⁵⁵ *Sauvé No. 1*, at 913.

⁵⁶ Canada Elections Act, S.C., c.9, Part 1 § 4, [2000]. Emphasis added.

⁵⁷ Section 33 states that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”

⁵⁸ *Sauvé No. 2*, at 921.

⁵⁹ *Id.* ¶ 11.

rational connection between the limitation and the objective.

The court was not convinced that the government had provided sufficient evidence of such a rational connection, concluding: “Depriving 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.”⁶⁰

Referring to “the variety of offences and offenders covered by the prohibition,”⁶¹ the court concluded that the policy could not communicate a clear lesson to the nation’s citizens about respect for the rule of law. Calling the government’s argument “bad pedagogy,”⁶² the court suggested that “the educative message is, at best, a mixed and diffuse one.”⁶³

With respect to the government’s “rule of law” argument as justification for denying prisoners the vote, the court implied that it was denial of the vote that was inconsistent with any concept of the rule of law: “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.”⁶⁴

Responding to the government’s second, “punishment” argument, the 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, which this restriction failed to do. Further, punishment for breaking the social contract, where it concerns constitutional rights, must be constitutionally constrained.⁶⁵

The court also held that the analysis as to “minimum impairment” 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.”⁶⁶

The court was wholly unconvinced by the government’s “seriousness of the crime” argument, and 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 years was “because it affects a smaller class than would a blanket disenfranchisement.”⁶⁷

In finding that none of the government’s arguments would allow the government to avail itself of the ‘demonstrably justified’ provision, the court concluded by stating that the effect of the provision was also disproportionate to the harm the government sought to prevent, adding that:

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.

In finding that the deprivation of the right to vote ran counter to the nation’s commitment to the inherent worth and

dignity of every individual, the Canadian court cited the South African Constitutional Court’s decision in *August*, discussed immediately below.⁶⁸

II. SOUTH AFRICA

Soon after the dismantling of apartheid, the South African Constitutional Court ruled on the issue of prisoner voting rights in two separate cases.

*August and another v Electoral Commission and others (CCT 8/99 1999)*⁶⁹

Shortly before the National Parliamentary and Provincial Election in 1999, a group of prisoners, acting in their own interest and on behalf of all prisoners, sought a declaration from the Electoral Commission that prisoners would be allowed to vote in that election. The prisoners relied on the fact that there were no express legal provisions disqualifying them from voting.⁷⁰

Since the Electoral Act of 1998 (the “Act”) did not limit the right of prisoners to vote, the Constitutional Court defined the issue as whether the Electoral Commission, by not providing the means and mechanisms to allow prisoners to vote, had breached the prisoners’ right to vote. Section 6(1) of the Act provided that “[a]ny South African citizen in possession of an identity document may apply for registration as a voter.”⁷¹ Section 8(2) of the Act gave the Chief Electoral officer the authority to prevent certain categories of persons from registering to vote. The disqualification provisions of the Act did not include prisoners – but neither did it delineate the mechanics of prisoner registration and voting.⁷²

⁶⁰ *Id.* ¶ 38.

⁶¹ *Id.* ¶ 39.

⁶² *Id.* ¶ 30.

⁶³ *Id.* ¶ 39.

⁶⁴ *Id.* ¶ 32.

⁶⁵ *Id.* ¶ 52.

⁶⁶ *Id.* ¶ 55.

⁶⁷ *Id.*

⁶⁸ *Id.* ¶ 35.

⁶⁹ 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC), available at <http://www.constitutionalcourt.org.za/Archimages/1989.PDF>.

⁷⁰ *Id.* ¶ 6.

⁷¹ *Id.* ¶ 3.

⁷² *Id.* ¶¶ 4-6.

“The achievement of the franchise has historically been important 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 ... The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says everybody counts.”

The Electoral Commission now decided to defend its *inaction*, offering a few distinct arguments. First, the commission claimed that its inaction had done nothing to infringe the prisoners’ right to vote.⁷³ Second, it was the obligation of the voter to apply for registration to vote, not the obligation of the commission to seek out every enfranchised person.⁷⁴ Third, it was incarceration – a predicament of the prisoners’ own making – and not the commission’s inaction, that prevented prisoners from availing themselves of the right to vote.⁷⁵ Fourth, with respect to the special votes provision in Section 33 of the Act, which allowed for persons in hospital and diplomats to vote, the commission said that attempting to introduce such a procedure in prisons would be logistically difficult and costly, and trying to apply the ‘ordinarily resident’ provision to prisoners would not work.⁷⁶

The Constitutional Court roundly rejected each of these arguments, starting with the Electoral Commission’s submission that it had not infringed the prisoners’ right to vote by not implementing the mechanisms required to facilitate prisoner registration. The court noted that, “by its very nature [the right to vote] imposes positive obligations upon the legislature and the executive [to provide] a date for

the elections ... [to secure] the secrecy of the ballot and the machinery established for managing the process.”⁷⁷

The court underscored that the Electoral Commission was part of the ‘machinery’ that implemented the voting process. This placed the commission under an affirmative obligation “to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote.”⁷⁸ The court went further, implying that the commission had acted *ultra vires* because in not complying with this obligation the commission was creating “a system of registration and voting which would effectively disfranchise all prisoners without constitutional or statutory authority ...”⁷⁹ The court flagged this as an issue for Parliament’s consideration, stating, “Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the Commission or this Court to decide which categories of prisoners, if any, should be deprived of the vote, and which should not ...”⁸⁰ The court eloquently underscored universal adult suffrage on a common voter roll as one of the foundational values of the entire constitutional order:

The achievement of the franchise has

historically been important 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 ... The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says everybody counts.⁸¹

The court was unimpressed with the commission’s view that incarceration justified disqualification from voting. Quoting from the U.S. Supreme Court’s decision in *O’Brien v Skinner*,⁸² the court emphasized that “denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to ... prisoners.”⁸³ Finally, the court also summarily dismissed the commission’s arguments concerning the more pragmatic aspects of the facilitation of prisoner voting.

*National Institution of Crime Prevention and the Re-Integration of Offenders (NICRO), Erasmus and Schwagerl v Minister of Home Affairs (CCT 03/04 2004)*⁸⁴

The judgment in *August* did not authoritatively answer the question whether prisoners could be denied the vote, the court having only ruled that the commission’s inaction could not be justified under the constitution’s law of general limitation.

In response to the court’s criticism in *August*, the South African Parliament amended the 1998 Electoral Act and published the amended law, the Electoral Laws Amendment Act 34 of 2003,⁸⁵ which read in relevant part “[t]he chief electoral officer may not register a person as a voter if that person ... is serving a

⁷³ *Id.* ¶ 13.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* ¶ 59.

⁷⁸ *Id.*

⁷⁹ *Id.* ¶ 22.

⁸⁰ *Id.* ¶ 33.

⁸¹ *Id.* ¶ 17.

⁸² *O’Brien v Skinner*, 414 U.S. 524 (1973).

⁸³ *August*, ¶ 22, [quoting Marshall, J., concurring at 425 U.S. at 532-33].

⁸⁴ *Minister of Home Affairs v Nicro*, CCT 03/04, available at <http://www.sentencingproject.org/pdfs/southafrica-decision.pdf>.

⁸⁵ Electoral Laws Amendment Act 34 of 2003, available at http://www.elections.org.za/Documents/iec-a6_act.pdf.

sentence of imprisonment without the option of a fine.”⁸⁶ This provision thus disfranchised all those who were in prison, except for those incarcerated only because they could not afford to pay a fine. Special provision was made by the Amendment Act to regulate the voting of those prisoners who retained the right to vote.⁸⁷

Six days after the Amendment Act took effect, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and two convicted prisoners serving sentences of imprisonment filed an urgent application in the High Court for an order, declaring that the provisions that deprive serving prisoners of the right to participate in the upcoming elections violated the constitution.⁸⁸

Because of procedural delays in the early stages of the litigation, and because the general elections were only a few weeks away, the entire case was considered by the South African Constitutional Court sitting as the court of first and final instance. The court considered the constitutionality of disfranchising prisoners who were serving sentences without the option of a fine, a question of law similar to that considered by the Canadian Supreme Court in *Sauvé No. 2*.

The government argued that the *August* judgment had directed Parliament to consider the issue and that it had done so, deciding to enfranchise prisoners awaiting trial whose guilt had the benefit of the doubt as well as those incarcerated solely because they were unable to pay the fine imposed at sentencing (so as not to disqualify them solely on the basis of their poverty).⁸⁹ Disfranchising prisoners

serving sentences without the option of a fine, the government asserted, was commensurate with the seriousness of the offenses they had committed. The state argued that allowing these persons to retain the vote would make the government appear soft on crime.⁹⁰ The government also argued 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.⁹¹

The court analyzed the validity of the government’s arguments much as the *Sauvé No. 2* court had done: searching for a reasoned and supported connection between the aim and the restriction.⁹² The court also reiterated its reasoning in *August* concerning the obligations of the government in ensuring the realization of the right to vote for every citizen.⁹³ 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. Drawing on the jurisprudence of the Canadian Supreme Court – which had decided the second *Sauvé* case in the interim between *August* and *NICRO* – the court found the government’s arguments failed for lack of any rationale underpinning its stated objectives.⁹⁴ Home Affairs failed “to place sufficient information before the court to enable it to know exactly what purpose the disenfranchisement was intended to serve.”⁹⁵ The South African 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.”⁹⁶

UNITED KINGDOM

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

Under section 3 of The Representation of the People Act 1983, John Hirst, a prisoner serving a life sentence, was barred from voting in parliamentary or local elections. The United Kingdom differentiates between remand prisoners (those awaiting trial), serving prisoners, and so-called part-time prisoners who are at the latter end of their re-integration into society and divide their time between jail and the community. The effect of Section 3 was a blanket ban on the right to exercise the vote by all serving prisoners.

Hirst brought his initial claim under the domestic Human Rights Act of 1998 seeking a declaration that this provision was incompatible with the Human Rights Act.⁹⁷ The domestic courts were unwilling to grant relief.⁹⁸ Thus Hirst’s application was dismissed, and because he was not granted leave to appeal to the British Court of Appeal, he resorted to obtaining the judgment of the European Court of Human Rights.⁹⁹

The European Court of Human Rights examined whether the United Kingdom’s legislation was compatible with the right-to-vote provisions in Article 3 of Protocol No. 1 of the European Conven-

⁸⁶ *Id.* s. 8(2)(f)

⁸⁷ *Nicro*, ¶ 108.

⁸⁸ *Id.* ¶ 83.

⁸⁹ *Id.* ¶ 125.

⁹⁰ *Id.* ¶ 139.

⁹¹ *Id.* ¶ 108.

⁹² *Id.* ¶ 102.

⁹³ *Id.* ¶ 110.

⁹⁴ *Id.* ¶ 108.

⁹⁵ *Id.* ¶ 65.

⁹⁶ *Id.* ¶ 56. Nine judges signed the majority opinion; two dissented separately, agreeing that denouncing crime was sufficient justification for disfranchisement. See *id.* ¶¶ 116, 140, and 147.

⁹⁷ *Hirst No. 1*, ¶ 11.

⁹⁸ *Id.* ¶ 14.

⁹⁹ *Id.* ¶¶ 15-16.

tion on Human Rights,¹⁰⁰ which the Human Rights Act sought to implement. Because the issue had never been discussed in Parliament, the Home Secretary's views of the policy prevailed, which he articulated in terms of the ancient concept of 'civic death,' the notion that a person convicted of a crime forfeits all rights of citizenship. The law at issue dated back to the Forfeiture Act of 1870.¹⁰¹

The court stated that while Article 3 of Protocol No. 1 is phrased in terms of the obligation of the High Contracting Party to hold elections, which ensure the free expression of the opinion of the people, the court's case law established that it guarantees individual rights, including the right to vote and to stand for elections.¹⁰² Those rights, while central to democracy and the rule of law, are not absolute and may be subject to limitations, said the court.¹⁰³ The Contracting States have a wide "margin of appreciation" to determine policies within this sphere, but the court would determine in the last resort whether the requirements of Article 3 of Protocol No. 1 had been complied with.¹⁰⁴ In deciding *Hirst's* case, the court would need to be shown that "(1) the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; (2) that they are imposed in pursuit of a legitimate aim, and (3) that the means employed are not disproportionate."¹⁰⁵

The court conducted an extensive examination of relevant national and interna-

tional law, guidance and practice, and noted that divergences exist in the law and practice of Contracting States.¹⁰⁶ "At one end of the spectrum, there are some 18 countries in which no restrictions are imposed on prisoners' rights to vote; in some 13 countries prisoners are not able to vote, due to operation of law or lack of enabling provisions; and between these extremes in the remainder of Contracting States loss of voting rights is tailored to specific offences or categories of offences or a discretion is left to the sentencing court."¹⁰⁷ While this variation may suggest a lack of consensus, and underline the importance of the margin of appreciation afforded to national legislatures in laying down conditions governing the right of franchise, the court did not agree that a Contracting State "may rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition."¹⁰⁸

The court seemed unconvinced of the government's arguments concerning the legitimate aims of the restrictive legislation which, according to the government's pleadings, were (1) to prevent crime and punish the offenders, and (2) to enhance civil responsibility and respect for the law.¹⁰⁹ Notwithstanding its doubts as to the validity of either aim in modern times, the court noted the varying political and penal philosophies and policies that might be invoked in this

context, and, since it was not necessary to the decision, chose not to rule on the legitimacy of these aims.¹¹⁰

Regarding the proportionality test, the court noted that the "restriction as applied in the United Kingdom does distinguish between different reasons for detention and varying types of crime and may be regarded as less draconian than the regime applying in certain other jurisdictions."¹¹¹ The restrictions affected "only those convicted of crimes sufficiently serious to warrant an immediate custodial sentence" and did not apply to remand prisoners, those imprisoned for failure to pay fines or those "detained for contempt of court."¹¹² The court continued, "furthermore, the incapacity is removed as soon as the prisoner ceases to be detained."¹¹³ The court accepted that this was "an area in which a wide margin of appreciation should be granted to the national legislatures in determining whether restrictions on prisoners' right to vote can still be justified in modern times and, if so how a fair balance was to be struck."¹¹⁴ Legislatures must examine, the court ruled, "whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote."¹¹⁵

However, the court observed that there was "no evidence that the legislature in the United Kingdom had ever sought to

¹⁰⁰ Article 3, Protocol 1 provides that: "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."

¹⁰¹ *Hirst No. 1*, ¶ 17.

¹⁰² *Id.* ¶ 36.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Mathieu-Mohin*).

¹⁰⁵ *Id.* The Court noted that in prior cases before it, the outcomes may have been different because the court had not yet defined the test above. For example, in *M.D.U. v. Italy* (No. 58540/00, January 1, 2003), the chamber rejected complaints of a court-imposed bar on voting under Article 3 of Protocol No. 1 where the applicant had been convicted of tax fraud offences and sentenced to 3 years' imprisonment, with the additional penalty of prohibition of exercising public functions for 2 years. *Id.* ¶ 38.

¹⁰⁶ *Id.* ¶ 40.

¹⁰⁷ *Id.* ¶ 40. The Court was relying on surveys conducted by the U.K. Government. See *Hirst No. 1*, at 8.

¹⁰⁸ *Id.* ¶ 41.

¹⁰⁹ *Hirst No. 1*, ¶ 46.

¹¹⁰ *Id.* ¶ 47.

¹¹¹ *Id.* ¶ 48.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 51.

¹¹⁵ *Id.*

weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners.”¹¹⁶ The court could not accept that “an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation.”¹¹⁷ The court noticed that the applicant in the particular case had “lost his right to vote as the result of the imposition of an automatic and blanket restriction on convicted [prisoners.]”¹¹⁸ By unanimous vote, the Chamber of 6 judges found a violation of Article 3 Protocol No. 1.¹¹⁹

Hirst v. United Kingdom (Hirst No. 2)
06.10.2005

The United Kingdom appealed to the Grand Chamber of the European Court of Human Rights – here, a panel comprised of judges representing 17 E.U. nations.¹²⁰ On Oct. 6, 2005, the ECHR Grand Chamber affirmed the *Hirst No. 1* decision. Noting that this was the first time it had considered “a general and automatic disenfranchisement of convicted prisoners,”¹²¹ the court made clear that 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.”¹²² The court surveyed all relevant law, including the International Covenant on Civil and Political Rights (Articles 10 and 25), discussed in the last section below, as well as the Canadian and South African decisions discussed above.¹²³ The court noted

that Article 3 of Protocol 1 guarantees individual rights including the right to vote.¹²⁴ Still, the court noted, there is a margin of appreciation. How wide is this margin? The court offered this guidance:

- 1) The conditions imposed may not curtail Convention rights to such an extent as to impair their essence;
- 2) The aim of the restrictive legislation must be legitimate; and
- 3) The means employed may not be disproportionate.¹²⁵

The court stated that all prisoners enjoy convention rights and freedoms except liberty. Still, conceded the court, there may be some abuses that may warrant disfranchisement, such as the serious abuse of a public position or conduct that threatens “to undermine the rule of law or democratic foundations.”¹²⁶ The court agreed that preventing crime was a legitimate purpose, but did not find the United Kingdom ban proportional.¹²⁷ The court found it significant that 48,000 English prisoners were disfranchised by the measure, including a wide range of minor and major offenders, and noted that English courts do not advise prisoners that disfranchisement is a consequence of imprisonment.¹²⁸ The court cited approvingly the Venice Commission’s recommendation – discussed later in this report – that withdrawal of political rights should only be carried out by express judicial decision, as “a strong

safeguard against arbitrariness.”¹²⁹

The court added that in the United Kingdom, there may be no direct link between the facts of unique cases and removal of the right to vote, and found no evidence that the legislature of the United Kingdom had weighed competing interests or assessed the proportionality of the sanction.¹³⁰ Finally, while accepting the lack of consensus between contracting states, and conceding that the U.K. law did permit unincarcerated prisoners to vote,¹³¹ the court noted that a minority of the 46 contracting states – no more than 13 – had blanket restrictions. The court ruled 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.”¹³²

ISRAEL

*Alrai v. Minister of the Interior et al.*¹³³

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...” As with many European countries, Israeli courts are given oversight of the laws relating to disfranchisement. However, it is the Minister of the Interior who holds the power to revoke the citizenship of “any person who has committed an act that contains an element of

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* ¶ 52.

¹²⁰ *Hirst No. 2*, ¶ 6.

¹²¹ *Id.* ¶ 68.

¹²² *Id.* ¶ 59.

¹²³ *Id.* ¶¶ 6, 9.

¹²⁴ *Id.* ¶ 62.

¹²⁵ *Id.*

¹²⁶ *Id.* ¶ 77.

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 71.

¹²⁹ *Id.* ¶ 71.

¹³⁰ *Id.* ¶ 79.

¹³¹ The United Kingdom permits voting by prisoners awaiting trial and so-called part-time prisoners [prisoners at the latter end of their reintegration into society, who are part of the civilian community by day and spend the night in jail].

¹³² *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).

¹³³ HCJ 2757/06 *Alrai v. Minister of the Interior et al.* [1996] Lsr SC 50(2) 18.

“However, said the court, that ‘contempt for this act’ must be separated from ‘respect for his right.’”

the breach of trust towards the State of Israel.”¹³⁴ And the right to vote is subsumed within the right of citizenship. On Nov. 4, 1995, law student Yigal Amir assassinated the Prime Minister of Israel, Yitzhak Rabin, in an effort to stop Rabin’s policy of trading land for peace with Palestinians. A third party petitioned the Supreme Court to review the decision of the Minister of the Interior, who had decided not to deprive Amir of his citizenship. The minister cited several provisions of international law supporting a person’s right to citizenship, the basis for a person’s right to vote for Knesset elections. Refusing to disfranchise Amir, the Israeli court called the right to vote “a prerequisite of democracy.” The court also cited *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 court agreed with the minister 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, said the court, that “contempt for this act” must be separated from

“respect for his right.”¹³⁵

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.”¹³⁶ Sounding a note that American courts have struck more than once, the Israeli judges ruled that “Without 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*.”¹³⁷

(Israel’s Chief Justice Aharon Barak has said, in discussing the need to balance security and civil liberties, that in a case presented to his court about the lawfulness of using violence in interrogating a terrorist in a ticking bomb situation, his court answered “never”, and he elaborated “[p]reserving the rule of law and recognition of individual liberties constitute an important component of [a democracy’s] understanding of security. At the end of the day, [those values buoy up] its spirit and strength [and its capacity to] overcome [the] difficulties.”¹³⁸)

Reactions to the Decisions

In each of these cases, the government tried to convince the relevant court of disfranchisement’s merits. While their

arguments varied, they shared common ground with many claims heard in the American debate: references to criminal-justice objectives, political theory, and the alleged logistical difficulties of voting by inmates. In each case, those arguments failed.

In several instances, the government also urged the court not to involve itself in a matter best left to legislatures. This kind of plea is familiar to students of American courts, long concerned with the “counter-majoritarian difficulty” posed by unelected judges sitting in judgment of policy made by legislatures. For this reason, we were particularly keen to know how the elected branches of government responded to these rulings. The answer is clear: following some scattered initial criticism, each government has cooperated. The one exception is the *Hirst No. 2* decision, but it has been only a few months since that case was decided – and in Ireland, the legislature has already responded.

CANADA

The day the *Sauvé No. 2* decision was handed down, the Chief Electoral Officer of Canada, a respondent in the litigation, issued a press release stating that as a result of the judgment “s.4(c) of the Canada Elections Act, which prevents those serving two or more years in prison from voting, is of no force or effect. All incarcerated electors may now vote in federal elections, by-elections, and referendums, regardless of the length of the term they are serving.”¹³⁹ The government of Canada, naturally, evinced some disappointment. A report on Capital News Online quoted a spokesperson for the then House Leader, Don Boudria, as saying:

¹³⁴ Clause 11b of The Law of Citizenship 5712-952.

¹³⁵ *Hilla Alrai*, ¶ 5.

¹³⁶ *Id.* ¶ 4.

¹³⁷ 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].

¹³⁸ Ginsburg, *supra* note 44 [quoting H CJ 5100/94 Pub. Comm. Against Torture in Israel v. Gov’t of Israel [1999] IsrSC 53(4) 817, 845].

¹³⁹ *The Chief Electoral Officer of Canada Announces the Application of the Supreme Court Decision on the Voting Rights of Incarcerated Electors*, Elections Canada Media Relations, available at <http://www.elections.ca/content.asp?section=med&document=oct3102&dir=pre&lang=e&textonly=false>.

The Supreme Court decision was against something we asked for...The government will continue to carefully review the Supreme Court decision and see what options we have available.¹⁴⁰

The commentary in the article continues:

Many in the government disagreed with the Supreme Court decision, especially members of Parliament who have federal penitentiaries in their ridings. They don't like the idea of elections decided by prisoners.¹⁴¹

In the same article, Graham Stewart, executive director of the John Howard Society, a charity that advocates for the rights of prisoners, pointed out that the government's fears were wholly unfounded because prisoners would not be able to vote in the riding in which they are incarcerated but rather in their home districts or where they were convicted, adding:

I think it unlikely that any government could come up with legislation that is justified to withhold voting rights. I hope the government realizes that in a democracy the voters pick the politicians; the politicians do not pick the voters.¹⁴²

Some Canadian crime victims also responded adversely to the outcome of Rick Sauvé's litigation. Gary Rosenfeldt, executive director of Victims of Violence, remained of the opinion that jail was to punish people, not to reward them.¹⁴³

The Canadian Conservative Party threatened that it would look to strip prisoners of their right to vote by using the "notwithstanding" clause in the Canadian Charter.¹⁴⁴ Tory lawmaker Vic Toews says Canadians have told him on the campaign trail that they don't believe federal prisoners, those serving sentences of more than two years, should have the right to vote. "What they say to me is that it is wrong that these individuals who have broken their obligations to society are now entitled to have the same voice in society."¹⁴⁵

Despite such comments, the Canadian government has taken affirmative steps to enable all Canadian prisoners to vote. As the government's reports indicate, all incarcerated electors in Canada were able to exercise their right to vote in Canada's 2004 General Election. According to the *Report of the Chief Electoral Officer of Canada on the 38th General Election Held on June 28, 2004*.¹⁴⁶

Of the 36,378 incarcerated persons in Canada who were eligible to vote, 9,635 registered and 9,250 cast ballots. In federal institutions, 13,198 inmates were eligible to vote and 5,189 registered. In provincial institutions, 23,180 inmates were eligible to vote and 4,446 registered.

The table below draws from the above-referenced report. It compares the number of incarcerated voters in the 37th General Election, held in 2000 (post-*Sauvé No. 1*), and the 38th General Election, held in 2004 (post-*Sauvé No. 2*).

Accordingly, as a result of *Sauvé No. 2*, the nearly 13,500 held in Canada's 53 federal prisons were enfranchised, these prisons holding inmates with sentences of two years or more.¹⁴⁷ A third of inmates registered to vote in the mid-2004 election – 9,250 of 36,378, or 26 percent – voted. (Prisoners could vote where they lived or where they were convicted.) Robby Nowicki, the chief administrator of Edmonton's Correctional Institution, says everything went smoothly during the 2004 election, with 65 of 238 eligible prisoners casting ballots.

The second time all federal prisoners were allowed to vote since the Supreme Court struck down part of the Elections Act was in January of 2006. Under Elections Canada rules, inmates voted with special ballots inside prisons on January 13, 10 days before the general election, in some of the country's "advance polls." (They may now vote in the riding where they lived before going to prison, in the riding where a relative lives or where they were convicted.) According to results officially released from Elections Canada, 2,344 more inmates voted in the last federal election than in the 2004 election.¹⁴⁸

TABLE 3: Comparison of Incarcerated Electors Voting in 2000 and 2004 Elections

Election	Electors on the Lists	Valid Ballots	Rejected Ballots	Total Ballots Cast	Voter Turnout
37th (2000)	23,116	4,881	307	5,188	22.44%
38th (2004)	36,378	8,824	426	9,250	25.43%

¹⁴⁰ Ryan Cormier, *Cell Block Democracy*, CAPITOL NEWS ONLINE, (Nov. 15, 2002), available at <http://temagami.carleton.ca/jmc/cnews/15112002/n3.shtml>.

¹⁴¹ *Id.* In Canada, it is the federal prisons that hold inmates serving sentences of two years or longer.

¹⁴² *Id.*

¹⁴³ *Canadian Prisoners Get the Right to Vote*, CBS NEWS (Jun. 18, 2004) available at http://www.cbc.ca/elections/national/2004/06/18/prisoners_vote040618.html.

¹⁴⁴ *Id.* (quoting conservative leader Stephen Harper.)

¹⁴⁵ *Prisoners eligible to vote in election*, available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051229/elxn_prisoners_060102?s_name=&no_ads=

¹⁴⁶ *Elections Canada's Official Reports: Report of the Chief Electoral Officer of Canada on the 38th General Election Held on June 28, 2004*, available at http://www.elections.ca/content.asp?section=gen&document=part2_div8&dir=rep/re2/sta2004&lang=e&textonly=false#sec82.

¹⁴⁷ Cormier, *supra* note 141. The 21,000 provincial prisoners could already vote.

¹⁴⁸ *Inmate Voting Numbers Increase*, Winnepeg Sun (May 14, 2006).

SOUTH AFRICA

As a result of the litigation in *August*, South African prisoners were, in principle, allowed to vote in the 1999 elections. However, the impact of the litigation was lessened two weeks later, when the Constitutional Court rejected the appeals of the New National Party and the Democratic Party concerning the requirement in the Electoral Act that anyone wishing to vote in the general election must possess a bar-coded identity document (ID). Many prisoners did not have bar-coded IDs and could not get them in time to register, given the proximity of the elections. There does not appear to be a consolidated report on how many prisoners were able to vote that year.

The Electoral Commission issued a press release on the day of the 1999 *August* judgment, stating that:

We have not yet studied the whole judgment to know all the reasons advanced by the court in dismissing the ... case, but we abide by the

decision of the court. We welcome the decision, as the court considered the matters we presented before it through our legal counsel in accordance with the affidavit filed by the Independent Electoral Commission.¹⁴⁹ The South African Government appeared to cautiously accept the judgment, held a special meeting of the Cabinet later that week, and issued a press release stating that:

Cabinet met in special session on 7 and 8 April to deliberate on the judgment of the Constitutional Court that prisoners should be allowed to vote in the coming elections ... While remaining committed to the principle behind its decision in February that there should be limitations on this right as it applies to certain categories of prisoners, Cabinet took into account the stringent demands of the Constitution on this matter. It therefore resolved that the issue needs to be handled by political parties within the context of future legislative and constitutional

debate. The Independent Electoral Commission and relevant government departments will strive to put in place requisite logistical arrangements, in accordance with the ruling of the Constitutional Court.¹⁵⁰

The subsequent *NICRO* decision appears to have drawn no substantial opposition from the government. Indeed, the most notable reaction was the increase in prisoner voter registration after the court ordered that the roll be opened to allow the newly enfranchised prisoners to vote. The table below is sourced from the South African Independent Electoral Commission's web site and reflects the significant increases in voter registration by province.

According to the Independent Electoral Commission report on the 2004 National and Provincial Elections:

Following the Constitutional Court's ruling on 3 March 2004 ordering that the Commission had to register all prisoners without exception, the Commission provided registration facilities at 242 prisons. Out of a population of approximately 182,000 prisoners, 27,350 applied for registration.¹⁵¹

TABLE 4: Number of Prisoner Registration Applications per Physical Address

Province	Registration Drive (January)	Registration Drive (March)	Total
Eastern Cape	5,160	3,874	9,034
Free State	251	2,881	3,132
Gauteng	1,483	5,107	6,590
KwaZulu - Natal	963	3,594	4,557
Limpopo	323	1,255	1,578
Mpumalanga	265	1,583	1,848
North West	34	2,774	2,808
Northern Cape	1,142	1,073	2,215
Western Cape	309	5,209	5,518
TOTAL	9,930	27,350	37,280

ISRAEL

Though initially criticized by a few politicians,¹⁵² the *Abrai* decision did not disrupt voting by Israeli inmates. Indeed, early in 2006, an official Website of the Israeli government noted that 51 polling stations would be set up inside "prisons and detention centers" for Israeli's upcoming parliamentary elections.¹⁵³ And Yigal Amir continues to vote from prison today.¹⁵⁴ In fact, in Israel's most recent elections for the 17th Knesset in late March 2006, at the close of voting, 53 percent of the 9000 prisoners eligible to vote exercised that right. (One-quarter of them refused to vote until provided an

¹⁴⁹ *IEC and Prisoners' Votes*, Independent Electoral Commission, Pretoria, (Feb. 23, 1999), available at http://www.info.gov.za/speeches/1999/99224_iec-pr99_10194.htm.

¹⁵⁰ *Cabinet Meeting on Prisoners' Voting Rights*, South African Government Information, (Apr. 8, 1999), available at <http://www.info.gov.za/speeches/1999/9904131053a1002.htm>.

¹⁵¹ Report on the National and Provincial Elections, p. 26-28, Independent Electoral Commission, South Africa (2004), available at <http://www.elections.org.za/papers/143/iec/pdf>.

¹⁵² Yitzhak Rabin's widow, Leah, has protested the policy. See *Rabin's Widow Tells Israelis: Vote for Perez*, CNN NEWS, available at <http://www.cnn.com/world/9605/29/israel.leah.rabin>.

¹⁵³ See http://www.knesset.gov.il/elections17/eng/cec/CecAboutElections17Facts_eng.htm.

¹⁵⁴ Laura Blumenfeld, *Slain Leader's Legacy Lives On, Assassin Admits*, available at <http://www.washingtonpost.com/wp-srv/inatl/daily/may99/amir14.htm>.

Israeli ID card while another 20 percent refused to have an ID card processed for them so that they could vote.)¹⁵⁵

THE UNITED KINGDOM

The *Hirst No. 1* judgment was delivered shortly before the United Kingdom's 2005 general election. Perhaps the ECHR had hoped that the U.K. Government would, as the governments of South Africa and Canada had done when faced with similar judgments in their own courts, implement some emergency provisions to comply with the judgment. The fact that it did not do so may have to do with the unique role of the ECHR as the arbiter of human rights for countries that are not even a federation, as contrasted with the authority and effect of the highest domestic courts within a country. The ECHR is a supranational institution without the power to immediately compel a member state of the European Union to implement its judgments.¹⁵⁶ Although in the 30 years since its establishment the court has steadily secured its standing with the member states, the court still defers to their sovereignty on certain issues, by, for example, citing the doctrine of the "margin of appreciation."

As explained above, the U.K. responded to the ECHR's initial ruling in *Hirst* by appealing the decision to the ECHR's Grand Chamber. According to Bobby Cummines, the executive director of the Association for Ex-Prisoners (UNLOCK) and advisor to the House of Commons on prisoner issues, the government may have appealed the decision to the Grand Chamber simply because of the proximity of the decision to the U.K.'s general election:

This government only appealed because it did not want to appear soft on crime; the government did not want to be the one that gave the vote to [all] prisoners without some distance from the event.¹⁵⁷

Moreover, it is likely that the government was just buying time so that it could, as Bobby Cummines remarked, "put its house in order and finally have a proper debate on the issue in Parliament."¹⁵⁸

As a direct result of the decision in *Hirst No. 1*, however, the United Kingdom's Electoral Commission did make one adjustment for voting in the 2005 general election, announcing that in addition to remand prisoners, prisoners in 'intermittent custody' – essentially, part-time prisoners who spend part of their week in jail and the rest in the community – would be allowed to vote if already on the voting register. No special provisions were implemented to facilitate the registration of people not already on the rolls, so the ability of these individuals to vote was entirely dependent on whether they were in prison on election day.

In February of 2006, Ireland became the first European country to respond directly to the *Hirst* ruling by moving to formally enfranchise inmates. Under legislation drafted collaboratively by Ireland's Attorney General and Environment Minister, all Irish prisoners would be enabled to vote. "The view has been taken, given the court judgment, that voting is a fundamental right, so we might as well move as soon as possible," said an official in the Environment Department.¹⁵⁹

IV. Mechanisms for Prisoner Voting

Introduction & Summary

In the South African *NICRO* litigation, the high court rejected the government's argument that implementation would be burdensome, concluding that this was a bad basis for policy. Indeed, in many countries, prison voting is implemented without incident. As to cost, prison voting is relatively cheap and easy to

administer, because the inmate population is constantly supervised and counted, and is subject to inexpensive administrative control.

We described in the preceding section how several governments had complied with their high courts' mandates to permit prisoner voting. We describe in this section one particularly important aspect of that compliance: steps taken to enable prisoners to vote. Here, we briefly describe voting practices in a few countries where prisoner-voting litigation has not taken place – as well as the three U.S. jurisdictions where inmates retain the right to vote, Maine, Vermont and Puerto Rico.

All the nations discussed below facilitate voting by eligible pretrial detainees – and by some or all convicted prisoners – in an institutionalized manner largely absent in the United States. As explained below, though a variety of mechanisms are employed, voting by absentee ballot in one's town of previous residence – the system employed by the three U.S. jurisdictions in which prisoners can and do vote – is common elsewhere. We might call these points the "logistical lessons" that other countries' high courts and voting-rights statutes teach us.

Whatever other claims opponents of prisoner voting may advance, these examples make two crucial points abundantly clear. First, the world's voting inmates are no threat to local politics, since they vote in their previous residences. Second, their ballots do not threaten the security of the prison, either. Each country, and three U.S. jurisdictions, have worked out slightly different ways to facilitate prison voting – but we have not found a single instance in which prison discipline was disrupted by the electoral process. Our surveys specifically asked if prisoner voting compromised prison security, and none of the dozens surveyed had ever experienced any such problem.

¹⁵⁵ 53% of Israel's Prisoners Exercise the Right to Vote, THE JERUSALEM POST (Mar. 28, 2006), available at http://prisonersoverseas.com/?page_id=51.

¹⁵⁶ As discussed further in the final section of this report, the Council of Europe's Committee of Ministers supervises the execution of the final judgments of the ECHR.

¹⁵⁷ Telephone Interview with Bobby Cummines, executive director, UNLOCK, in London, U.K. (Aug. 23, 2005).

¹⁵⁸ *Id.*

¹⁵⁹ Jamie Smyth, *Prisoners in Irish Jails to Get Postal Vote*, IRISH TIMES, (Feb. 4, 2006), available at <http://www.iprt.ie/ireland/1664>.

EUROPE

In many of the European nations in which some or all prisoners may vote, the government facilitates prison voting for eligible inmates. In Finland, Italy, Portugal, and the Netherlands, a government entity brings mobile polling stations into prisons.¹⁶⁰ In Austria, although mobile polling stations are authorized, they are rarely used. Instead, so-called “flying election commissions,” special election authorities dispatched to prisons to collect the votes, are employed.¹⁶¹ In Lithuania, Slovenia and Switzerland, prisoners complete and mail absentee ballots to government entities.¹⁶² In Romania, pretrial detainees and those convicted of relatively minor offenses vote by a “special ballot box” arrangement: The president of the local electoral commission designates, from among commission members, a number of persons to go with a special ballot box and the necessary voting materials to sites where voters are confined, so that these voters may be polled.¹⁶³ A special election precinct is set up in the pretrial detention facility. In Belgium and France, eligible prisoners vote by proxy – ‘vote par procuration.’¹⁶⁴ In Luxembourg, eligible prisoners may leave the prison to vote with or without an escort, and prisoners are educated about their voting rights, as they are in Portugal and Lithuania as well. In Malta, the police escort eligible prisoners to their respective polling stations.¹⁶⁵

CANADA

Canadian prisoners vote by special ballot¹⁶⁶

as residents not of the prison location, but of the place they would live were they not incarcerated.¹⁶⁷ Canadian law now explicitly states that everyone who is at least 18 years of age on polling day and who is currently in a correctional institution or a federal penitentiary in Canada may vote in a federal election or referendum regardless of the length of their sentences.¹⁶⁸ A staff member in each institution is appointed liaison officer to facilitate the process of registering and voting. The liaison officer answers questions about the manner of voting and helps the electors to register. A prisoner registers by filling out a special registration application, available from the liaison officer once an electoral event has been called. The elector returns the completed application to the liaison officer, who then validates it. On polling day, incarcerated electors sign a series of statements verifying their identity, place their ballots in the proper envelope, and may leave their completed ballots with the deputy returning officer to forward by special arrangement. In some cases, guards shut down other activities in the prison on election day to facilitate the work of the polling clerks.¹⁶⁹

SOUTH AFRICA

South African prisoners now vote. Under Section 64 of the 1998 Electoral Act, the Electoral Commission is empowered to establish mobile voting stations in a voting district. Under a subsequent amendment to that statute – Section 64(1A) (b), introduced by the Amendment Act – such mobile voting stations

may be employed where necessary for use in a prison. Even in a country beset by grave economic problems, the South African court in *August* rejected cost-saving as a rationale for denying inmates the vote. The court was unconvinced by the arguments presented by the commission that the registration and polling of prisoners would present insurmountable logistical hurdles, stating that:

It was ... contended that if special arrangements were to be made for prisoners, then the resources of the Commission would be strained to bursting point by the need to make equivalent arrangements for citizens abroad, pilots, long-distance truck drivers, and poor persons living in remote areas without public transport ... On the one hand we have a determinate class of persons, subject to relatively easy and inexpensive administrative control, who have consistently asserted their claims, who are physically prevented from exercising their voting rights whatever their wishes are ... On the other hand there are speculative notional claims by a variety of other persons who could point to difficulty rather than impossibility of enjoyment of rights, and who have not come timeously to court to assert their claims. We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.¹⁷⁰

¹⁶⁰ ACLU surveys on file with author for Finland, Italy, Portugal and the Netherlands. See also Section II of the Constitution Act of Finland providing that “[it] shall be the task of public authorities to promote opportunities of the individual to participate in activities of society and to influence decision making affecting him.” Fin. Const. [Constitution Act, 2000] §11 [17 July 1995/969]. In practice, mobile polling stations are brought by local governments to their prisons.

¹⁶¹ Survey on file with ACLU.

¹⁶² Surveys on file with ACLU.

¹⁶³ Romanian Electoral Law, Art. 87 (2), Art. 59, available at (http://www2.essex.ac.uk/electjp/ro_el92.htm). Survey on file with ACLU.

¹⁶⁴ Surveys conducted by ACLU. French prisoners must make a request, by mail, through a third party who will proxy vote for the prisoner. The prisoner has to register at the polling station in the prison district, and may do so long as he or she has spent six months in that district. Once the proxy vote is ready, a police officer comes to the prison to pick it up and take it to the polling station. Belgium specifies who may serve as a proxy, the time in which the request must be made, and how this works if the proxy and prisoner are registered in different districts. See Code Electoral, Art. 147bis.

¹⁶⁵ Survey conducted by ACLU.

¹⁶⁶ Special Voting Rules in Part 11, Division 5 of the Elections Canada Act 2000 c 9 (as amended). Department of Justice Canada at <http://laws.justice.gc.ca/en/E-2.01/14787.html#rid-14936>

¹⁶⁷ For electoral purposes, the incarcerated elector’s address of ordinary residence is not the institution in which he or she is serving a sentence but rather one of the following places for which the elector knows the civic and mailing addresses: 1) his or her residence before being incarcerated, 2) the residence of the spouse, the common-law partner, a relative or dependent, a relative of his or her spouse or common-law partner, or the person with whom the elector would live if not incarcerated; 3) if these addresses are not known or do not apply, the place where the elector was arrested; or 4) the last court where the elector was convicted and sentenced. *Id.* at 251(2).

¹⁶⁸ *Voting by Incarcerated Electors*, available at <http://www.elections.ca/content.asp?section=gen&document=ec90545&dir=bkg&lang=e&textonly=false>

¹⁶⁹ *Prisoners eligible to vote in election*, available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051229/elxn_prisoners_060102?s_name=&no_ads=

¹⁷⁰ *August*, ¶ 30.

The court would not entertain the commission's seeming ignorance of the well-established law relating to the term ordinarily resident,¹⁷¹ stating that for the purposes of the act the term was to be interpreted in a way that "enhances enfranchisement and underlines the positive responsibilities of the commission in facilitating registration and voting."¹⁷² The court observed that prisoners "are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted."¹⁷³ The commission, said the court, "should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and that the objective of achieving an easily managed poll on Election Day is accomplished."¹⁷⁴

As Table 4 above illustrates, that prediction appears to have been correct, since thousands of South African prisoners now vote without incident.

AUSTRALIA

In Australia, the right to vote is withdrawn from prisoners who are serving a sentence of more than three years.¹⁷⁵ The Australian Electoral Commission uses mobile polling and mail to reach inmates, and travels by air, land and sea to visit all communities necessary in the 12 days before and including election day. In the 2004 federal election, 17 mobile polling teams took portable polling places to electors in 21 prisons and remand centers who were not able to get to a polling place.¹⁷⁶ The majority of eligible electors serving a prison sentence voted by mail.¹⁷⁷

NEW ZEALAND

People sentenced to prison terms of more than 3 years and those serving preventive detention are not entitled to enroll while in prison.¹⁷⁸ Prisoner voting in New Zealand is implemented through "returning officers," who work with prison management and visit prisons in the advance voting period, 17 days before election day. Prisoners can also apply to vote by mail.¹⁷⁹

THE UNITED STATES: MAINE, VERMONT AND PUERTO RICO

In the three U.S. jurisdictions that do allow prison voting – Maine, Vermont and the territory of Puerto Rico – prisoners vote by absentee ballot, and the votes are counted where the prisoners last resided. Absentee ballots in Maine are most commonly obtained through a caseworker or from the prison library. In Vermont, inmates request absentee ballots from their hometown clerks. In Puerto Rico, though inmates vote in person in prison, these votes are classified as "absentee votes." The State Elections Commission visits the prisons to register inmates six months before an election. For most elections, inmates vote two or three days before the general population. Inmates get a ballot, enter a 'ballot area,' vote, and cast the ballot. Elections personnel then take the boxes to elections headquarters. A small number of inmates serving time at federal institutions under a special arrangement vote absentee in the more traditional manner, by mail.¹⁸⁰ Turnout is high: in 1996, 71.1 percent of Puerto Rican inmates voted in

the general elections, while 56.8 percent cast ballots in 2000, and 82 percent did so in 2004.

V. INTERNATIONAL LAW SUPPORT FOR PRISONERS' VOTING RIGHTS

Introduction

From aspirational to binding documents, a host of international rights instruments give special importance and special protection to the right to vote. Many of these documents state, suggest, or imply that their standards and protections extend to *everyone* – including prisoners. U.S. courts and legislatures generally do not defer to other nations' policies in designing our own, and Americans are justly proud of our long history of domestic rights protections. But American citizens and lawmakers must consider treaties and other international such accords – because of our formal legal obligations under these instruments, and because it is profoundly in the United States' national interest to honor and strengthen international legal regimes that reinforce the values of democracy and the rule of law. Indeed, American policymakers often point to these regimes to help achieve their objectives, sometimes in high-profile situations. Recently, for example, Secretary of State Condoleezza Rice reminded Afghan judges deciding the fate of a convert to Christianity that Afghanistan "has a Constitution to which one can appeal about the Universal Declaration of Human Rights."¹⁸¹ And while

¹⁷¹ *Id.* ¶ 26.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ The Commonwealth, Queensland, Tasmania, Australian Capital Territory, and Northern Territory have this law. Prisoners serving 12 months or more are disqualified in New South Wales and Western Australia. Those serving five years or more are disqualified in Victoria. South Australia allows prisoners to vote. Melinda Ridley Smith & Ronnit Redman, PRISONERS AS CITIZENS: HUMAN RIGHTS IN AUSTRALIAN PRISONS 286 [David Brown & Meredith Willie eds., 2002].

¹⁷⁶ Behind the Scenes: Election 2004, available at <http://results.aec.gov.au/12246/polling.htm>.

¹⁷⁷ *Id.*

¹⁷⁸ Survey on file with ACLU.

¹⁷⁹ Survey on file with ACLU.

¹⁸⁰ Surveys on file with ACLU [all completed by the states' respective Departments of Corrections]. In Vermont, while inmates generally mail their ballots, some candidates for public office provide for delivery of ballots. Candidates also campaign in Vermont jails. In Maine, Education Department representatives also bring material to prisons concerning voting rights and procedures. A state absentee voting guide is posted in the dorms as well as a notice to contact caseworkers for further information. Caseworkers handle registrations and notarize ballots. Candidates even hold "registration forums" on visiting days as elections approach. In Maine and Vermont, the prison administration posts notices of opportunities for registration in living areas, in their community high-school classes and engages offenders in civic education.

¹⁸¹ Sultan M. Mundai and Christine Hauser, *Afghan Convert to Christianity is Released*, *Officials Say*, *N.Y. TIMES*, (Mar. 28, 2006), p.3.

TABLE 5: International Instruments Protecting Voting Rights

Document	US Rela-	Text of Document
International Covenant on Civil and Political Rights (1966/1992)*	Signatory	<p>Article 25:</p> <p>Every citizen shall have the right and opportunity, without and of the distinction 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:</p> <p>(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;</p> <p>(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 ...</p> <p>Comment: The grounds for [] deprivation of [the right to vote] should be objective and reasonable. If conviction for an offense is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offense and sentence.</p> <p>Article 10:</p> <p>1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person...</p> <p>2. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.</p>
International Covenant on the Elimination of All Forms of Racial Discrimination (1965/1994)	Signatory	<p>Article 5 (C):</p> <p>1. In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:</p> <p>(C) Political rights, in particular the right to participate in election - to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;...</p> <p>Comment: “[We are] concerned about the political disenfranchisement of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices based on the Commission of more than a certain number of criminal offences, and also sometimes by preventing them from voting even after the completion of their sentences.”</p>
Universal Declaration of Human Rights (1948)	Party to Drafting Committee	<p>Article 21(1) and (3):</p> <p>(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...</p> <p>(3) 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.</p>
Venice Commission Code of Good Practice In Electoral Matters (2002)	Observer	<p>Universal Suffrage Section I(1)(a)(dd):</p> <p>I. ... provision may be made for depriving individuals of their right to vote and to be elected, but only subject o the following cumulative conditions;</p> <p>II. It must be provided for by law;</p> <p>III. The proportionality principle must be observed; conditions for disenfranchising individuals of the right to stand for election may be less strict</p>

Document	US Relationship	Text of Document
CONTINUED...		<p>than for disenfranchising them;</p> <p>IV. The deprivation must be based on mental incapacity or a criminal conviction for a serious offense;</p> <p>V. Furthermore, the withdrawal of political rights ... may only be imposed by express decision of a court of law.</p>
European Convention of Human Rights (1950)		<p>Article 3, Protocol 1:</p> <p>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 their legislature.</p>
Standard Minimum Rules for the Treatment of Prisoners (1955)		<p>Standard Minimum Rule 61:</p> <p>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, their rights relating to civil interests, social security rights and other social benefits of prisons.</p>
Basic Principles for the Treatment of Prisoners (1990)		<p>Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the state concerned is a party, the ... International Covenant on Civil and Political Rights ... as well as such other rights as are set out in other United Nations covenants.</p> <p>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.</p>
European Committee on Crimes Problems - Recommendations	Observer	<p>Recommendation No. R (87)(3):</p> <p>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.</p> <p>Recommendation NO. R(2003)(23) (a general objective to prison administrations of member states on the management of long-term prisoners):</p> <p>2. ...to ensure that prisons are safe and secure places for these prisoners ... to counteract the damaging effect 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.</p> <p>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).</p> <p>4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalization principle).</p> <p>5. Prisoners should be given the opportunity to exercise personal responsibility in daily prison life (responsibility principle).</p>

he did not name a specific document, President Bush said that the case should be decided based on what he called “universal values.”¹⁸²

A study of eight treaties and other documents relevant to voting rights and criminal justice finds an emerging international consensus that automatic, blanket disfranchisement policies – of the kind found in 48 of our 50 states – do indeed violate at least one, and may run afoul of several, international accords. Moreover, one United Nations body has specifically criticized U.S. disfranchisement policy. As we show, the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination, as amplified by the comments of the treaty bodies that monitor compliance with these covenants, are critical of blanket voting bans. The European Court of Human Rights and the Venice Commission have opined that prison voting bans should be proportional, with disfranchisement limited to certain serious offenses only, and be explicitly imposed by sentencing courts. We also conclude that mass disfranchisement contravenes the spirit, if not the letter, of foundational agreements such as the Universal Declaration of Human Rights.

Applicable Treaties Signed by the United States

The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) are binding treaties that the United States has ratified, accepting their provisions as binding on both federal and state governments, and obligating it to comply with their terms.¹⁸³ Neverthe-

less, disfranchisement policies in 48 U.S. states may well violate relevant provisions in both agreements.

The International Covenant on Civil and Political Rights (ICCPR) (1966/1992)¹⁸⁴

The ICCPR, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights together form the international community’s bill of rights. Ratified by the United States in 1992, the ICCPR provides 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...

Article 10, on criminal justice, specifies that:

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.

In 1996, in its capacity as the treaty body mandated to oversee ICCPR implementation by signatory member states,¹⁸⁵ the Human Rights Committee (HRC) issued a General Comment¹⁸⁶ stating, *inter alia*:

In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. *The grounds for such deprivation should 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.* Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.¹⁸⁷

According to this General Comment, the ICCPR requires any suspension of the right to vote to be based on “objective and reasonable” grounds, and proportionate to the offense and the sentence. That language may require an *individualized* assessment - a procedure that does not take place in any of the 48 U.S. states with blanket disfranchisement policies, but does occur in those European nations employing limited disfranchisement. It certainly suggests that a disqualification applying to the “felony” category is an inadequate substitute, since that class includes a great many different offenses and sentences.¹⁸⁸

In its consideration of reports from other countries, including the United Kingdom, the HRC has consistently tried to limit the reach of criminal disfranchisement laws, concluding that it cannot find justifi-

¹⁸² Richard Sisk, *Bush Pushes to Save Christian*, N.Y. DAILY NEWS, (Mar. 23, 2006).

¹⁸³ The United States’ understandings to the ICCPR include Understanding (5) that it “understands that this Covenant shall be implemented by the Federal Government to the extent it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by state and local governments; to the extent state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.”

¹⁸⁴ The International Convention on Civil and Political Rights opened for signature and ratification in 1966, available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm.

¹⁸⁵ *Id.* at Art. 40(4) (mandate of the Human Rights Committee established by this article).

¹⁸⁶ The Human Rights Committee publishes its interpretation of the content of human rights norms in the form of General Comments.

¹⁸⁷ General Comment (No.25 [57]) 27 August 1996, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument). (emphasis added).

¹⁸⁸ Furthermore, the *Basic Principles for the Treatment of Prisoners* state 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*, [hereinafter *Basic Principles*] 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.unhcr.ch/html/menu3/b/h_comp35.htm.

cation for a general ban on voting by all serving prisoners in modern times. In its post-review assessment of the U.K.'s 1999 report, issued in 2001 (prior to *Hirst*), 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.¹⁸⁹

For its part, in its most recent report on compliance with the ICCPR, submitted to the Human Rights Committee last fall, the United States noted changes American states have made in their criminal disfranchisement policies.¹⁹⁰ The U.S. report begins by boldly stating: "the right to vote is the principal mechanism for participating in the political system."¹⁹¹ The United States notes the progress several states have made over the last decade in lowering barriers to voting for ex-felons, and points to the National Commission on Federal Election Reform chaired by former presidents Jimmy Carter and Gerald Ford, which recommended that states restore voting rights to citizens upon full completion of sen-

tence (which would only ameliorate the situation in the three most regressive, permanent disfranchisement, states).¹⁹² The United States touted as progress modest legislative change in three states that had heretofore permanently barred people with felony convictions from voting. The government also referred to nine other states that had "lowered barriers to voting," but all of them continue to have blanket bans on all serving prisoners; seven also bar all parolees and probationers.¹⁹³ No mention was made of any efforts by the federal government to secure voting rights for people with felony convictions in federal elections; indeed, there have been no such efforts. Notably, neither this legislative "progress" nor the Ford-Carter commission's recommendation would bring American states significantly closer to the clear democratic norm elsewhere: either no disfranchisement at all, or disqualification only of selected incarcerated people.¹⁹⁴

International Covenant on the Elimination of All Forms of Race Discrimination (ICERD) (1965/1994)¹⁹⁵

The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1994. Ratified by 169 countries, ICERD is the oldest and most widely ratified treaty. In Article 1, the ICERD provides:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or 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 in the political, economic, social, cultural or any other field of public life. (Emphasis added.)

In Article 5(C):

In compliance with the fundamental obligations laid down in article 2 of this Convention,¹⁹⁶ *States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, 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, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; ... (Emphases added.)*

Thus, Articles 1 and 5 of ICERD prohibit racial distinctions having the purpose or effect of nullifying or impairing the equal exercise of various human and political rights, including the right to vote. Under Article 5, the parties "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone" to vote on a non-discriminatory basis. This Convention's United Nations monitoring body, the Committee on the Elimination of Racial Discrimination, issued *Concluding Observations* to the United States in 2001 specifically noting its concern about the breadth and duration of felony dis-

¹⁸⁹ *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*. Jun. 12, 2001, CCPR/CO/73/UK;CCPR/CO/73/UKOT, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2153823041947eaeac1256afb00323ee7?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2153823041947eaeac1256afb00323ee7?Opendocument).

¹⁹⁰ *Second and Third Periodic Report to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, submitted Oct. 21, 2005, available at <http://www.state.gov/g/drl/rls/55504.htm>.

¹⁹¹ *Id.* ¶ 397.

¹⁹² *Id.* ¶¶ 411-12.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ The International Covenant on the Elimination of All Forms of Racial Discrimination, which was opened for signature and ratification in 1966, available at http://www.unhcr.ch/html/menu3/b/d_icerd.htm

[hereinafter ICERD]. The U.S. has not made this Convention self-executing, however, and thus until Congress enacts legislation rendering it domestically enforceable, ICERD has no legal effect here.

¹⁹⁶ 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.* at Art. 2, ¶ 2.

franchisement laws. The committee noted that it was:

concerned about the political disenfranchisement of a large segment of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices based on the commission of more than a certain number of criminal offences, and also sometimes by preventing them from voting even after the completion of their sentences.¹⁹⁷

The committee recommended that the United States “take all appropriate measures, including special measures according to article 2, paragraph 2, of the Convention, to ensure the right of everyone, without discrimination as to race, color, or national or ethnic origin, to the enjoyment of the rights contained in article 5 of the Convention.”¹⁹⁸

To the extent that U.S. states’ legislative disqualifications and administrative restrictions continue to disproportionately affect minorities, they are discriminatory and breach the ICERD. In fact, two recent empirical studies have demonstrated just such effects on the political power of minority communities in Atlanta and Rhode Island.¹⁹⁹

As numerous studies have demonstrated, minority participation in U.S. elections is disproportionately limited by our disfran-

chisement policies.²⁰⁰ While the U.S. Supreme Court has struck down those state policies motivated by explicit racist bias,²⁰¹ that decision is generally viewed to be quite limited in its reach, and federal courts have not yet been persuaded that the Voting Rights Act compels the abolition of disfranchisement.²⁰²

Of course, state and national legislatures are perfectly free to respond more assertively to disfranchisement’s racial inequities than courts have. And particularly given that disfranchisement law sits at the intersection of two systems with clear histories of discrimination in the United States – elections and criminal justice – the racial impacts of disfranchisement law ought to be of greater concern.

There is a deep critical literature on American disfranchisement focusing on its racial dimension, and it is not our purpose here to document the racial history and current impacts of the policy. Instead, we show that in Australia, Canada, New Zealand, and South Africa – countries with large, heterogeneous, disproportionately minority prison populations, race has been an explicit part of the disfranchisement debate – and those countries have decided on much more inclusive policies than the U.S., sometimes because of disfranchisement’s racial impact. And some have evaluated whether the disproportionate effect of

disfranchisement on the minority population violates international law, including the ICERD.

While indigenous persons constitute only 2.4 percent of the Australian population, they are 16 times more likely to be in prison than non-indigenous persons. They constituted 20 percent of all Australian prisoners in 2003.²⁰³ Legislators consider this disparity in briefing papers discussing the issue in the context of Australia’s international treaty obligations under the ICERD. 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.²⁰⁴

This brief also cites provisions of the International Covenant on Civil and Political Rights – which is not formally part of Australian domestic law – stating

¹⁹⁷ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, August 14, 2001, ¶ 397, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/001961f8a1ae7b29c1256aa9002ae228?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/001961f8a1ae7b29c1256aa9002ae228?Opendocument).

¹⁹⁸ *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*, 59 U.S. 306, at 342–43 (2003). Justice Ginsburg went on to cite Art. 1(4) similarly providing for temporally limited affirmative action.

¹⁹⁹ Marc Mauer and Ryan S. King, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia*, p. 2, The Sentencing Project, September 2004, available at <http://www.sentencingproject.org/pdfs/providence-report.pdf>. In 2004, The Sentencing Project conducted a study focused on Atlanta, Ga., and found that black males in Atlanta are 11 times more likely than non-black males to be disfranchised. Overall, half the registration gap between black males and non-black males in Georgia is a function of disfranchisement; in Atlanta, over two-thirds of the gap is accounted for by this practice. Marshall Clement & Nina Keough, *Political Punishment: The Consequences of Felon Disenfranchisement for Rhode Island Communities*, p.1, September 2004, available at <http://www.sentencingproject.org/pdfs/providence-report.pdf> This study, conducted by the Rhode Island Family Life Center in 2004, found that Rhode Island’s felony disfranchisement law disproportionately impacts people of color: Blacks are 10 times more likely than whites to be disfranchised, and Latinos four times more likely. That study also found that felony disfranchisement dilutes the political power of urban communities and communities of color, meaning that neighbors of disfranchised residents are essentially subjected to some of the same punishments as felons themselves.

²⁰⁰ See, e.g., The Sentencing Project, *Losing the Vote*, available at <http://www.hrw.org/reports98/vote/>

²⁰¹ See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985).

²⁰² See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004), for a critical review of the law and the literature on the first point. See also *Farrakhan v. Locke*, 338 F.3d 1009 (9th Cir. 2003), where the 9th Circuit remanded the VRA challenge to federal district court, and *Hayden v. Pataki*, 04-3886 (2d.Cir. May 4, 2006) where the Court held that the VRA did not extend to felon disfranchisement provisions.

²⁰³ Jerome Davidson, *Inside Outcasts: Prisoners and the Right to Vote in Australia*, p. 2, Department of Parliamentary Services, Current Issues Brief No. 12, 2003-04, (May 24, 2004). Australia has a general population of 20,438,802, a prison population of 23,362, and a prison population per 100,000 of 117.

²⁰⁴ *Id.* at 10.

“it is at least arguable that international influences play 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.”²⁰⁵

In *Sauvé No. 2*, the Canadian Supreme Court discussed the effect of imprisonment on the minority population in Canada, stating 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 system.” All Aboriginals taken together comprise 3.3 percent of the Canadian population; First Nations,²⁰⁶ the largest subgroup, make up about 2 percent of Canada’s population, but as of 2000 they accounted for 18 percent of the federal prison population.²⁰⁷

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. These initiatives, some of which have served as a model for other jurisdictions, include: information and education programs; an Aboriginal Community Relations Officer program; an Aboriginal Elder and

Youth program, and a Placement of Polling Stations program.²⁰⁸

People sentenced to prison terms of more than three years and those serving preventive detention are not entitled to enroll while in prison.²⁰⁹ New Zealand’s Maori offenders comprise over 50 percent of the prison population. Although this project did not deal explicitly with disfranchisement law, recognizing the critical nature of this problem, the official Electoral Commission in association with Nga Pae o te Maramatanga (National Institute of Research for Maori Development and Advancement) and the Faculty of Arts at the University of Auckland organized a workshop to remedy falling electoral participation by the Maori. “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 said in its invitation to participants. “The Electoral Commission wants to help raise Maori participation in electoral matters. It wants particularly to influence those whose policies and programs can encourage greater Maori electoral participation.”²¹⁰

South Africa has an estimated population of 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.²¹¹ In May 2001, its prison population numbered 170,044. Africans comprised 77 percent of prisoners, of the rest, 20 percent were colored (mixed ancestry), 2 percent Asian, and 1 percent white.²¹² In the *NICRO* decision, dis-

cussed above, the court observed:

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.²¹³

“[R]egardless of race,” the same court ruled in the subsequent *August* case, the vote “of each and every citizen is a badge of dignity and personhood.”²¹⁴ The South African Constitution emphatically provides in Section 39: “When interpreting the Bill of Rights, a court ... must consider international law; and may consider foreign law.”

U.N. Declarations, Principles, Rules and Recommendations for Member States

Besides the core treaties above, several other universal human rights instruments—declarations, principles, guidelines, rules and recommendations – bear on disfranchisement law. While these documents may lack binding legal effect, they exert an undeniable moral suasion and provide practical guidance to states in their conduct.

The Universal Declaration of Human Rights (1948)²¹⁵

That the right to vote is enshrined in the Universal Declaration of Human Rights (UDHR), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, makes it, as the

²⁰⁵ *Id.* at 9 (internal citation omitted).

²⁰⁶ This term refers to peoples indigenous to North America currently living in Canada. It does not include all Aboriginals, which would require also counting the Inuits and the Metis. See <http://www.afn.ca/article.asp?id=3>.

²⁰⁷ Shelley Trevelyan & Christopher J. Rastin, *A Profile of Visible Minority Offenders in the Federal Canadian Correctional System*, available at http://www.csc-scc.gc.ca/text/rsrch/reports/r144/r144_e.shtml.

²⁰⁸ Elections Canada, <http://www.elections.ca/content.asp?section=loi&document=abor&lang=e&textonly=false>.

²⁰⁹ Survey on file with ACLU.

²¹⁰ Elections New Zealand, available at http://www.elections.org.nz/uploads/maori_electoral_research_hui_26_nov_04.doc, and <http://www.elections.org.nz/maori-research-rfp-jan06.html>.

²¹¹ Mid-year Population Estimates, South Africa, 2005, p. 1, Statistics South Africa, available at <http://www.statssa.gov.za/Publications/P0302/P03022005.pdf>.

²¹² Amanda Dissel & Jody Kollapen, *Racism and Discrimination in the South African Penal System*, Centre for the Study of Violence and Reconciliation, (2002), available at <http://www.wits.ac.za/csvp/papers/papad;k.htm#note1>.

²¹³ *Nicro*, ¶ 13.

²¹⁴ *August*, ¶ 17. 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. Prison Reform Trust/UNLOCK “Barred From Voting”, *supra* note 14.

²¹⁵ Universal Declaration on Human Rights, available at <http://www.un.org/Overview/rights.html>.

preamble states, "...[one of] the equal and inalienable rights of all members of the human family..."

Article 21(1) and (3) of the UDHR further state that:

(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.²¹⁶

Although conceived as a statement of objectives to be pursued by governments, and therefore not part of binding international law, the UDHR has served as a vibrant moral standard for the world community, providing international norms and standards to which the world community is expected to adhere.²¹⁷ Led by Eleanor Roosevelt, the United States played a key role in the adoption of the UDHR, which for the first time bound all governments to a common standard of conduct.²¹⁸

Rules for the Treatment of Prisoners²¹⁹ (1955)

The United Nations has also periodically issued "Standard Minimum Rules," or

SMRs, regarding criminal justice policies. Standard Minimum Rules are not intended to describe in detail a model system of penal institutions, but rather to set out generally accepted good principles and practices in the treatment of prisoners and the management of penal institutions.²²⁰ At least three SMRs describe the appropriate restrictions on the rights of prisoners to participate in civil society and political life. One, 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.

More recently, the United Nations General Assembly issued its Basic Rules for the Treatment of Prisoners. Promulgated in 1990, these principles state that except for those limitations which are demonstrably necessitated by imprisonment, the human rights and fundamental freedoms protected in the ICCPR are to be retained by all prisoners.²²¹ Further,

"favorable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions."²²² Since disfranchising inmates emphasizes their exclusion from society, is not demonstrably necessary to imprisonment, and could certainly thwart reintegration, it may run afoul of these rules and principles. Clearly, American policies disqualifying from the franchise people who are not even incarcerated openly flouts them.

Council of Europe's Positions on the Issue (1949)²²³

"The Council of Europe believes that human rights are universal, indivisible and fundamental to all democratic societies."²²⁴ Founded in 1949, the Council of Europe is Europe's oldest political organization. The Council was set up to defend human rights, parliamentary democracy and the rule of law, develop continent-wide agreements to standardize member countries' social and legal practices, and promote awareness of a European identity based on shared values and cutting across different cultures.²²⁵ It groups together 46 countries, including 21 Central and Eastern European states. The United States, the Holy See, and four other nations – Canada, Israel, Japan and Mexico – have been granted observer status.²²⁶ The Council is distinct from the 25-nation European Union, but no country has ever joined the Union without first

²¹⁶ Since the Declaration is not technically legally binding, there are no signatories to the Declaration. Instead, the Declaration was ratified through a proclamation by the General Assembly on Dec. 10, 1948 with a count of 48 votes to none with only 8 abstentions.

²¹⁷ The Declaration is based on the "inherent dignity" of all people and affirms the equal rights of all men and women, in addition to their right to freedom, and gives human rights precedence over the power of the state. While states are permitted to regulate rights, they are prohibited from violating them.

²¹⁸ The United States is also a party to the American Declaration of Human Rights and Duties of Man of 1948, which in Article 20 provides: "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." American Declaration of the Rights and Duties of Man, OEA/ser. L./V/II.23, doc. 21 rev.6 (1948), available at <http://www.cidh.org/Basicos/basic2.htm>.

²¹⁹ Standard Minimum Rules for the Treatment of Prisoner, [hereinafter SMR] 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 www.unhcr.ch/html/menu3/blh_comp34.htm.

²²⁰ SMRs were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

²²¹ Basic Principles, *supra* note 188, at Principle 5.

²²² Basic Principles, *supra* note 188, at Principle 10.

²²³ About the Council of Europe, at http://www.coe.int/T/E/Com/about_coe/

²²⁴ The Council of Europe and Human Rights, at www.coe.int/T/E/Com/About_Coe/Brochures/human_rights.asp.

²²⁵ The Resolution granting the United States observer status declares that "the U.S. share[s] the ideals and values of the Council of Europe." Resolution 95[37] "On Observer Status for the United States of America with the Council Of Europe," adopted on Dec. 7, 1995 by the Committee of Ministers, at the 551st meeting of the Ministers' Deputies. available at http://www.coe.int/T/E/Com/About_Coe/Member_states/e_USA.asp.

²²⁶ See *supra* note 224

belonging to the Council.

European Convention on Human Rights (1950)

The European Convention on Human Rights was drafted within the Council of Europe, and it is binding upon the 46 Council of Europe countries. In Article 3 of Protocol No. 1, the Convention states:

Right to Free Elections

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.²²⁷

Set up in 1950 to hear citizens' complaints under the European Convention of Human Rights, the European Court of Human Rights (ECHR) is the court of last resort on the interpretation of that Convention for the 46 Council of Europe signatory countries; its decisions are considered binding upon those nations. The court's analyses of states' disfranchisement practices focus on Article 3 of Protocol 1 of the Convention, quoted above.

Under Article 46(2) of the Convention, the Committee of Ministers supervises the execution of the final judgments of the ECHR. The Court transmits judgments to the committee, who must ensure member states' compliance. The committee invites member states to report on compliance measures, and if satisfied with them, issues resolutions to that effect. The committee may also bring member states before the court for non-compliance. Though ECHR decisions bind only the nations before the court, the international impact of a regional court as mature as the ECHR is considerable.

Relevant ECHR disfranchisement cases under Article 3, Protocol 1 begin with *Labita I*.²²⁸ This case concerned an Italian law under which persons on whom preventive measures were imposed by a court order or administrative decision were disfranchised; their names were removed from the electoral register. Even though he had been acquitted of the charge of being a member of a Mafia-type organization, the applicant was disfranchised. The government argued that the measures were legitimate because the person represented a danger to society, since he was suspected of belonging to the Mafia. The court recognized that temporary suspensions of the voting rights of possible Mafiosi pursued a legitimate aim. But, because the applicant had been acquitted, the court unanimously found the measures in question were not proportionate, and, therefore, a violation of Article 3 Protocol 1.

In another important decision, *Hirst/GB* (No. 2) 30.6.2004, Rep 2004 (*Hirst No. 1*) – discussed in detail in Section III, above – the applicant was a serving prisoner who, under British legislation, was barred from voting in parliamentary or local elections. While the court acknowledged the “margin of appreciation” it must accord national legislatures, it reached the unanimous conclusion that the absolute bar on voting for all serving prisoners was unacceptable. As explained above, following a United Kingdom appeal, the Grand Chamber of the ECHR affirmed the *Hirst* decision. In *Hirst No. 2*, the ECHR held that universal suffrage “has become the basic principle,” and found the United Kingdom’s “general, automatic and indiscriminate restriction on a vitally important convention right” outside “any acceptable margin of apprecia-

tion” and “incompatible with Article 3, Protocol 1.”²²⁹

European Committee on Crime Problems: Recommendations

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 – set up the European Committee on Crime Problems. The Committee was entrusted with responsibility for overseeing and coordinating the council’s activities in the field of crime prevention and crime control. This body’s recommendations urge states to foster prisoners’ connections with society, in order to increase inmates’ awareness of their stake in society – recommendations that support the retention of voting rights by prisoners.

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.²³⁰

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

²²⁷ Article 14 of the Convention may also be relevant. It states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The European Convention on Human Rights, available at <http://www.hri.org/docs/ECHR50.html>.

²²⁸ *Labita I*, 6.4.2000, Rep 2000. Although *Patrick Holland v. Ireland*, an Irish case preceding those discussed below is also relevant, the court did not apply there the test it developed in *Mathieu-Mohin and Clerfayt v. Belgium*, March 2, 1987 which it now uses to assess disfranchisement measures’ compliance with the Convention. This test is essentially an examination of the legitimacy of the government’s aim in enacting the exclusionary measure, and of the proportionality of the restriction. See *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A, No. 113, p. 23, § 52).

²²⁹ *Hirst No. 2*, ¶ 24.

²³⁰ 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>.

resettled and to lead a law-abiding life following their release.²³¹

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).²³¹

The Venice Commission²³³

Established in 1990, the European Commission for Democracy through Law – known as the Venice Commission – is the Council of Europe’s advisory body on the development and functioning of democratic institutions and constitutional laws.²³⁴ The commission is mandated to “uphold the three underlying principles of Europe’s constitutional heritage: democracy, human rights and the rule of law – the cornerstones of the Council of Europe.”²³⁵ The United States is one of 10 observer states to the Venice Commission.²³⁶

The commission’s *Code of Good Practice in*

Electoral Matters (2002), based on the underlying principles of Europe’s electoral heritage – universal, equal, free, secret and direct suffrage – outline the circumstances in which deprivation of the right to vote is permissible:

provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions; It must be provided for by law; ... The *proportionality* principle must be observed; conditions for disenfranchising individuals of the right to stand for election may be less strict than for disenfranchising them; The deprivation must be based on mental incapacity or a criminal *conviction for a serious offense*; ... Furthermore, *the withdrawal of political rights ... may only be imposed by express decision of a court of law.*²³⁷

Accordingly, the *Code of Good Practice* limits denial of the vote to serious offenses, where the term of the deprivation is proportional to the offense and where the prohibition is openly and expressly imposed by sentencing courts.²³⁸ As we have seen elsewhere, this insistence on proportionality, serious offenses, and the express imposition by a court of law seem a direct challenge to disqualification based on the general category of “felony,” common in American disenfranchisement law.

At the request of the Council’s Parliamentary Assembly, the principal statutory organ of the Council of Europe, the Venice Commission published its Report

on the Abolition of Restrictions on the Right to Vote in General Elections in 2005.²³⁹ The report, both an aggregation and an evaluation of the European Court of Human Rights’ approach concerning restrictions on the right to vote, concludes:

The 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. 1.²⁴⁰

It is this “very essence” language that has guided the relevant ECHR decisions, most importantly *Hirst No. 2*.

Summary

International legal instruments have specifically identified prisoner-voting rights as an important issue of democracy and criminal justice subject to the scrutiny of international bodies. The U.S.-ratified ICCPR, in Article 25 (as amplified by General Comment 25), provides that where conviction is the basis for suspending the right to vote, the period of suspension should be proportionate to the offense and sentence. None of the 48 U.S. states that disenfranchise varying categories of offenders engages in a particularized proportionality analysis. ICCPR Article 10 also requires that penitentiary systems exist to treat prisoners, with the essential aim of reformation and social rehabilitation. *Basic Principle 5*, though non-binding, indicates further that unless necessitated by imprisonment, beyond the deprivation of liberty there should be *no* restriction on any funda-

²³¹ 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.

²³² *Id.*

²³³ Code of Good Practice in Electoral Matters, available at [http://www.Venice.coe.int/docs/2002/cdl-el\(2002\)005-e.asp](http://www.Venice.coe.int/docs/2002/cdl-el(2002)005-e.asp), adopted at the Commission’s 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on November 6, 2002. Adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

²³⁴ The Venice Commission, available at http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E

²³⁵ *Id.* Since 1989, its main job has become acting as a political anchor and human rights watchdog for Europe’s post-communist democracies, assisting the countries of Central and Eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform, providing know-how in areas such as human rights, local democracy, education, culture and the environment.

²³⁶ List of observer states available at http://www.venice.coe.int/site/dynamics/N_members_ef.asp?L=E

²³⁷ Code of Good Practice in Electoral Matters, available at [http://www.Venice.coe.int/docs/2002/cdl-el\(2002\)005-e.asp](http://www.Venice.coe.int/docs/2002/cdl-el(2002)005-e.asp), Part I, 1, dd (Emphases added).

²³⁸ *Id.*

²³⁹ Report on the Abolition of Restrictions on the Right to Vote in General Elections, CDL-AD(2005)012, endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004) available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)012-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)012-e.asp).

²⁴⁰ *Id.* ¶ 82.

mental ICCPR rights. And *Basic Principle 10* requires that favorable conditions be created for the reintegration of the ex-prisoner into society under the best possible conditions. Article 10 and the *Basic Principles* suggest that the retention of voting rights for convicted persons would be rehabilitative and aid in reintegration. Similarly, the Standard Minimum Rules, while non-binding, suggest that states focus on minimizing the differences between prison and the external world, and treat prisoners so that once back in society, they reintegrate without difficulty. The Human Rights Committee, in Concluding Observations directed at the United Kingdom, also indicated that blanket bans do not serve to rehabilitate and amount to “additional punishment.”

The ICERD, ratified by the United States, makes it clear that legislative disqualifications and administrative restrictions disproportionately affecting minorities are discriminatory and may breach the ICERD. It is fast becoming clear that in many U.S. jurisdictions, it is economically disadvantaged and minority communities that are most heavily affected by these laws. The ICERD monitoring body has noted concern with the breadth and duration of U.S. states’ disfranchisement policies, particularly as they affect a large segment of the ethnic minority population.

There is also guidance from the Council of Europe, to which the United States is an observer, whose rules on the treatment of prisoners suggest that restrictions should not serve to further alienate prisoners from their communities and that any restriction on prisoners’ liberty should be “demonstrably necessary.” The Venice Commission’s *Code of Good Practice in Electoral Matters* makes clear that the right to vote may only be deprived where the deprivation is proportional,

based on criminal conviction for a serious offense, and imposed by express decision of a court of law. Applying the Convention, the European Court of Human Rights has developed in the last five years an extensive body of Article 3, Protocol 1, case law. The relevant cases appear to conclude that there is room for some limited, targeted deprivation of rights, but that any such policies must pursue a legitimate aim and also be proportionate. From *Labita* and both *Hirst* decisions, one can see the court, like the Venice Commission, accepts only targeted policies excluding prisoners from the franchise. Although specifically addressing only the United Kingdom’s voting ban, the reasoning of the case would invalidate blanket disfranchisement policies in any of the other signatory countries with similar policies. It is unlikely that the constitutional provisions and electoral laws of the Eastern European states with blanket bans on all serving prisoners will withstand scrutiny in light of *Hirst No. 2*.²⁴¹

These international understandings and treatment of the right to vote stand in sharp contrast to the blanket policies in place in 48 American states. In its 2005 report to the Human Rights Committee on its compliance with the ICCPR, the U.S. government fell far short of the standards set by the treaties and other instruments analyzed here.²⁴²

VI. CONCLUSIONS

Disfranchisement of people with criminal convictions is not the democratic norm. Many nations which share the same Western philosophical foundations as the United States – and the same interests in reducing crime and strengthening republican self-government – have opted for dramatically different policies, often

including full voting rights for inmates.

This report has emphasized three central conclusions:

- First, while European policies vary, the vast majority of western European states either insist on full voting rights for all inmates, or apply disfranchisement in a very limited way. While there are disagreements among European states in this area, those disagreements tend to stop at the prison walls, as it were. Certainly, some other democracies do bar some people with criminal convictions from voting. But their existence actually *weakens* the case for American-style restrictions, because their policies differ dramatically from those now in place in the United States. In those several western European nations where disfranchisement is policy, it is usually applied only narrowly and selectively, to a small number of crimes and criminals. It is publicly imposed, often at the sentencing judge’s discretion. And while hard numbers are difficult to come by, it appears that these policies disqualify a relative handful of voters – while American restrictions remove millions from the rolls.
- Second, those high courts in peer democracies that have examined disfranchisement policies have rejected them on philosophical, pragmatic, and, occasionally, racial grounds. And after some predictable but low-key grumbling by politicians, all levels of government, including corrections and elections staff, have complied with these rulings. Significantly, neither the security of elections nor prison safety has been threatened in any way – in any country.
- Third, some of the most significant international treaty bodies have criticized blanket disfranchisement policies – in one case, directly and specifically rejecting

²⁴¹ Thus, in Europe the issue of prisoner disfranchisement has been raised in two high level fora – the court and the Venice Commission, which influences the Council of Europe on policy matters. This means that the issue is a matter of priority at the highest levels of Europe. (*The Hirst No. 2* Court twice cited the work of the commission with approval and the concurrence noted that the issue will be made a high EU priority if it comes from the court and committee of ministers.)

²⁴² In that Report, the U.S. fails to mention that despite policy changes lowering barriers to voting by ex-felons in a few states, 48 states still bar individuals with felony records from voting in prison, 36 bar convicted felons from voting while on parole, and 31 of these states also exclude felony probationers from voting. In fact, three states prohibit all ex-felons from voting even after they have fully completed their sentences, with one of these states, Florida, alone disfranchising 600,000 ex-felons. Another 9 states permanently restrict from voting those convicted of certain, specific offenses; or, permit voting rights to be restored to all ex-felons, or to those who committed certain specific offenses, after a set waiting period. See Second and Third Periodic Report of the United States of America to the UN Comm. on Human Rights Concerning the International Covenant on Civil and Political Rights at para. 397 (Oct. 21, 2005).

U.S. policies for their “breadth and duration,” their racial effects and their coverage of such a wide range of offenses.

The unpopularity of criminal disfranchisement among the world’s advanced democracies should reverse the terms of the ongoing debate over the policy here in the United States. Disfranchisement’s defenders – including those who advocate barring people with felony convictions from voting even after they’ve left prison – give the impression that universal suffrage would threaten the very foundations of western democratic thought and destroy our criminal-justice system.

Barring these people from voting, the policy’s defenders argue, is just common sense. In fact, it is not common in any sense. American disfranchisement policies are unlike those of any other advanced democracy, and are increasingly at odds with modern understandings of international law.

These facts shift the burden of proof, as it were, to those who would continue automatic, mass disfranchisement in the United States. Pointing vaguely at political theory is no longer enough. Given how unusual the policy is, we should ask whether it is necessary to fulfill some exceptional need. What particular evil does it address?

The policy’s defenders have never satisfactorily answered these simple, practical questions. It is neither hyperbole nor subversion to say that a decent respect for the opinions of mankind requires Americans to take a hard look at whether mass disfranchisement is truly necessary to prevent crime and strengthen our democracy. In fact, it accomplishes neither objective.

