

Decision Memos to Bob Nash

PAS

PHOTOCOPY
PRESERVATION

THE WHITE HOUSE

Deputy Chief of Staff

3/6/00

To:

Bruce Reed / Beth Nolan

We need to set up
a policy process (a fast
one, I think) to get an
answer back to him.
Will you two coordinate
input from DOT and any
other relevant agencies?
I'd like to then call a
mtg to review your
preliminary thoughts
late next week, ok?

Thanks,
Maria

cc: John D Padesta

JP/Maria THE PRESIDENT HAS SEEN 3-6-00
 who has been federal but
 should we get behind it? B

copied
 Podesta
 Echo Vista

USA TODAY MONDAY, MARCH 6, 2000 3A

THE NATION

Ex-convicts hope to regain right to vote

1 million are no longer behind bars, but remain barred from the process

By Richard Willing
 USA TODAY

One of the first things Bob Frantz did after returning home from prison in 1997 was visit the Bucks County courthouse in eastern Pennsylvania to register to vote.

Or try to. "They told me I had to wait until five years after my sentence was finished," says Frantz, who served 5½ years for assault. "I thought: ... This isn't right. I did my time. Now they tell me I've got five more (years) to do before I'm out from under."

Frantz is a recruit in the national campaign to restore voting rights to convicted felons.

Led by an alliance of black

state legislators and grass-roots prison reform groups, the effort has prompted pending legislation in Maryland, Pennsylvania and Delaware.

Lawmakers in Alabama, Nevada, Florida, Virginia and Connecticut are considering offering similar bills. A proposal to restore the right to vote in federal elections is before the House Judiciary Committee.

Frantz, a 61-year-old former engineer, is among an estimated 1 million former convicts who have completed their sentences but remain barred from voting by state laws.

Some view recovering their voting rights as a matter of justice. Forfeiting a civil right, they argue, shouldn't be part of a criminal sentence.

Others, such as former Pennsylvania attorney general Ernest Preate, say regaining the vote can be a vital part of rehabilitation.

"It's a way of society saying: 'OK, you're back. Let's move on,'" says Preate, who spent most of 1996 in a federal prison after pleading guilty to a corruption-related fraud charge. Mujahid Ramadan, Nevada's former director of state drug policy, says restoring the right to vote is also an empowerment issue. About 36% of present or former convicts who are barred from voting are black, according to a 1998 study by Human Rights Watch, a liberal advocacy group.

"That's a lot (of African-Americans) that should have that stake in the system who aren't there," says Ramadan, who directs Nevada Partners, a non-profit group that finds em-

ployment for former prisoners.

Opponents say losing the right to vote is a traditional part of a felon's sentence, based on European laws that predate the nation's founding. They also say people who have committed serious crimes can't be trusted to participate in civic life.

According to the Sentencing Project, a Washington-based advocacy group that favors voting rights for ex-convicts, convicted felons in 32 states are not allowed to vote until they complete parole.

In 10 states, ex-convicts are barred from voting for life.

Voting by ex-convicts who committed federal felonies is governed by the laws of the states in which they reside.

Thus far, the movement to restore voting rights has encountered little resistance, in part because it has not attracted much attention. But some

states that once allowed felons to vote have retrenched.

The Massachusetts Legislature is expected later this year to consider amending the state constitution to eliminate inmate voting.

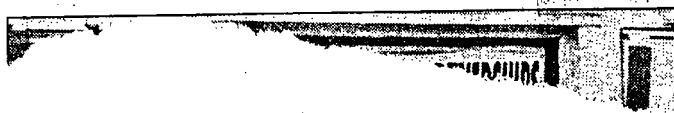
In 1998, Utah voters stripped that state's inmates of the vote by a 4-1 ratio. And in Oregon last year, legislators closed a gap in state law that permitted federal prisoners to vote in state and local elections.

Yamhill County Clerk Charles Stern says he raised the issue after six federal inmates at a Sheridan, Ore., prison registered to vote.

"There are 4,800 people in Sheridan, and 2,500 — the prisoners — don't want to be there," Stern says. "They could have a serious impact on a bond issue or a school board election. And that's a little alarming."

Will states say 'I do' to gay marriage?

California, parts
 Vermont vote



they say the marriage monster is upon us, and now everyone is thinking same-sex marriage is on the horizon," says Tracey Conaty, a spokeswoman for the "No on Knight" campaign.

Opponents of Proposition 22



1516 P Street NW, Washington DC 20005

FOR IMMEDIATE RELEASE CONTACT: Gil Kline (202) 966-4994

January 17, 2000

HISTORIC EFFORTS TO REFORM FELONY VOTING LAWS THROUGH LEGISLATION AND LITIGATION DOCUMENTED IN NEW REPORT

- **13 States Examining Policies; Majority Seeking to Expand Voting Rights for Ex-Felons**
- **Congressional Hearings Held to Permit Voting in Federal Elections**
- **New Activity Spurred by 1998 Study on Disenfranchisement Impacts**

Washington, D.C... A wave of activity to reform felony voting laws for the first time in a century is revealed in a new national report by The Sentencing Project. The study outlines legislative and legal activity in thirteen states and in Congress over the past year to address the issue of whether convicted felons and ex-felons should have the right to vote.

These state and federal efforts were spurred in large part by a 1998 study by Human Rights Watch and The Sentencing Project which found that 13 percent of African American males and nearly four million Americans are disenfranchised due to felony convictions. The new report, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, uncovers these state and federal activities:

State Legislative Activity

- **Enhanced Voting Rights Activity in Seven States**
- In Alabama, Florida, Pennsylvania, and Nevada, legislators have proposed automatic restoration of voting rights for ex-felons, and in Connecticut, for felons on probation or parole.
- The Delaware legislature is considering restoration of voting rights for certain ex-felons after a five-year post-release period.
- In Virginia, the state legislature appointed a subcommittee to examine issues of disenfranchisement of convicted felons.

Litigation

- In New Hampshire, inmates' voting rights have recently been restored after a state constitutional challenge.
- In Washington, a legal challenge has been brought to the state constitution on the grounds of violating the *Voting Rights Act*.

Federal Legislative Activity

- The Subcommittee on the Constitution of the House Judiciary Committee held a hearing in October 1999 to consider restoring federal voting rights to non-incarcerated felons.

In at least three states, efforts are underway to make voting rights more restrictive. Voters in Utah chose

to take away the right of inmates to vote and a similar measure is being considered in Massachusetts. A 1999 vote in Louisiana restricts the crimes for which first offenders can receive automatic pardons.

Marc Mauer, Assistant Director of The Sentencing Project, stated that "The expansion of the criminal justice system over the past 25 years has created an ever-larger pool of ineligible voters. Current efforts to restore the right to vote to offenders who have 'paid their debt' to society may help to bring the U.S. more in line with other democratic nations."

The report also documents the often erratic nature of the restoration process in several states. In Alabama, ex-offenders who apply for a pardon are required to provide DNA samples. In Virginia, ex-felons (both violent and non-violent offenses) are required to wait five years before applying for a pardon, but persons convicted of a drug offense must wait seven years.

The 1998 report on disenfranchisement had found that nearly three-quarters (73 percent) of the total disenfranchised population of 3.9 million were not in prison. Of these, 1.4 million were ex-offenders who had completed their sentences, one million were offenders sentenced to probation, and nearly half a million were on parole.

The new report, *Regaining the Vote*, is available from The Sentencing Project, 1516 P St. NW, Washington, D.C. 20005, (202) 628-0871, and is available on-line at www.sentencingproject.org.

-30-

[Members of the media: Marc Mauer and persons active on these issues at the state level are available for interviews. Contact Gil Kline at (202) 966-4994.]



1516 P Street NW • Washington, DC 20005

REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS

Patricia Allard

Marc Mauer

January 2000

This report was written by Patricia Allard and Marc Mauer.

The Sentencing Project is a national non-profit organization engaged in research and advocacy on criminal justice policy issues. Funding for this report was made possible by support from the Center on Crime, Communities, and Culture of the Open Society Institute, the John D. and Catherine T. MacArthur Foundation, and individual contributions.

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REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS

OVERVIEW

Since the founding of the country, most states in the U.S. have enacted laws disenfranchising convicted felons and ex-felons. Today, forty-six states and the District of Columbia have disenfranchisement laws that deprive inmates of the right to vote. In thirty-two states, convicted offenders may not vote while they are on parole, and twenty-nine of these states disenfranchise offenders on probation. In fourteen states, ex-offenders who have fully served their sentences nonetheless can be disenfranchised for life. As a result of the dramatic increases in the number of people under the control and supervision of the criminal justice system in recent years, these laws now affect a substantial number of potential voters.

In a 1998 report, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*¹ Human Rights Watch and The Sentencing Project documented the impact of felon disenfranchisement laws in the United States:

- An estimated 3.9 million Americans, or one in fifty adults, have currently or permanently lost the ability to vote because of a felony convictions.
- 1.4 millions persons disenfranchised for a felony conviction are ex-offenders who have completed their criminal sentence. Another 1.4 million of the disenfranchised are on probation or parole.
- 1.4 million African American men, or 13 percent of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average. More than one-third (36 percent) of the total disenfranchised population are black men.

HIGHLIGHTS

There has been a great deal of activity nationally over the past year on the issue of felony disenfranchisement. This report provides an update on the legal, legislative, and community initiatives undertaken to restore or preserve felons' and ex-felons' voting rights, as well as those initiatives that seek to limit or ban voting rights. It also examines the often confusing and cumbersome restoration procedures in a number of states. The following are some of the highlights found in the report:

State Legislative Activity

• Enhanced Voting Rights Activity in Seven States

- In Alabama, Florida, Pennsylvania, and Nevada, members of the legislature have proposed the automatic restoration of ex-felons' voting rights, and in Connecticut, restoration of voting rights for probationers and parolees.
- The Delaware legislature is considering the restoration of voting rights for certain ex-felons after a five-year post-release period.

- In Virginia, the state legislature appointed a subcommittee to examine issues of disenfranchisement of convicted felons.
- In Nevada, initiatives are being undertaken to ensure that information is provided to ex-felons with respect to the restoration of their voting rights.

• **Measures to Restrict Voting Rights in Three States**

- Over 80 percent of the Utah electorate voted in favor of disenfranchising inmates in November 1998.
- In Massachusetts, the state legislature is considering a constitutional amendment that would strip inmates of their voting rights.
- Until recently the Louisiana Constitution stipulated that "a first offender never previously convicted of a felony" was to be automatically pardoned upon the completion of his or her sentence. In October 1999, the electorate voted in favor of a constitutional amendment effectively limiting this provision to certain felony offenses.

Federal Legislative Activity

- In Congress, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing in October 1999 to consider restoring federal voting rights to ex-felons. Members of the Subcommittee generally supported the policy of permitting ex-felons to vote, but raised questions regarding the constitutionality of proposed legislation.

Litigation

- In New Hampshire, inmates' voting rights have recently been restored after a state constitutional challenge.
- In Washington, a legal challenge has been brought to the *Washington State Constitution* on the grounds that the statute's provision which disenfranchises persons convicted of felony offenses violates the *Voting Rights Act*.

Restoration Process Often Erratic or Cumbersome

- In Alabama, persons convicted of felony offenses are required to provide DNA samples as a condition of obtaining a pardon.
- Under Nevada law, ex-felons are required to wait five years before their voting rights can be restored. However, the letter sent to ex-felons describing this process indicates a period of ten years.
- Under Virginia statute, ex-felons convicted of both violent and non-violent offenses can apply for the restoration of their voting rights five years after the completion of their sentence. For drug offenses, though, the waiting period is seven years.
- An ex-felon who relocates to Virginia can register to vote immediately upon moving to Virginia. But ex-felons convicted in one of the four states that permit inmates to vote can only apply for restoration of voting rights after the five or seven year waiting period.

International Developments

- In the Republic of South Africa, inmates now have the right to vote as a result of a decision by

the Constitutional Court.

STATE ACTIVITIES

ALABAMA

Under Section 17-3-10 of the *Code of Alabama 1975* any person convicted of offenses cited under Article VIII of the *Constitution of Alabama-1901* is ineligible to vote, whether the conviction is handed down in a state or federal court. The restoration of the right to vote can be obtained only upon pardon.

House Representative Yvonne Kennedy introduced Bill 156 in February 1999, which was defeated in March. Bill 156 sought to require the court of conviction or the state Board of Pardons and Parole to restore a person's citizenship and the right to vote upon satisfactory completion of any sentence, including restitution or other conditions, if any, imposed by the court or the state Board of Pardons and Paroles. On September 1, 1999, Representative Kennedy pre-filed Bill 17, which is identical to Bill 156. Bill 17 should be considered by House Representatives early in the new year.

Section 36-18-24 of the *Code of Alabama 1975* authorizes the Director of the Alabama Department of Forensic Sciences (Director) to create and establish a DNA database for the purpose of assisting federal, state, county, municipal, or local criminal justice and law enforcement officers in the identification, detection, or exclusion of persons who are the subjects of criminal investigations or prosecutions. Pursuant to Section 36-18-25, any person convicted of a criminal offense set out under Section 36-18-24 who has become eligible for pardon or parole can be required to provide the Director with a DNA sample as a condition of the pardon or parole. Only four of the 67 counties in Alabama are set up to administer DNA testing (Jefferson, Mobile, Madison, and Montgomery).

The Alabama Democratic Conference (Black Political Caucus of Alabama) is working on two legal challenges to Section 36 of the *Code of Alabama 1975*. The first challenge, expected by the end of December 1999, will be brought under Section 5 of the *Voting Rights Act of 1965*. Pursuant to Section 5, a state that seeks to enact or administer any voting qualification or prerequisite to voting is under a statutory obligation to either (1) institute an action in the United States District Court for a declaratory judgment that such qualification or prerequisite does not have the purpose and will not have the effect of denying the right to vote on account of race or color; or (2) submit the proposed voting qualification or prerequisite to the Attorney General for review. The Alabama Democratic Conference contends that the state of Alabama has failed to comply with Section 5, as it has neither submitted Section 36-18 to the Attorney General for review nor instituted an action for declaratory judgment. The second challenge will be brought under the *Constitution of Alabama-1901*, which requires the state to ensure uniformity in voting accessibility. The Alabama Democratic Conference's lawsuit will contend that because there are only four locations in the state of Alabama for DNA testing, the state is in violation of the voting uniformity requirement.

A community outreach initiative is presently under consideration by the Southern Poverty Law Center. The initiative would focus on reaching as many ex-felons as possible to inform them of the steps required to restore their right to vote.

CONNECTICUT

Efforts are underway in Connecticut to restore voting rights to persons on probation or parole. Representative Kenneth Green introduced Proposed H.B. No. 5033 – An Act Concerning the Forfeiture of Electoral Rights and Privileges in the 1999 Legislative Session. The Statement of Purpose was: To permit a person convicted of a felony to vote if he is not physically confined in a correctional facility. The proposed bill was referred to the Government Administration and Elections Committee and had a

public hearing on February 8th. The Bill was not raised out of Committee. Rep. Green then proposed the language of the bill as an amendment to the campaign finance reform legislation on the floor of the House near the end of the Session. Republicans who opposed the campaign finance reform legislation voted with a strong voice vote for Rep. Green's amendment, which passed. The Democratic controlled House leadership then withdrew the bill fearing that the amended bill would split the Democrats.

The advocacy group DemocracyWorks is currently organizing a broad based coalition to work on the issue for the upcoming legislative session in 2000. A letter went out to many organizations from Miles Rapoport, Executive Director of DemocracyWorks, Rep. Kenneth Green, Chair, Legislative Black and Puerto Rican Caucus, Roger Van, President, Connecticut NAACP and Maureen Knight-Price, Executive Director, Community Partners in Action. The coalition is proposing the same restoration of voting rights post incarceration as proposed by Rep. Green last session.

DELAWARE

Delaware is one of fourteen states where ex-offenders who have completed their sentences can lose the right to vote for life, unless their civil rights are restored. In 1998, Bill 219 was passed by the House of Representatives amending the state constitution to allow certain categories of former felons to vote once they have fulfilled all aspects of their sentences and remain crime-free for a period of five years. All persons convicted of a felony offense on the following grounds will *not* be considered for the restoration of voting rights under this bill:

- (1) any felony murder or manslaughter;
- (2) any felony constituting a sexual offense; or
- (3) any felony constituting an offense against public administration involving bribery or improper influence or abuse of office.

In order for the constitutional amendment to take effect, it must be passed by the Senate before the end of its next session (June 30, 2000).

The Coalition for the Restoration of Ex-Felon Voting Rights has and continues to support Bill 219. The Delaware Center for Justice, a member of the Coalition, has been working closely with the Brennan Center at NYU Law School and has decided to await the outcome of the legislative process in the next session before bringing a legal challenge.

FLORIDA

Presently the *Constitution of the State of Florida* specifically bars any person convicted of a felony from being qualified to vote until that person's civil rights, including voting rights, have been restored by way of executive clemency. This executive power is granted to the Governor by the *Constitution of the State of Florida*, under which the additional consent of at least three members of the cabinet must be obtained.

The review process for the majority of felons convicted in Florida state courts is designed to be automatic, and should not require ex-felons to file any application or request. Upon final release of a felon from prison or state supervision, the Department of Corrections is required to submit each individual's name to the Florida Parole Commission. The Commission determines, based on specific criteria, whether a felon is eligible. If the Commission determines that the felon is eligible, and no member of the Board of Executive Clemency objects to the restoration of civil rights, the Clemency Coordinator is supposed to issue a certificate restoring the felon's civil rights without a hearing. The restoration process is not open to persons convicted of a capital or life felony, or to persons convicted of more than two felonies. Individuals convicted of felonies in other state or federal courts are required to submit an application to the Clemency Board in order to have their civil rights restored.

On March 2, 1999, Senator Hargrett introduced Bill 210 and Joint Resolution 208 in the Florida Senate.

The intent behind Resolution 208 was to remove the constitutional bar in Article VI, Section 4 of the *Constitution of the State of Florida* disqualifying a convicted felon from being eligible to register to vote or hold office until his or her civil rights have been restored. It would have replaced it with a requirement that the person's right to vote be restored as provided by law.

The joint resolution was to be implemented through Senate Bill 210, which would have amended a provision of *Florida Statutes* addressing qualifications to register to vote. Bill 210 did maintain portions of the current law disqualifying convicted felons from being eligible to register or vote while incarcerated or otherwise under state supervision. However, the bill also sought to modify the process by which a convicted felon's right to vote is restored. It provided that the right to vote should be automatically restored one year after the date of completion of a felony sentence and satisfaction of all non-monetary components of the sentence imposed, unless a majority of the members of the Board of Executive Clemency object. If there is an objection, the right to register or vote could only be restored by petitioning the Board.

Joint Resolution 208 and Bill 210 were referred to the Ethics and Elections Committee, which made two amendments to each bill. Bill 210 was then forwarded to the Committee on Criminal Justice on March 5 and died in the committee on April 30. Joint Resolution 208 was also forwarded to the Committee on Rules and Calendar on March 5th and died in the committee on April 30. Bill 210 has been re-drafted and Senator Hargrett plans to introduce the revised bill in the Florida State Senate during the current session.

LOUISIANA

Under Section 5 (E) (1) of the *Louisiana Constitution of 1974*, "a first offender never previously convicted of a felony" is automatically pardoned upon completion of his or her sentence, without the need for a recommendation by the Board of Pardons and without action by the Governor. In March 1999, State Senator Malone introduced Bill 217, proposing a constitutional amendment to Section 5 (E) (1) effectively limiting automatic pardons to first offenders convicted of "a non-violent crime or convicted of aggravated battery, second degree battery, aggravated assault, mingling harmful substances, aggravated criminal damages to property, purse snatching, extortion, or illegal use of weapons or dangerous instrumentalities." Bill 217 was passed on June 15, 1999 by a vote of 94 to 3 in the House of Representatives and on June 17, 1999 by a vote of 32 to 4 in the Senate. On October 23, 1999, the electorate voted in favor of the constitutional amendment. The Department of Justice's Civil Rights Division is examining whether the constitutional amendment violates Section 5 of the *Voting Rights Act*.

MASSACHUSETTS

Massachusetts is one of only four states which allows inmates to vote. In 1997, then acting Governor Paul Cellucci began a crusade to disenfranchise inmates when he became aware that inmates had organized into a political action committee (PAC). Cellucci introduced a constitutional amendment disenfranchising inmates, and signed an executive order directing prison officials to punish inmates participating in the PAC.

In July 1998, a majority of the House of Representatives and the Senate approved, in a joint session, a constitutional amendment, that if enacted, will strip inmates of their voting rights. The amendment is expected to be brought before both the Senate and the House of Representatives for a second vote between January and July 2000. Several community organizations, including the Criminal Justice Policy Coalition and the League of Women Voters, are actively involved in opposing the constitutional amendment.

NEVADA

On February 9, 1999, Assemblyman Wendell Williams, along with 15 other members, introduced Assembly Joint Resolution - No.6 (AJR 6), which proposed to amend the *Constitution of the State of*

Nevada to automatically restore the right to vote to ex-felons who have paid all court-ordered restitution, and have completed their parole or probation terms. On May 18, 1999, the Nevada Assembly approved AJR 6 by a vote of 27 to 14. The resolution was sent to the Senate on May 19. The Senate completed its first reading and referred AJR 6 to the Senate Committee on Judiciary. Before any new amendments can go into effect, AJR 6 must be approved by the Senate in the course of the current session. Following such approval, both houses would have to approve AJR 6 again in 2001, and finally, a referendum would be held in 2002.

Under the current statute, probationers can apply for restoration of their voting rights six months following the discharge of their probation. With respect to parolees, the parole board has the discretion to restore parolees' civil rights upon discharge of their parole. If the parole board does not award restoration at that time, parolees can request restoration five years after their discharge. Felons who complete their full sentence in prison can also apply for the restoration of their civil rights after five years.

During the Senate Committee on Judiciary hearings regarding AJR 6, Assemblyman Williams informed the Committee that, although the current statute provides for five years before voting rights can be reinstated, the letter sent to ex-felons indicates a period of ten years. Carlos Concha, Chief of the Division of Parole and Probation, addressed this discrepancy by stating that, following a request by the Chairman of the Assembly Committee on Constitutional Amendments, he provided a directive to all his staff advising them to provide each parolee or probationer, upon discharge, with a document outlining who they have to call, what they need to do, and the specific applicable statutes regarding the restoration of civil rights upon discharge. The African-American Political Caucus is presently working with the Governor to draft and issue an executive order ensuring that the Division of Parole and Probation adhere to the statute and inform exfelons of their ability to restore their civil rights.

NEW HAMPSHIRE

In October 1998, a state trial court found that two state laws which prohibited felons from voting while in prison violated the state's constitution.² The state appealed the decision of the trial court judge to the New Hampshire Supreme Court. Both the state and David Fischer, the plaintiff in the case, have presented their arguments to the Supreme Court and a decision is pending.

Following the trial court's decision, members of the legislature undertook a variety of initiatives to ensure the disenfranchisement of inmates. Only one initiative thus far has been successful. A law has been passed specifying that any inmates voting must use their "old hometown" as their voting place. Some believe, including former state Supreme Court Justice Chuck Douglas, that if the Supreme Court upholds the trial court's decision, the New Hampshire Legislature will probably draft a constitutional amendment banning inmates voting rights.

OREGON

Until recently, state legislation in Oregon prohibited only state inmates from voting, and the 1,800 federal inmates housed in the new Federal Correctional Institution in Sheridan, Oregon, had the right to participate in the electoral process. However, officials were worried about the political ramifications of 1,800 federal inmates pooling their voting power in the city of Sheridan, where there are only 1,662 registered voters. In response to this concern, Governor John Kitzhaber has signed a law which prohibits federal prisoners from voting in local elections.

PENNSYLVANIA

In Pennsylvania, inmates are denied the right to vote, and inmates who complete their prison term are subject to a five-year post-release ban on restoration of voting rights. At the legislative level, the Chairman of the Crime and Corrections Subcommittee of the House Judiciary, Rep. Birmelin, attached an amendment to Bill 1981 which would repeal the five-year post-release ban. The amendment failed by a vote of 160-40. Rep. Strittmatten led the opposition, questioning whether released felons could be entitled to vote without having completed parole or paid court costs and restitution. Rep. Birmelin and

Rep. Carn have indicated that they will propose a new amendment clarifying that released felons would have to have completed parole and paid court costs and restitution prior to being entitled to the restoration of their voting rights. In addition, Jon Yount, a state inmate, recently filed a lawsuit in state court petitioning for the restoration of voting rights for inmates.

UTAH

Until recently, the state of Utah was one of four states in which inmates had the right to vote. In January 1998, House Representative Carl Saunders (R - South Ogden) sponsored two bills initiating the disenfranchisement of inmates. The first bill, which passed 64 to 5, placed the question of whether inmates should retain the right to vote on the November 1998 general election ballot. The second bill, passing 66 to 4, provided the legislature with the power to set standards for deciding under what circumstances voting rights could be restored. In November 1998, over 80% of the Utah electorate voted in favor of disenfranchising inmates. Rep. Saunders indicated that the restoration of voting rights is automatic after inmates complete their prison term.

VIRGINIA

Currently under Virginia statute, once felons have completed their full sentence, including all periods of probation or parole, and have paid all fines and court costs, they can apply to the Governor for restoration of the right to vote five years after the completion of their sentence, or seven years after sentence completion for drug offenses. The *Richmond Times-Dispatch* has reported that felons are not informed of their right to apply for restoration of voting rights when they are released from the criminal justice system.

Felons convicted in states where there is an automatic restoration of the right to vote upon the satisfactory completion of their sentence are not subject to the five or seven year post-release ban, and are eligible to register to vote immediately upon their return to Virginia. However, felons convicted in one of the four states where felons retain the right to vote during their incarceration *are* required to go through the procedural steps established in Virginia to restore their voting rights.

On January 20, 1999, a joint resolution was introduced in the House of Delegates and the Senate to establish a joint subcommittee examining felony voting rights. On February 26, 1999, another joint resolution was introduced in the Senate broadening the scope of the study. The Joint General Assembly Subcommittee Studying Elections Law Innovations (JGASSELLI) was directed to explore methods to improve voter knowledge of and participation in the electoral process. Within this mandate, the JGASSELLI is required to examine issues of disenfranchisement of persons convicted of felonies, as well as effective procedures to restore their civil rights. On July 1, 1999, the *Richmond Times-Dispatch* reported that the JGASSELLI had agreed to devote the bulk of its study for the current year to restoring the voting rights of felons. The JGASSELLI is expected to release the results of its study in December 1999. The Senate and the House of Delegates are expected to address the subcommittee's report during the next legislative session in January 2000.

In the fall of 1998, Virginia auditors found that the State Board of Elections' voter rolls listed 11,000 ineligible felons and 1,500 dead people. The number of ineligible felons represented less than one percent of the 3.6 million Virginians qualified to vote. State officials now say that the initial count may have overstated the problem. Hugh Key, Deputy Secretary of the State Board of Elections, estimates that the actual number of ineligible voters registered to vote is as low as 700-800 statewide. Despite these low numbers, in July 1999, a Loudoun County grand jury indicted 15 people on charges of lying about their criminal records on voter registration forms. The state has recently installed an extensive computer system which will enable all voting registrars to have immediate access to the list of convicted felons.

WASHINGTON

The *Washington State Constitution* disenfranchises any person convicted of an "infamous crime," defined as any crime punishable by death or imprisonment, and has been construed to include felony conviction in this definition. The disenfranchisement of felons is automatic. A weekly report of felony

Check Status

convictions is produced and sent to the county auditor where the offender resided prior to his or her conviction. This process triggers the offender's disqualification.

Plaintiffs in the case of *Farrakhan, et al. V. Locke, et al.* claim that felony disenfranchisement in Washington violates the *Voting Rights Act (VRA)* under the premise of vote denial. The plaintiffs will be amending their complaint to include a "procedural" claim directed at attacking the present process of reinstatement of voting rights in Washington. The plaintiffs will be requesting (1) the automatic reinstatement of offenders upon the completion of their sentences using a similar weekly report as the one used to disenfranchise them; (2) the development and implementation of educational and assistance programs to inform offenders about the reinstatement process and aid them in restoring their rights; and (3) the allowance for automatic reinstatement for ex-felons who demonstrate a good faith effort in satisfying the monetary component of the sentence.

Co-counsels for the plaintiffs, Gonzaga University Legal Assistance and Dennis Cronin of Maxey Law Offices, have successfully challenged the defendants' motion to dismiss in Federal District Court. The case is presently in discovery, and is expected to go to trial in the early months of the year 2000.

FEDERAL ACTIVITIES

On March 2, 1999, Rep. Conyers (D-MI), along with 37 co-sponsors, introduced the *Civic Participation and Rehabilitation Act of 1999 (CPRA)*. The Act was referred to the House Committee on the Judiciary on the same day. On March 6, the Act was referred to the Subcommittee on the Constitution.

The *CPRA* seeks to secure the Federal voting rights of persons who have been released from incarceration even if they are prohibited from participating in state elections. The *CPRA* would authorize the Attorney General, in a civil action, to obtain a declaratory or injunctive relief to remedy a violation. The *CPRA* would also empower persons aggrieved by any violation of the Act to provide written notice of the violation to the chief election official of the State so that the violation may be remedied within a prescribed time frame.

During a Subcommittee hearing, held on October 21, 1999, Chairman Canady, Congressman Conyers and Ranking Member Watt heard testimony from six experts: Roger Clegg, Vice President and General Counsel for the Center for Equal Opportunity; Viet Dinh, Associate Professor of Law at Georgetown University Law Center; Todd Gaziano, Senior Fellow in Legal Studies at The Heritage Foundation; Marc Mauer, Assistant Director of The Sentencing Project; Gillian Metzger, Staff Attorney for the Brennan Center; and Hilary Shelton, Director of the Washington Bureau of the NAACP. The Subcommittee members were receptive to a policy that permits ex-felons to participate in elections. Their questions focused primarily on whether Congress has the constitutional authority to legislate the enfranchisement of non-incarcerated offenders for federal elections.

Professor Dinh testified that prescribing franchise qualifications, even for federal elections, is generally a power the Constitution leaves within the prerogative of the states.³ However, Gillian Metzger of the Brennan Center informed the members of the Subcommittee that there are at least three potential constitutional bases for Congress' authority to enfranchise non-incarcerated felons for federal elections.

Ms. Metzger indicated that the first basis for Congress' constitutional authority is found under the Elections Clause of Article I, S.4. She stated that at present it is unclear whether Congress' supervisory power over federal elections includes the ability to establish qualifications for voters, but indicated that an argument could be made that it does.

The second basis identified by Ms. Metzger is found under the 14th Amendment, which stipulates that Congress has the authority to intervene where states have enacted laws that have a discriminatory intent and impact. She argued, based on extensive case law, that "Congress's power to enfranchise criminal offenders does not depend on whether all disenfranchisement laws are discriminatorily motivated and is

not undermined by the fact that some disenfranchisement laws originally enacted with discriminatory intent have since been reenacted for nondiscriminatory purposes." She further stated that there is historical evidence, which demonstrates the utilization of felon disenfranchisement laws to deny voting rights to people of color and that these laws have a discriminatory impact.

Ms. Metzger contended that under the 14th Amendment, Congress also has the authority to enforce the Amendment's prohibition against arbitrary and irrational state classification. Ms. Metzger stated that CPRA's findings support a congressional determination that criminal disenfranchisement laws operate in an arbitrary and irrational fashion.⁴

The third constitutional basis for Congress' constitutional authority for the CPRA identified by Ms. Metzger is found under Section 2 of the 15th Amendment, which empowers Congress "to enact measures intended to protect against racial discrimination in voting." Based on the history of the use of criminal disenfranchisement laws as a means to deny African-Americans the right to vote, as well as the discriminatory impact of these laws, "Congress has the authority under its 15th Amendment enforcement powers to enfranchise non-incarcerated offenders in federal elections."

Professor Dinh stated that under prevailing constitutional interpretations, Congress' power to set the time, place, and manner of congressional elections, to preserve the integrity of national institutions, or to protect the privileges and immunities of national citizenship do not extend to prescribing voter qualification.

With respect to the 14th Amendment, Professor Dinh indicated that a court is unlikely to find that Congress' current discriminatory findings provide adequate support for the CPRA to enable Congress to exercise the power to enfranchise ex-felons on the basis that it is enforcing the 14th Amendment. According to Professor Dinh, currently the use of the CPRA to enforce the 14th Amendment is only supported by findings that "State disenfranchisement laws disproportionately impact on ethnic minorities," without reference to the required discriminatory intent. He stated that a facially neutral law that has a racially disparate impact does not constitute a violation of the Equal Protection Clause under current Supreme Court precedent.

Professor Dinh concluded that in order for Congress to alleviate the constitutional infirmity of CPRA, it would need to establish that racially discriminatory intent was the substantial factor behind the states' felony disenfranchisement laws. This could be achieved by compiling historical literature demonstrating that some states had enacted or amended felony disenfranchisement laws with discriminatory purpose.

INTERNATIONAL— REPUBLIC OF SOUTH AFRICA

On April 1, 1999 the Constitutional Court of South Africa, the country's highest court, ruled that inmates should be allowed to vote in the country's June 2 elections. In a unanimous judgment, Judge Sachs stated, "the vote of each and every citizen is a badge of dignity and personhood. Quite literally everybody counts." The Constitutional Court judges overturned a lower court ruling that inmates had forfeited their voting rights by committing crimes, making 146,000 South African inmates eligible to register and vote. The Constitutional Court ordered the Electoral Commission, Minister of Home Affairs, and Minister of Correctional Services to make necessary arrangements to enable inmates to register for and to vote at the June election.

ENDNOTES

1. Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project, October 1998.

2. David J. Fischer et al. vs. Jeanne Shaheen, Gov. et al., No. 98-695 (Merrimack County Super. Ct. Oct. 27, 1998).
3. Article I, S. 2, cl. 1 (for U.S. Representatives), 17th Amendment, cl.1 (for U.S. Senators), and Article II, S. 1, cl. 2 (for the President).
4. CPRA's findings include, "(A) there is no uniform standard for voting in Federal elections which leads to an unfair disparity and unequal participation in Federal elections based solely on where a person lives; (B) laws governing the restoration of voting rights after a felony conviction are unequal throughout the country and persons in some States can easily regain their voting rights while in other States persons effectively lose their right to vote permanently."

TESTIMONY OF MARC MAUER**Assistant Director****The Sentencing Project****Before the****Constitution Subcommittee****House Judiciary Committee****on****Felony Voter Disenfranchisement****Thursday, October 21, 1999**

My name is Marc Mauer and I am the Assistant Director of The Sentencing Project, a national non-profit organization based in Washington. The Sentencing Project was founded in 1986 to conduct research on criminal justice policy issues and to provide technical assistance to state and local jurisdictions on sentencing options. My observations on the issue of felon voting disenfranchisement are based on research and programming work I have conducted over the past twenty-five years.

In 1998 I co-authored a study with Human Rights Watch titled "Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States." In that study, we produced estimates of the number of persons subject to disenfranchisement as a result of a felony conviction and examined the history and rationale for these laws. I will try to summarize the most relevant issues from that study in my remarks today.

History of Disenfranchisement Laws

Felony disenfranchisement laws have existed in many states since the founding of the nation two hundred years ago. At that time, only a minority of the newly-independent population was granted the right to vote. Women, African Americans, the poor, and illiterates were all specifically excluded from the voting population, along with convicted felons. All of these other groups, of course, are permitted to vote today and we now look back on the period of their exclusion with a great deal of national embarrassment. The only significant group still disenfranchised are felons and ex-felons.

In this regard, the United States stands at an extreme end of the spectrum in comparison to other democratic nations. In no other democracy are convicted offenders who have served their sentences disenfranchised for life, as is done in a number of our states. A few countries restrict the right to vote for a short period after the conclusion of a prison term, but only in the case of persons convicted of electoral offenses. And, in fact, many countries - including France, Germany, Israel, Norway, and Poland - permit persons in prison to vote as well.

After the Civil War, the felony voting restrictions took on new significance in some Southern states. Along with other ostensibly race-neutral voting barriers - literacy tests, poll taxes, and grandfather clauses - the felony voting laws were tailored in some states specifically to disenfranchise newly-empowered blacks. In South Carolina and Alabama, for example, legislators explicitly crafted laws that resulted in disenfranchisement for crimes supposedly committed more frequently by blacks and excluded offenses believed to be primarily committed by whites. While the felony voting restrictions in place today contain no such direct racial intent, their application has resulted in substantial racial disparities nevertheless, for a complex set of reasons.

Voting Restrictions and Impact

Currently, 46 states prohibit prisoners serving a felony sentence from voting. (The four states that permit inmates to vote are Maine, Massachusetts, New Hampshire, and Vermont.) In addition, 32 states deny the vote to persons on probation and/or parole, and in 14 states a felony conviction can result in disenfranchisement for life. Voting in federal elections is determined by the voting laws in place in one's state of residence.

There are today an estimated 3.9 million Americans, representing two percent of the adult population, who cannot vote as a result of a felony conviction. Of these, 1.4 million are persons who have fully completed their felony sentence but reside in one of the states that impose lifetime disenfranchisement.

States that disenfranchise for life generally have some type of mechanism in place whereby ex-felons can apply to have their civil rights restored. Typically, ex-felons are required to obtain a pardon from the governor or action by a board of pardons or parole. In practice, it is often extremely cumbersome to engage in this process and few ex-offenders have the financial and political resources needed to succeed. In Virginia, for example, only 404 ex-felons had their voting rights restored in a recent two-year period, of a total of 200,000 such persons in the state. In Mississippi, ex-offenders must either secure an executive order from the governor or have a state legislator introduce a bill on their behalf and obtain a two-thirds vote in the legislature.

The differing voting restrictions in each state result in participation in the electoral process that is in part based on one's state of residence. An ex-felon in West Virginia can vote for President, but an ex-felon in Virginia cannot. Similarly, if an ex-felon moves from Virginia to West Virginia, he or she regains the right to vote, while a shift from West Virginia to Virginia would result in the loss of the vote.

As a result of the high proportion of minorities in the criminal justice system, felony voting restrictions have had a very disproportionate racial impact. Our study estimated that 1.4 million African American men, representing 13 percent of the black adult male population, cannot vote as a result of a current or prior felony sentence. In ten states, more than one in five black men is currently disenfranchised. Given current rates of felony convictions and incarceration, we can expect that in the next generation of black men 30-40 percent will lose the right to vote for some or all of their adult lives.

Rationale for Restoring Voting Rights

Given the increasing numbers of persons in the criminal justice system, the felony voting restrictions are resulting in increasing numbers of Americans losing their voting rights each year. There are several reasons why policymakers should consider reversing this trend by examining relevant legislation:

1. Participation in voting aids in rehabilitation and public safety.

When offenders are sentenced to prison or probation for a felony conviction, their sentence incorporates a loss of liberty and other punitive measures. What is sometimes forgotten, though, is that 95% of all prisoners (and, of course, all probationers) will return to the community after serving their sentence. If society is to encourage their participation in legitimate activities, it needs to foster a sense of obligation and responsibility among offenders. One clear means of doing so is through participation in the electoral process. Those persons who believe they have a stake in the welfare of their community are less likely to engage in illegal activities that will bring harm to individuals.

For ex-offenders in particular, felony voting restrictions conflict with the longstanding principle that once an offender has "paid his debt to society" he should be free to join the community again as a full member. Exclusion from the electoral process instead sends a message that this "debt" can never be paid in full.

2. Felony voting restrictions are antiquated.

Many of the voting restrictions currently in place were enacted over a century ago and have rarely been examined since that time. In many instances the rationale originally offered for such policies holds little relevance to current conditions. One finds in the legislative history and legal cases references to these laws as being necessary to protect the "purity" of the electoral process or to protect against fraud. For offenders convicted of such crimes as bribery, treason, or electoral fraud, this might represent a legitimate concern. It is difficult to understand, though, how a person convicted of stealing a car or writing a bad check twenty years ago presents a threat to the electoral process itself.

3. Voting restrictions should not serve as a form of punishment.

Another rationale offered for the disenfranchisement laws is that they constitute a legitimate punishment that accompanies a felony conviction. Here, too, it is not clear what useful purpose is served by such statutes, and particularly so for persons who have completed their sentences. When a person is convicted of a felony offense, the punishment imposed will inevitably curtail some of the individual's rights, but these are generally related to public safety concerns. For offenders sentenced to prison, the restrictions imposed are generally those required to maintain the security of the institution. Thus, a prisoner can subscribe to a weekly newsmagazine, but not to a publication that provides information on how to produce explosive devices. Restrictions placed on parolees are designed to reduce the risk of criminal activity by, for example, prohibiting them from associating with known criminals. But there is no rational crime control purpose that is served by prohibiting an ex-offender from voting.

Further, voting restrictions are imposed without any action by a judge and without any sense of proportionality. Thus, offenders convicted of larceny lose their voting rights along with mass murderers. This can result in persons convicted of a single relatively minor crime, even one committed before reaching voting age, being turned into political "outcasts" for life.

4. Felony voting restrictions exacerbate racial tensions.

Whether intended or not, disenfranchisement laws have had a significantly disproportionate impact on African Americans, and one that is increasing each year. While there need to be consequences for persons who violate the law, unnecessary policies such as the felony voting restrictions serve only to communicate a message of exclusion from the political process. If we are to promote racial harmony in our society, it is vital to make our democracy as inclusive as possible.

Conclusion

Laws in the United States that disenfranchise persons convicted of a felony offense are resulting in greater numbers of persons being excluded from the ballot box as the number of persons under criminal justice supervision continues to expand. These laws have also had a significant impact on racial minorities and run counter to society's legitimate interest in promoting the development of law-abiding ex-offenders who have a stake in the well-being of their community.

The issue of felony voting disenfranchisement is not a question of whether there should be punishment for crime. It is instead a question of whether society is promoting practices and behaviors that will make for a more inclusive and democratic community. It is long past time to reconsider the wisdom of such policies.

**Testimony of
Gillian E. Metzger**

Staff Attorney, Brennan Center for Justice at New York University School of Law

Before the House Judiciary Committee

Subcommittee on the Constitution

on

Constitutional Issues Raised by the Civic Participation and Rehabilitation Act

October 21, 1999

Mr. Chairman and members of the Committee:

Good morning. My name is Gillian Metzger. I am a staff attorney at the Brennan Center for Justice at New York University School of Law, and one of my areas of specialization is felon disenfranchisement. The mission of the Brennan Center is to develop and implement an innovative and nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. Supporting efforts to eliminate restrictions on the right to vote, such as provisions disenfranchising criminal offenders, is an integral part of the Brennan Center's mission.

I am honored that you have invited me to testify before this Committee concerning H.R. 906, the Civic Participation and Rehabilitation Act of 1999, which would grant persons who have been released from incarceration the right to vote in federal elections. Attached to my testimony is a more detailed memo I wrote analyzing the constitutionality of H.R. 906.

I will be limiting my remarks to discussing Congress' authority to enact H.R. 906. I believe there are two possible bases for Congress' power to enact this bill: the Election Clause of Article I, section 4, combined with Congress' inherent power to regulate all federal elections, and Congress' enforcement powers under the Fourteenth and Fifteenth Amendments. In what follows, I first discuss the Election Clause and Congress' inherent power, identify possible arguments that could be raised against Congress' ability to enact H.R. 906 on this basis, and then explain why I don't believe that these arguments are sound. I then undertake a similar analysis of Congress' authority to enact H.R. 906 under its enforcement powers.

At the outset, the view that Congress has direct power to set the qualifications of voters in federal elections is supported by the Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970). *Mitchell* upheld Congress' ability to lower the age for voting in federal elections at the same time as it denied Congress' power to do so regarding state elections. Although a majority of Justices did not agree in *Mitchell* on the basis for Congress' power to lower the age for voting in federal elections -- with one basing it on the Elections Clause and the others on Congress' enforcement powers -- the Court itself has not viewed this disagreement as undercutting the import of *Mitchell*'s holding. Instead, it subsequently cited *Mitchell* for the proposition that "Congress has the power to establish voter qualifications" for

federal elections. *Kusper v. Pontikes*, 414 U.S. 51, 57 n. 11 (1973). Thus, under the Supreme Court's last pronouncement on the specific point of congressional power to set voter qualifications for federal elections, H.R. 906 is clearly constitutional.

I. The Election Clause and Congress' Inherent Authority to Regulate Federal Elections

In assessing the constitutionality of H.R. 906, it is important to bear in mind that the bill only applies to federal elections. This fact is particularly important because of the very broad power that Congress has to regulate federal elections under the Elections Clause of Article I, section 4. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Although the Elections Clause refers to regulations affecting the time, place, and manner of holding congressional elections, the Clause has been read expansively. For example, in *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976), the Supreme Court cited the Elections Clause as the basis for Congress' authority to enact the Federal Election Campaign Act, even though FECA relates to the manner of conducting campaigns for federal office as opposed to the manner of holding elections for federal office.

It is also now beyond dispute that Congress has a similar broad power to legislate in regard to presidential elections, despite the lack of a textual grant of such authority. In *Burroughs v. United States*, 290 U.S. 534 (1933), the Court sustained Congress's power to adopt the Corrupt Practices Act to regulate contributions and expenditures intended to influence the selection of presidential electors, notwithstanding that the power and manner of appointing presidential electors is entrusted to the states by Article 2, Section 1 and the Twelfth Amendment to the U.S. Constitution. In rejecting the claim that this Act exceeded Congress' powers, the Court ruled that Congress has a broad inherent power to safeguard the legitimacy of federal elections, concluding that such a power as "vital" to our Nation's "self-protection."

As H.R. 906 details, there is currently a great deal of disparity among the states regarding when criminal offenders can vote. Fourteen States disenfranchise convicted offenders permanently, while 32 States disenfranchise felons on parole and 29 States disenfranchise felons on probation. As a result, criminal offenders' rights to vote in federal elections can vary tremendously according to the state in which they reside. H.R. 906 embodies the policy judgment that such disparities in citizens' fundamental rights based on the happenstance of geography are unwarranted, and threaten the integrity and legitimacy of federal government. This judgment is eminently reasonable, particularly given the disproportionate impact criminal disenfranchisement provisions have on minorities, and the Elections Clause gives Congress the authority to require states to adhere to its policy judgments regarding the conduct of federal elections.

Opponents of H.R. 906 have argued that notwithstanding Congress' broad power to regulate federal elections, Congress lacks the power to directly set qualifications of voters for federal elections by virtue of the Qualifications Clauses of Article I and the Seventeenth Amendment. These provide that the "Qualifications" of voters in Senate and House elections must be the same as the qualifications for voters in elections to the most populous branch of the state legislatures.

I believe this argument against the Elections Clause as a basis for Congress' authority to enact H.R. 906 fails, because it does not accord with Supreme Court precedent regarding the scope of the Qualifications Clauses. As the Supreme Court's decision in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), makes clear, the Qualifications Clause of Article I, which the Seventeenth Amendment adopted verbatim, was not intended to limit congressional power. Instead, it was adopted rather to address the danger that a uniform rule for voting in federal elections, adopted in the Constitution itself or by Congress, would leave many citizens eligible to vote in state elections but not in congressional elections. The Framers feared that such a situation would lead to popular discontent and undermine support for the national government.

Thus, under *Tashjian*, all the Qualifications Clauses do is prevent either Congress or the states from

imposing a regulation that excludes persons qualified to vote in elections for the most populous branch of the state legislature from participating in congressional elections. But Congress' broad power to regulate federal elections remains otherwise unconstrained. As H.R. 906 expands rather than contracts the group of qualified voters in federal elections, it will not lead to the type of problem the Framers intended the Qualifications Clauses to address. Thus, it would appear that no Qualifications Clause issue is present here, and that Congress has power to enfranchise non-incarcerated criminal offenders pursuant to the Elections Clause.

This conclusion is reinforced by the Court's decision in *Mitchell*. While the Justices in the majority disagreed about the basis of Congress' power to require that 18 year olds be allowed to vote in federal elections, none believed that the Qualifications Clauses limited Congress' power to do so. The Court's reiteration of Congress' power to set qualifications for federal elections in *Kusper* also undercuts the claim that the Qualifications Clauses prevent Congress from being able to enact legislation enfranchising non-incarcerated offenders for federal elections.

II. Congress' Enforcement Powers under the Fourteenth and Fifteenth Amendments

Congress's enforcement powers under the Fourteenth and Fifteenth Amendments provide an additional basis for congressional authority to enact H.R. 906. The right to vote, and the right to do so free of racial discrimination, are fundamental rights protected by the Fourteenth and Fifteenth Amendments, which Congress has explicit power to enforce. After the Civil War and enactment of the Fifteenth Amendment, numerous southern states adopted criminal disenfranchisement provisions, along with literacy tests and poll taxes, to exclude newly-enfranchised Black voters. And as H.R. 906 finds, criminal disenfranchisement provisions today continue to have a substantially greater impact on minorities, particularly African-American men. This disparate effect is particularly dramatic in states with laws that permanently disenfranchise criminal offenders. In some states, it is estimated that 30 percent of Black men are currently disenfranchised.

Both racially discriminatory intent and impact are therefore present in regard to criminal disenfranchisement provisions. Laws that are enacted out of racially discriminatory intent and have a discriminatory impact violate the Fourteenth Amendment generally, and violate the Fifteenth Amendment when they restrict the right to vote. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239 (1976); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). And Congress plainly has the power under its enforcement powers to prohibit measures that violate the Fourteenth and Fifteenth Amendments. Nor does it matter, in regard to Congress' authority to enact H.R. 906 pursuant to its enforcement power, that some felon disenfranchisement provisions were not adopted out of an invidious intent to discriminate. Congress has the power to adopt remedial legislation pursuant to its enforcement power even if in the process it prohibits some conduct which is not unconstitutional. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997). For example, the Court has reaffirmed Congress' power to ban literacy tests, even though literacy tests could be adopted out of a legitimate desire to ensure an informed electorate and do not in themselves violate the Constitution. *See Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999).

Instead, all that is required for an exercise of congressional enforcement power to be legitimate is that Congress have reason to believe that "many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 117 S. Ct. at 2170. The historical and contemporary record gives Congress ample reason to conclude that such a likelihood may exist in regard to many criminal disenfranchisement provisions.

The Court's recent decision in *City of Boerne v. Flores* does not preclude Congress's authority to enact H.R. 906 under its Fourteenth and Fifteenth Amendment enforcement powers. In *Boerne*, the Court concluded that the Religious Freedom Restoration Act, or RFRA, exceeded Congress' enforcement powers because in RFRA Congress did not merely prohibit restrictions on the right to exercise one's religion freely but expanded the scope of that right. Some opponents of H.R. 906 might argue, analogously, that H.R. 906 exceeds Congress' enforcement powers because the Supreme Court has held that felons do not have the same fundamental right to vote as other citizens. *See Richardson v. Ramirez*,

418 U.S. 24 (1974). But the Court has also held that felon disenfranchisement statutes are subject to the highest level of scrutiny insofar as they reflect discrimination on another ground, such as race. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Moreover, H.R. 906 and RFRA are significantly different measures. To begin with, H.R. 906 lacks the expansive scope that the Court found to undercut RFRA's remedial character. Rather than applying to almost all areas of state regulation, H.R. 906 is carefully targeted to a specific area -- regulation of federal elections -- where Congress' interests are paramount and congressional preemption frequently occurs. In addition, H.R. 906 is designed to take into account the states' penological interests, and only applies to non-incarcerated offenders. These are the offenders that the states themselves have concluded can and should be integrated into the community. Most importantly, H.R. 906 differs from RFRA in that it targets a type of voting qualification that historically has been used to deny voting rights on racial grounds, and that continues to have a disproportionate effect on minorities. In *Boerne*, the Court repeatedly emphasized that Congress has broad remedial power to act against voting practices and requirements of this type.

Even aside from this concern with preventing racial discrimination, Congress could act to enfranchise non-incarcerated offenders in federal elections based simply on its determination that laws disenfranchising non-incarcerated criminal offenders are arbitrary and irrational, and thus violate the Fourteenth Amendment's prohibition on arbitrary and irrational classifications. H. R. 906's findings -- that states vary tremendously in their approach to felon disenfranchisement, that imposition of disenfranchisement is often not connected to the seriousness or nature of the offense, that in many states there is no effective means by which to regain the right to vote, and that federal and state offenders have differing abilities to take advantage of whatever means of regaining the vote are available -- support a congressional determination that criminal disenfranchisement laws operate in an arbitrary and irrational fashion. It is also difficult to discern the purpose behind disenfranchisement provisions as they apply to non-incarcerated offenders, who the state does not believe need to be kept segregated from the community, particularly offenders convicted of crimes not related to elections.

In sum, I believe that both the Elections Clause, combined with Congress' broad power over federal elections, and Congress' enforcement powers under the Fourteenth and Fifteenth Amendments offer two separate bases for congressional authority to enact H.R. 906. Finally, although I have limited my remarks to an assessment of H.R. 906's constitutionality, I also strongly agree with its policy determination that non-incarcerated criminal offenders who are integrated into our communities physically, socially and economically should also be integrated into our communities politically.

Thank you.

TESTIMONY OF
HILARY O. SHELTON
DIRECTOR OF THE WASHINGTON BUREAU OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
BEFORE THE HOUSE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
HEARING ON H.R. 906,
THE CIVIC PARTICIPATION AND REHABILITATION ACT
OF 1999

October 21, 1999

Thank you, Chairman Canady and distinguished members of this panel for inviting me to testify before you today on this important subject. I would especially like to thank Congressman John Conyers for all of his work on this issue, as well as Ranking Member Watt for helping to bring attention to this issue.

My name is Hilary O. Shelton and I currently serve as the Director of the Washington Bureau of the National Association for the Advancement of Colored People, or the NAACP. The NAACP is the nation's oldest and, with over 600,000 card-carrying members and 1,700 branches nationwide, largest grassroots civil rights organization. I am here today to share with you our association's strong support of H.R. 906, the "Civic Participation and Rehabilitation Act of 1999." This legislation would restore voting rights to ex-felony offenders. In fact, in February of this year the NAACP national Board of Directors voted unanimously to endorse H.R. 906 and make it one of the association's top legislative priorities for the 106th Congress.

H.R. 906 is crucial to the NAACP for a number of reasons. Voting is a fundamental American right, and the fact that almost 4 million Americans, or 1 in 50 American adults, are not allowed to vote is an insult to our Constitution and to the Bill of Rights. Many of these Americans have paid their debt to society and want to be reintegrated fully into their communities. Yet in too many states, the law bars them from participating in what may well be our most basic American responsibility of citizenship.

As you have heard from previous speakers, though this legislation would have a wide-ranging impact on every ethnic group, it affects ethnic minority Americans at a vastly disparate rate. In fact, 13% of all African American males today - 1.4 million American men - are prohibited from voting.

There are several reasons for this lopsided representation, and the question of disproportionate minority confinement could and probably should be the subject of another hearing in and of itself. However, one of the primary reasons that African Americans find themselves disproportionately barred from the ballot

box is our national so-called "war on drugs." Our country's effort over the last decade to eliminate the scourge of drugs from our society has had a much more severe impact on African Americans and other ethnic minorities than on their Caucasian counterparts. Between 1985 and 1995, there was a 707% increase in the number of African Americans in state prison for a drug related offense, compared to a 306% increase for Caucasians over the same period. Furthermore, although African Americans make up only 12 percent of the U.S. population, 15 percent of our country's drug users, and 17 percent of cocaine users, African Americans represent 33 percent of all Federal drug convictions and 57 percent of all Federal cocaine convictions.

But the war on drugs is not the only cause of the disproportionate minority disenfranchisement. According to the Justice Policy Institute, as we convict and incarcerate more and more people for nonviolent offenses, African Americans and Hispanic Americans comprised a growing number of the people we send to prison. In the 1930s, 75 percent of the people entering state and federal prison were Caucasian, which roughly reflected the demographics of our nation. As of March, 1999, ethnic minorities represent 70 percent of all new prison admissions, and more than half of all Americans behind bars.

Thus African Americans and other Americans of color are being kept out of the electoral process at an unequal rate, even after they have paid their debt to society.

Also troubling to our organization is the fact that state laws vary dramatically when it comes to defining a felony, and that states have very different processes through which an ex-felon must go to regain his or her civic rights. It is therefore often difficult for ex-offenders to know what, if anything, they can do to regain their right to vote. The extreme policies of some states have even led to real problems. Two cases in point are Alabama and Florida. In both of these states more than 30 percent of all African American men have lost their rights to vote forever, some for seemingly minor and certainly non-violent offenses. In Alabama, for example, it is possible to lose your right to vote forever if you write one bad check. Most states require specific gubernatorial action, and in 16 states federal ex-felons need a presidential pardon to regain their voting rights.

America expects felons to come out of our penal system prepared to act as productive members of society. We believe ex-felons should support their families and their communities. This is not an unreasonable expectation, but we need in turn to support them in their efforts. Because voting is such an integral part of being a productive member of American society, we should be encouraging ex-felons to vote, not prohibiting them.

In my travels across the nation, I have had the opportunity to talk to many ex-felons, some of whom committed crimes that never even warranted jail time, who are deeply troubled by the fact that they are not able to participate in our nation's democratic process. As Joe Loya, a disenfranchised ex-offender so eloquently said, "without a vote, a voice, I am a ghost inhabiting a citizen's space ... I want to walk calmly into a polling place with other citizens, to carry my placid ballot into the booth, check off my choices, then drop my conscience in the common box."

Throughout the world, the right to vote is seen as one of the paramount signs of personal liberty and freedom. Few Americans were not touched by the pictures of Black South Africans waiting in line, sometimes for several days, to vote for the first time in their lives. It is hypocritical of the United States to hold the right to vote up as a real test of true democracy, and yet to fail that very test here at home.

Felony voting restrictions are the last vestige of voting prohibitions in the United States. When the U.S. was founded only wealthy white men were allowed to vote. Women, ethnic minorities, those who were illiterate and the poor were excluded. With continued national enlightenment, these restrictions have all been eliminated over time, often with much debate and rancor. I am certain that the issue of allowing ex-felons to vote once they are released into society is not one that will be settled without a fair amount of heated debate. Yet I have faith that the morally correct path, blazed by the inspiration of a more democratic union, shall ultimately prevail, and that this imperfection in our society too shall be corrected.

I would like to take just a minute to focus on two elements of H.R. 906 that I think are important. First, the legislation is constitutional. As we have heard from a previous witness, this bill is carefully crafted so as to avoid any constitutional tangles. If any members of this subcommittee would like any further proof, we also have opinions of several other constitutional scholars who all agree that this legislation passes muster.

Secondly, I would like to emphasize that this bill very specifically provides that Americans who have been convicted of a felony may have their voting rights restored only upon release. The title of H.R. 906 is the "Civic Participation and Rehabilitation Act of 1999." The focus of this legislation is to help men and women who have served their time successfully reintegrate themselves into society. H.R. 906 establishes a national, uniform policy under which all Americans, after they have served their time in prison, may register to vote in federal elections and thus take one important step towards reestablishing himself or herself as a productive member of our society.

Because voting is such an integral part of being a productive member of American society, the NAACP has and will continue to support and work tirelessly for Congressman Conyers' legislation, the "Civic Participation and Rehabilitation Act of 1999." I hope that every member of this panel, and indeed of this Congress, will take a look at this bill. I have also included in my testimony two charts that I feel do a good job of illustrating the disparity between states as well as the severity of the problem facing African Americans. I hope that all the members of this panel will review these graphs and consider their impact on society.

Thank you again, Chairman Canady and Ranking Member Watt, for taking the time to address this issue today. I am willing to answer any questions you may have at this point, and I am available at any time in the future to discuss this problem at greater length.

Statement of Representative Danny K. Davis
Testimony Before the Constitution Subcommittee of
House Judiciary Committee

Mr. Chairman, and Members of the Subcommittee I want to thank you for the opportunity to testify on such an important issue. The question before us today tugs at the heart of our democracy and stirs the conscience of the nation. The question is whether ex-felons should be given the right to vote in federal elections after they have served their sentences. I believe they should. Therefore, I support Representative Conyers legislation H.R. 906, that would restore the right to vote in federal elections to ex-felons.

Our nation was founded on supposedly democratic principles. The forefathers of this nation pinned a great document called the Declaration of Independence, in that document they proclaimed that all men were created equal, and entitled to certain unalienable rights. But yet slavery was allowed to exist and women were not treated equal. We fought a bloody Civil War over slavery and still there is a sense that remnants of slavery remain. The right to vote must be intertwined with the Declaration of Independence and the Constitution. It is one of the most basic and fundamental rights of citizenship in a democracy. To deny the ballot box to individuals who have paid their debt to society is akin to rendering them voiceless in their own home.

Disenfranchisement laws are a vestige of medieval times when offenders were banished from the community and suffered what is likened to civil death. Brought from Europe to the colonies, they gained new political importance at the end of the 19th Century, when many Southern states revisited them as a way to exclude blacks from the vote. The fact that we legally deny people the right to vote after they have served their time is indeed troubling.

In forty-six states and the District of Columbia, criminal disenfranchisement laws deny the vote to all convicted adults in prison. Thirty-two states also disenfranchise felons on parole; twenty-nine disenfranchise those on probation. And fourteen states permanently disenfranchise ex-offenders who have fully served their sentences. Currently, an estimated 3.9 million U.S. citizens are disenfranchised, including over 1 million who have completed their sentences. Implementation of these laws have had tremendous impact on African American males. Thirteen percent of African American men or 1.4 million are disenfranchised. Of that number, 440,000 have completed their sentences and paid their debt to society. A report issued by the Sentencing Project in conjunction with Human Rights watch revealed that in Alabama and Florida, 31 percent of all Black men are permanently disenfranchised---unbelievable! In Iowa, Mississippi, New Mexico, Virginia, and Wyoming one in four or 24 to 28 percent of Black men are permanently disenfranchised. In Delaware, one in five black men or 20 percent are permanently disenfranchised. In Texas, one in five black men or 20 percent are permanently disenfranchised. And Black men represent less than 6 percent of the total U.S. population.

Clearly, this is not a White or a Black issue, this is a human rights issue, this is a test of democracy, and this is an American issue. It is clear that Blacks are disproportionately affected by these laws. An unacceptable trend is continuing in our nation with respect to prisons. We have what some have described as a prison industrial complex mentality, a new growth industry, a lock them up and throw away the key and deny them the right to vote when they get out. The impact of drugs, unemployment and antiquated sentencing laws have our prisons bursting at the seams. In the past 12 years the number of Americans in jails and prisons has doubled. At the end of 1985, there were 744,208 people locked up; by mid-1998, that number rose to 1.8 million. I suspect that the number will continue to rise.

Disenfranchisement laws are inconsistent with our democratic principles. With this bill we have a

unique opportunity to move from the dark ages to the light of a new sense of democracy and belonging for individuals who have paid their debt to society. If we are to live as an enlightened nation then we must not only talk rehabilitation, and reclamation but we must practice it. Moreover, rehabilitation and reclamation must not only include helping ex-felons get jobs and a place to live once they get back into society, but it must include encouraging and providing them opportunities to experience full citizenship, including the right to vote.

To those who will argue against this bill, I ask you, what will America gain by denying ex-felons the right to experience the fullness of this great democracy. Are you saying that the prodigal son or daughter can never again come home and be accepted as a full member of the family. Is that the standard we want for our nation? I hope not, and so Mr. Chairman, I urge, I implore, I importune this honorable committee to look favorably upon the Conyers Bill and make democracy available to all of our law abiding citizens.

Thank you.



Briefing/Fact Sheets

Facts About Prisons and Prisoners

The Growing Corrections System

- The number of inmates in state and federal prisons has increased more than five-fold from less than 200,000 in 1970 to 1,232,900 by 1998. An additional 592,000 are held in local jails.
- The number of persons on probation and parole has been growing dramatically along with institutional populations. There are now 5.7 million Americans incarcerated or on probation, or parole, an increase of 209 percent since 1980.
- Almost one in three (32%) young black males in the age group 20-29 is under some type of correctional control (incarceration, probation, or parole), as is 1 in 15 young white males and 1 in 8 young Hispanic males.
- In fiscal year 1995, state and federal governments planned \$5.1 billion in new prison construction, at an average cost of \$58,000 for a medium security cell.
- The 1998 United States' rate of incarceration of 672 inmates per 100,000 population is the second highest reported rate in the world, behind only Russia's rate of 685 per 100,000.

Who is in our Prisons and Jails?

- 94% of prison inmates are male, 6% female.
- 49% of state and federal prisoners in 1997 were black and 17% were Hispanic.
- 65% of state prison inmates in 1991 had not completed high school.
- 33% of jail inmates in 1991 were unemployed prior to entering jail.
- 32% of jail inmates in 1991 who had been free for at least one year prior to their arrest had annual incomes of under \$5,000.
- 71% of those sentenced to state prisons in 1995 were convicted of non-violent crimes, including 31% for drug offenses, and 29% for property offenses.
- 57% of jail inmates in 1989 reported they were under the influence of alcohol or drugs at the time they committed their offense.
- 1 in 4 jail inmates in 1989 was in jail for a drug offense, compared to 1 in 10 in 1983; drug offenders constituted 21% of 1997 state prison inmates and 60% of 1996 federal prison inmates.

- Black males have a 29% chance of serving time in prison at some point in their lives; white males have a 4% chance.

Sources: Bureau of Justice Statistics, *Corrections Compendium*, and The Sentencing Project.

8/99

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Briefing/Fact Sheets

Prison Populations, "Projections and Analysis"

NATIONAL INMATE POPULATION OF TWO MILLION PROJECTED IN 2000

An analysis of 1998 prison population figures just released by the Bureau of Justice Statistics indicates that the nation's prison and jail population will reach a total of two million inmates in the first year of the new millennium if current trends continue. As seen below, by 1995 the number of inmates had more than tripled from the level of 501,900 in 1980. Based on the 1997-98 rate of increase (4.8% for prisons, 4.5% for jails), the population will be four times the 1980 level by the end of the year 2000.

YEAR	NATIONAL PRISON AND JAIL POPULATION
1980	501,900
1985	742,600
1990	1,148,700
1995	1,585,600
1997	1,743,900
1998	*1,837,000
1999	*1,923,000
2000	*2,014,000

* estimated year-end

The current level of incarceration represents the continuation of a 25-year escalation of the nation's prison and jail population beginning in 1973. The U.S. rate of incarceration of 672 per 100,000 is second only to Russia, and represents a level of incarceration that is 6-10 times that of most industrialized nations.

The rise in the prison population in recent years is particularly remarkable given that crime rates have been falling nationally since 1992. With less crime, one might assume that fewer people would be sentenced to prison. This trend, though, has been overridden by the increasing impact of lengthy mandatory sentencing policies. These include:

- *Mandatory Minimums* - The mandatory minimum sentencing policies that now exist in every state have been used disproportionately for drug offenders, who now constitute one of every four inmates nationally. Research by the Department of Justice, the U.S. Sentencing Commission, and other agencies has documented that many of these offenders are low-level offenders whose continued incarceration is extremely costly and wasteful of prison space.
- *"Three Strikes" Policies* - The federal government and nearly half the states have some type of "three strikes and you're out" law that requires sentences of life without parole or significant increases over past sentencing patterns. California's law is by far the broadest such statute, with more than 40,000 offenders having been sentenced under its provisions since its enactment in 1994.
- *"Truth in Sentencing"* - Spurred on by financial incentives in the 1994 federal crime bill, half the states have qualified for federal prison funding as a result of having changed their sentencing laws to require that certain offenders serve 85% of their prison sentence. In most cases, these changes will result in significant increases in time served in prison for these offenders, many of whom would have received lengthy prison terms under past practices. The consequent increased cost of incarceration, though, was cited as the main factor for not adopting such policies in 16 states, according to an analysis by the General Accounting Office.

Continued expansion of the prison system has also been demonstrated to be a far less cost-effective means of addressing crime than other measures. Research by Rand, for example, has documented that spending an additional \$1 million on treatment for drug offenders would reduce serious crime 15 times more than expanding the use of mandatory prison terms.

The growth in incarceration has had its greatest impact on minorities, particularly African Americans. In the ten-year period 1985-95, the number of African Americans in state prisons increased by 132%, compared to an increase of 109% for white prisoners. For drug offenses, there was a 707% rise in the number of imprisoned blacks, compared to 306% for whites.

The proliferation of harsh mandatory sentencing policies has also inhibited the ability of courts to sentence offenders in a way that permits a more "problem-solving" approach to crime, as is being demonstrated in the community policing and drug court movements today. By eliminating any consideration of the factors contributing to crime and a range of responses, such sentencing policies fail to provide justice for either victims or offenders. Finally, given cutbacks in prison programming and rates of recidivism of 60% or more for released prisoners, the increased use of incarceration in many respects represents a national commitment to policies that are both ineffective and inhumane.

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LOSING THE VOTE

The Impact of Felony Disenfranchisement Laws in the United States

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

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

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

Joe Loya, disenfranchised ex-offender

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

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

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

Andrew Shapiro, attorney

October 1998

I. OVERVIEW AND SUMMARY	1
II. FELONY DISENFRANCHISEMENT IN THE UNITED STATES	2
III. CURRENT IMPACT OF DISENFRANCHISEMENT LAWS	7
National Impact	7
Racial Impact	8
IV. CRIME, CRIMINAL JUSTICE POLICIES AND INCARCERATION ...	11
Racially Disproportionate Incarceration Rates	12
V. DISENFRANCHISEMENT LAWS CANNOT BE JUSTIFIED	14
Denying the Vote to Ex-Offenders	15
Denying the Vote to Incarcerated Citizens	17
VI. DISENFRANCHISEMENT IN OTHER COUNTRIES	18
VII. CONSTITUTIONALITY OF CRIMINAL DISENFRANCHISEMENT ...	18
VIII. U.S. CRIMINAL DISENFRANCHISEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW	20
IX. CONCLUSIONS AND RECOMMENDATIONS	22
APPENDIX	
<i>Methodology</i>	24

I. OVERVIEW AND SUMMARY

The expansion of suffrage to all sectors of the population is one of the United States' most important political triumphs. Once the privilege of wealthy white men, the vote is now a basic right held as well by the poor and working classes, racial minorities, women and young adults. Today, all mentally competent adults have the right to vote with only one exception: convicted criminal offenders. In forty-six states and the District of Columbia, criminal disenfranchisement laws deny the vote to all convicted adults in prison. Thirty-two states also disenfranchise felons on parole; twenty-nine disenfranchise those on probation. And, due to laws that may be unique in the world, in fourteen states even ex-offenders who have fully served their sentences remain barred for life from voting.

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

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

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

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

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

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

- An estimated 3.9 million Americans, or one in fifty adults, have currently or permanently lost the ability to vote because of a felony conviction.
- 1.4 million persons disenfranchised for a felony conviction are ex-offenders who have completed their criminal sentence. Another 1.4 million of the disenfranchised are on probation or parole.
- 1.4 million African American men, or 13 percent of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average. More than one-third (36 percent) of the total disenfranchised population are black men.
- Ten states disenfranchise more than one in five adult black men; in seven of these states, one in four black men is *permanently* disenfranchised.
- Given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their lifetime. In states with the most restrictive voting laws, 40 percent of African American men are likely to be *permanently* disenfranchised.

II. FELONY DISENFRANCHISEMENT IN THE UNITED STATES

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

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

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

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

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

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

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

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

April 8, 1991

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

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

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

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

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

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

TABLE 1: Categories of Felons Disenfranchised under State Law

State	Prison	Probation	Parole	Ex-felons
Alabama	X	X	X	X
Alaska	X	X	X	
Arizona	X	X	X	X (2nd felony)
Arkansas	X	X	X	
California	X		X	
Colorado	X		X	
Connecticut	X	X	X	
Delaware	X	X	X	X
District of Columbia	X			
Florida	X	X	X	X
Georgia	X	X	X	
Hawaii	X			
Idaho	X			
Illinois	X			
Indiana	X			
Iowa	X	X	X	X
Kansas	X			
Kentucky	X	X	X	X
Louisiana	X			
Maine				
Maryland	X	X	X	X (2nd felony)
Massachusetts				
Michigan	X			
Minnesota	X	X	X	
Mississippi	X	X	X	X
Missouri	X	X	X	
Montana	X			
Nebraska	X	X	X	
Nevada	X	X	X	X
New Hampshire	X			
New Jersey	X	X	X	
New Mexico	X	X	X	X
New York	X		X	
North Carolina	X	X	X	
North Dakota	X			
Ohio	X			
Oklahoma	X	X	X	
Oregon	X			
Pennsylvania	X			
Rhode Island	X	X	X	
South Carolina	X	X	X	
South Dakota	X			
Tennessee	X	X	X	X (pre-1980)
Texas	X	X	X	X (2 years)
Utah				
Vermont				
Virginia	X	X	X	X
Washington	X	X	X	X (pre-1984)
West Virginia	X	X	X	
Wisconsin	X	X	X	
Wyoming	X	X	X	X
U.S. Total	47	29	32	15

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

Disenfranchisement of ex-felons is imposed even if the offender was convicted of a relatively minor crime or even if the felon was never incarcerated. For example, Abran Ramirez was denied the ability to vote for life in California because of a twenty-year old robbery conviction, even though he had served only three months in jail and had successfully completed ten years of parole.¹¹ Sanford McLaughlin was disenfranchised for life in Mississippi because he pled guilty to the misdemeanor of passing a bad \$150 check.¹² As Andrew Shapiro, an attorney who has closely studied criminal disenfranchisement, points out, "an eighteen-year-old first-time offender who trades a guilty plea for a lenient nonprison sentence (as almost all first-timers do, whether or not they are guilty) may unwittingly sacrifice forever his right to vote."¹³ Federal Judge Henry Wingate aptly described the political fate of the disenfranchised:

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

In theory, ex-offenders can regain the right to vote. In practice, this possibility is usually illusory. In eight states, a pardon or order from the governor is required; in two states, the ex-felons must obtain action by the parole or pardons board. Released ex-felons are not routinely informed about the steps necessary to regain the vote and often believe—incorrectly—that they can never vote again. Moreover, even if they seek to have the vote restored, few have the financial and political resources needed to succeed. In Virginia, for example, there are 200,000 ex-convicts, and only 404 had their vote restored in the last two

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

¹⁰*Richardson v. Ramirez*, 418 U.S. 24 (1974). Ramirez's co-plaintiff was denied the vote because of a seventeen-year-old conviction for heroin possession; he had served two years in prison and two years on parole.

¹¹Ruling in a suit brought by McLaughlin challenging his disenfranchisement, the court ruled that Mississippi's disenfranchisement provision did not apply to misdemeanor false pretense convictions. The court also ruled that a provision which disenfranchised persons convicted of misdemeanors was unconstitutional unless the state could show the provision was "precisely tailored to serve some compelling governmental interest." *McLaughlin v. City of Canton, Mississippi*, 947 F. Supp. 954, 974-75 (S.D. Miss. 1995).

¹²Andrew L. Shapiro, "The Disenfranchised," *The American Prospect*, no. 35 (November-December 1997): 60-62.

¹³*McLaughlin v. City of Canton*, 947 F. Supp. at 971 (S.D. Miss. 1995).

years.¹⁵ In Mississippi, an ex-convict who wants to vote must either secure an executive order from the governor or get a state legislator to introduce a bill on his behalf, convince two-thirds of the legislators in each house to vote for it, and have it signed by the governor.¹⁶ In Florida, an ex-felon must wait ten years after completion of sentence before being eligible to seek the gubernatorial pardon needed to restore the vote.

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

Criminal disenfranchisement can follow conviction of either a state or federal felony. According to the Department of Justice, however, "not all states have paid consistent attention to the place of federal offenders in the state's scheme for loss and restoration of civil rights. While some state statutes expressly address federal offenses.... many do not. The disabilities imposed upon felons under state law generally are assumed to apply with the same force whether the conviction is a state or federal one."¹⁸ In at least sixteen states, federal offenders cannot use the state procedure for restoring their civil rights. The only method provided by federal law for restoring voting rights to ex-offenders is a presidential pardon.¹⁹

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

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

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

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

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

¹⁹*Ibid.*, pp.2-3.

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

receives probation can vote, while in other states an offender guilty of the same crime who receives probation cannot.

III. CURRENT IMPACT OF DISENFRANCHISEMENT LAWS

National Impact

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

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

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

- A total of 3.9 million adults, or 2.0 percent of the eligible voting population, is currently or *permanently* disenfranchised as a result of a felony conviction.
- Six states—Alabama, Florida, Mississippi, New Mexico, Virginia, and Wyoming—exclude from the vote more than 4 percent of their adult population, or more than one in twenty-five.
- Florida and Texas each disenfranchise more than 600,000 people.

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

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

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

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

- Nearly three-quarters (73 percent) of the disenfranchised are not in prison, but are on probation, or parole or have completed their sentences.
- 1.4 million of the disenfranchised are ex-offenders.
- Five states—Alabama, Florida, Mississippi, Texas, and Virginia—each disenfranchise more than 125,000 ex-felons. One-third of all disenfranchised ex-felons (436,900) are in Florida.
- One million people of the disenfranchised were only sentenced to probation and not to prison. Texas disenfranchises nearly a quarter of a million people (234,200) on probation.

Racial Impact

State disenfranchisement laws have a dramatically disproportionate racial impact. Thirteen percent of all adult black men—1.4 million—are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is seven times the national average. Election voting statistics offer an approximation of the political importance of black disenfranchisement: 1.4 million black men are disenfranchised compared to 4.6 million black men who voted in 1996.²³

The racial impact in certain individual states is extraordinary:

- In Alabama and Florida, 31 percent of all black men are permanently disenfranchised.
- In five other states—Iowa, Mississippi, New Mexico, Virginia, and Wyoming—one in four black men (24 to 28 percent) is *permanently* disenfranchised. In Washington state, one in four of black men (24 percent) are currently or *permanently* disenfranchised.²⁴
- In Delaware, one in five black men (20 percent) is *permanently* disenfranchised.
- In Texas, one in five black men (20.8 percent) is currently disenfranchised.
- In four states—Minnesota, New Jersey, Rhode Island, and Wisconsin—16 to 18 percent of black men are currently disenfranchised.

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

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

TABLE 2: Disenfranchised Felons by State

State	Total Felons	Rate for Total*	Black Men	Rate for Black Men**
Alabama	241,100	7.5%	105,000	31.5%
Alaska	4,900	1.2%	500	6.3%
Arizona	74,600	2.3%	6,600	12.1%
Arkansas	27,400	1.5%	10,700	9.2%
California	241,400	1.0%	69,500	8.7%
Colorado	15,700	0.6%	3,500	6.1%
Connecticut	42,200	1.7%	13,700	14.8%
Delaware	20,500	3.7%	8,700	20.0%
District of Columbia	8,700	2.0%	8,100	7.2%
Florida	647,100	5.9%	204,600	31.2%
Georgia	134,800	2.5%	66,400	10.5%
Hawaii	3,000	0.3%	100	0.9%
Idaho	3,800	0.5%	100	2.7%
Illinois	38,900	0.4%	24,100	4.5%
Indiana	16,800	0.4%	6,800	4.6%
Iowa	42,300	2.0%	4,800	26.5%
Kansas	7,800	0.4%	2,800	5.6%
Kentucky	24,000	0.8%	7,000	7.7%
Louisiana	26,800	0.9%	19,600	4.8%
Maine	0	0.0%	0	0.0%
Maryland	135,700	3.6%	67,900	15.4%
Massachusetts	0	0.0%	0	0.0%
Michigan	42,300	0.6%	22,700	5.4%
Minnesota	56,000	1.6%	7,200	17.8%
Mississippi	145,600	7.4%	81,700	28.6%
Missouri	53,800	1.5%	26,100	11.3%
Montana	2,100	0.3%	0	2.9%
Nebraska	11,900	1.0%	2,100	10.2%
Nevada	16,800	1.4%	4,800	10.0%
New Hampshire	2,100	0.2%	0	3.8%
New Jersey	158,300	2.3%	65,200	17.7%
New Mexico	48,900	4.0%	3,700	24.1%
New York	126,800	0.9%	62,700	6.2%
North Carolina	96,700	1.3%	46,900	9.2%
North Dakota	700	0.1%	0	1.1%
Ohio	46,200	3.5%	23,100	6.2%
Oklahoma	37,200	1.5%	4,800	12.3%
Oregon	7,300	0.3%	900	4.5%
Pennsylvania	34,500	0.4%	18,900	5.2%
Rhode Island	13,900	1.8%	2,800	18.3%
South Carolina	48,500	1.7%	26,000	7.6%
South Dakota	2,100	0.4%	100	3.5%
Tennessee	97,800	2.4%	38,300	14.5%
Texas	610,000	4.5%	156,600	20.8%
Utah	0	0.0%	0	1.0%
Vermont	0	0.0%	0	1.0%
Virginia	269,800	5.3%	110,000	25.5%
Washington	151,500	3.7%	16,700	24.0%
West Virginia	6,700	0.5%	400	4.4%
Wisconsin	48,500	1.3%	14,900	18.2%
Wyoming	14,100	4.1%	400	27.7%
U.S. Total	3,892,400	2.0%	1,367,100	13.1%

* Percentage of adult population who are disenfranchised

** Percentage of black men who are disenfranchised

TABLE 3: Disenfranchised Felons by State and Correctional Status

State	Disenfranchised Population				
	Prison	Probation	Parole	Ex-felons	Total
Alabama	21,100	21,300	5,200	193,500	241,100
Alaska	2,300	2,100	600	0	4,900
Arizona	21,600	23,800	3,800	25,400	74,600
Arkansas	9,000	13,200	5,100	0	27,400
California	144,400	0	97,100	0	241,400
Colorado	12,400	0	3,300	0	15,700
Connecticut	10,300	30,800	1,100	0	42,200
Delaware	3,100	9,100	1,000	7,300	20,500
District of Columbia	8,700	0	0	0	8,700
Florida	63,700	137,200	9,200	436,900	647,100
Georgia	34,300	79,300	21,100	0	134,800
Hawaii	3,000	0	0	0	3,000
Idaho	3,800	0	0	0	3,800
Illinois	38,900	0	0	0	38,900
Indiana	16,800	0	0	0	16,800
Iowa	6,300	8,500	2,200	25,300	42,300
Kansas	7,800	0	0	0	7,800
Kentucky	12,900	6,400	4,600	n/a	24,000
Louisiana	26,800	0	0	0	26,800
Maine	0	0	0	0	0
Maryland	21,000	38,800	16,200	59,700	135,700
Massachusetts	0	0	0	0	0
Michigan	42,300	0	0	0	42,300
Minnesota	5,200	48,400	2,400	0	56,000
Mississippi	13,600	5,500	1,500	125,000	145,600
Missouri	22,000	24,600	12,200	0	48,800
Montana	2,100	0	0	0	2,100
Nebraska	3,200	8,300	700	0	11,900
Nevada	8,200	5,400	3,200	n/a	16,800
New Hampshire	2,100	0	0	0	2,100
New Jersey	27,500	69,200	41,500	0	138,300
New Mexico	4,500	4,900	1,400	35,000	45,900
New York	69,700	0	57,100	0	126,800
North Carolina	27,900	56,400	12,400	0	96,700
North Dakota	700	0	0	0	700
Ohio	46,200	0	0	0	46,200
Oklahoma	19,500	15,400	2,200	0	37,200
Oregon	7,300	0	0	0	7,300
Pennsylvania	34,500	0	0	0	34,500
Rhode Island	2,000	11,200	500	0	13,900
South Carolina	19,800	23,100	5,400	0	48,300
South Dakota	2,100	0	0	0	2,100
Tennessee	15,600	23,600	8,900	52,700	97,800
Texas	132,400	234,200	112,600	133,800	613,000
Utah	0	0	0	0	0
Vermont	0	0	0	0	0
Virginia	27,100	16,300	9,900	215,600	269,300
Washington	12,500	68,900	600	69,500	151,500
West Virginia	2,700	3,100	900	0	6,700
Wisconsin	17,900	28,400	8,100	0	48,500
Wyoming	1,500	1,900	400	10,400	14,100
U.S. Total	1,032,300	1,016,000	452,600	1,391,000	3,892,400

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

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

IV. CRIME, CRIMINAL JUSTICE POLICIES AND INCARCERATION

As one might expect, the number of people disenfranchised reflects to some extent the number of people involved in criminal activity. But the proportion of the population that is disenfranchised has been exacerbated in recent years by the advent of harsh sentencing policies such as mandatory minimum sentences,²⁵ "three strikes" laws²⁶ and truth-in-sentencing laws. Although crime rates have been relatively stable,²⁷ these laws have increased the number of offenders sent to prison and the length of time they serve.

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

The impact of changed sentencing policies is readily apparent from Department of Justice data. For example, persons arrested for burglary had a 53 percent greater likelihood of being sentenced to prison in 1992 than in 1980, while those arrested for larceny experienced a 100 percent increase. The most dramatic change can be seen for drug offenses, where arrestees were almost five times as likely to be sent to prison in 1992 as in 1980.²⁸ In addition, since the number of drug arrests nearly doubled during this period, the impact was magnified further.²⁹ Over this same twelve-year period, the rate of incarceration in prisons rose

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

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

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

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

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

from 139 to 332 per 100,000 U.S. residents.³⁰ Eighty-four percent of the increase in state prison admissions during this period was due to incarceration of nonviolent offenders.³¹

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

If these incarceration rates remain unchanged, Department of Justice data indicate that an estimated one in twenty of today's children will serve time in a prison during his or her lifetime and will be disenfranchised for at least the period of incarceration.³³ The total number of disenfranchised will be substantially greater because it will also include felons on probation in the twenty-nine states that disenfranchise those on probation. And in those states that disenfranchise ex-felons for life, it is likely that as many as 7 to 8 percent of the next generation of adults will be permanently disenfranchised (because of the combined impact of those incarcerated at some point plus additional numbers convicted but not sentenced to prison).

Racially Disproportionate Incarceration Rates

The strikingly disproportionate rate of disenfranchisement among African American men reflects their disproportionate rate of incarceration. The rate of imprisonment for black men in 1996 was 8.5 times that of white men: black men were confined in prison at a rate of 3,098 per 100,000 compared to a white rate

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

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

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

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

of 370.³⁴ Even more strikingly, in the past ten years the black men's rate increased ten times the white men's increase.³⁵

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

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

The increased rate of black imprisonment is a direct and foreseeable consequence of harsher sentencing policies, particularly for violent crimes, and of the national "war on drugs." Although the black proportion of arrestees for violent crimes has remained relatively stable over the past two decades, blacks nonetheless continue to constitute a disproportionately large percentage of those arrested for violent crimes (43 percent in 1996); their incarceration rate in part reflects the longer sentences imposed for those crimes.³⁹

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

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

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

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

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

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

But drug control policies that have led to the arrest, prosecution and imprisonment of tens of thousands of African Americans represent the most dramatic change in factors contributing to their disproportionate rate of incarceration. Although drug use and selling cuts across all racial, socio-economic and geographic lines, law enforcement strategies have targeted street-level drug dealers and users from low-income, predominantly minority, urban areas. As a result, the arrest rates per 100,000 for drug offenses are six times higher for blacks than for whites.⁴⁰ Although the black proportion of all drug users is generally in the range of 13 to 15 percent, blacks constitute 36 percent of arrests for drug possession.⁴¹ Under harsh drug sentencing policies, convictions for drug offenses have led to predictable skyrocketing in the numbers of blacks in prison. In 1985 there were 16,600 blacks in state prisons for drug offenses; by 1995 the number had reached 134,000.⁴² Between 1990 and 1996, 82 percent of the increase in the number of black federal inmates was due to drug offenses.⁴³

V. DISENFRANCHISEMENT LAWS CANNOT BE JUSTIFIED

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

Depriving citizens of a political right should only be undertaken for compelling reasons and only to the extent necessary to further those interests. But as we discuss below, felony disenfranchisement laws in the United States are not necessary to further any substantial state interests. The fact that disenfranchisement laws have long historical roots is, of course, an inadequate justification for retaining them: as standards of moral decency or political rights evolve, societies continually reject practices that were formerly acceptable. As one court has pointed out, disenfranchisement "doubtless has been brought forward into modern statutes

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

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

⁴² DOJ OJP, "Prisoners in 1996," Table 13.

⁴³ DOJ OJP, "Prisoners in 1997."

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

without fully realizing the effect of its literal significance or the extent of its infringement upon the spirit of our system of government."⁴⁵

Denying the Vote to Ex-Offenders

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

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

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

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

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

⁴⁵ *Dyers v. San Savings Bank*, 41 Okla. 728 (1914), quoted by Justice Marshall in his dissent in *Richardson v. Ramirez*.

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

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

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

⁴⁹ *Carrington v. Rush*, 380 U.S. 89, 94 (1965); See also *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) (state may not limit the vote to those with "a common interest"); *Cipriano v. City of Houma*, 395 U.S. 701, 705-06 (1969) (differences of opinion cannot justify excluding any group from the franchise).

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

Some might argue that disenfranchisement of ex-felons is simply another penalty the state chooses to impose in addition to incarceration, although there is little historical basis for this view.⁵⁴ It is questionable whether a state may punish offenders by depriving them of any right it chooses. Would a state be able to punish felons by forever denying them the right to go to court or to petition the government? But even if one assumes that deprivation of the right to vote is a legitimate punishment, then such punishment must conform to the fundamental principles governing criminal sanctions. It should, for example, be imposed by a judge following trial, and it should be proportionate to the offense. Yet none of the states require that disenfranchisement be imposed by a judge as part of a criminal sentence. And disenfranchisement laws operate without regard to the seriousness of the crime or the severity of the sentence. As noted above, for example, a person convicted of a single relatively minor crime who never serves any prison time can be turned into a political "outcast" for life. Decades after the crime was committed and the sentence served, regardless of however exemplary the ex-offender's subsequent life may have been, he or she is still denied the ability to exercise the most basic constitutive act of citizenship in a democracy: the right to vote.⁵⁵

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

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

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

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

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

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

Denying the vote to ex-offenders accomplishes little of value. Indeed, it may do more harm than good. Disenfranchisement contradicts the promise of rehabilitation. "The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement...[Denying him the vote] is likely to reaffirm feelings of alienation and isolation, both detrimental to the reformation process."⁵⁶ As the National Advisory Commission on Criminal Justice Standards and Goals observed, "If correction is to reintegrate an offender into free society, the offender must retain all attributes of citizenship...."⁵⁷

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

Denying the Vote to Incarcerated Citizens

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

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

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

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

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

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

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

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

VI. DISENFRANCHISEMENT IN OTHER COUNTRIES

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

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

VII. CONSTITUTIONALITY OF CRIMINAL DISENFRANCHISEMENT

Despite the scant justification for U.S. criminal disenfranchisement laws, they have withstood constitutional challenge. Ordinarily, the courts carefully scrutinize state restrictions on the right to vote to assess their constitutionality under the equal protection clause of Section 1 of the Fourteenth Amendment to the U.S. constitution.⁶² States must show that the restriction is necessary to a legitimate and substantial state interest, is narrowly tailored and is the least restrictive means of achieving the state's objective.⁶³ In

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

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

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

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

Richardson v. Ramirez,⁶⁴ however, the U.S. Supreme Court exempted criminal disenfranchisement laws from such strict scrutiny. It construed Section 2 of the Fourteenth Amendment as granting states an "affirmative sanction" to disenfranchise those convicted of criminal offenses,⁶⁵ and therefore reversed the California Supreme Court's ruling that the disenfranchisement of ex-felons was unconstitutional as a violation of equal protection guarantees.⁶⁶

Eleven years later, in *Hunter v. Underwood*,⁶⁷ the Supreme Court unanimously declared that Section 2 did not protect disenfranchisement provisions that reflected "purposeful racial discrimination" that otherwise violated the equal protection clause.⁶⁸ The court held unconstitutional a provision of the Alabama constitution that disenfranchised offenders guilty of misdemeanors of "moral turpitude" after finding that the intent of the provision had been to prevent blacks from voting and that it continued to have a racially disproportionate impact.⁶⁹

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

⁶⁴418 U.S. 24 (1974)

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

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

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

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

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

enacted with racist intent⁷⁰ It is an unsettled question in the federal courts, however, whether the Voting Rights Act can be used to strike down criminal disenfranchisement laws.⁷¹

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

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

The U.N. Human Rights Committee, which reviews adherence to the ICCPR, has affirmed that Article 25 “lies at the core of democratic government based on the consent of the people” and that

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

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

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

⁷³International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, Art. 25. The U.S. ratified the ICCPR on June 8, 1992.

restrictions on the right to vote should only be based on grounds that are "objective and reasonable."⁷⁴ Acknowledging the existence of criminal disenfranchisement laws, the committee has stated that "[i]f conviction for an offence is the basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence."⁷⁵ It has consistently frowned on and tried to limit the reach of criminal disenfranchisement laws that it has reviewed.⁷⁶

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

The racially disproportionate impact of disenfranchisement laws in the United States is also inconsistent with the principles of non-discrimination contained in the ICCPR and in the Convention on the Elimination of All Forms of Racial Discrimination (CERD), an international treaty adopted for the purpose

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

⁷⁵*Ibid.*

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

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

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

of more effectively combating race-based discrimination that the United States ratified in 1994.⁷⁹ Article 25 of the ICCPR specifically enjoins racial discrimination with regard to electoral rights.⁸⁰ CERD also requires states parties to guarantee, without distinction as to race, color or national or ethnic origin, “[p]olitical rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage,...”⁸¹ CERD wisely does not impose the requirement of discriminatory intent for a finding of discrimination. It requires states parties to eliminate laws or practices which may be race-neutral on their face but which have “the purpose *or* effect” of restricting rights on the basis of race. Regardless therefore, of whether they were enacted with racial animus, U.S. criminal disenfranchisement laws appear to be precisely the kind of laws condemned by CERD: they unnecessarily and unjustifiably create significant racial disparities in the curtailment of an important right.⁸²

IX. CONCLUSION AND RECOMMENDATIONS

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

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

Given the major impact of felony disenfranchisement laws on the voting population, and in particular their strikingly disproportionate impact on African Americans, policymakers should consider alternative policies that will better protect voting rights without injury to legitimate state criminal justice interests. We believe the best course of action would be to remove conviction-based restrictions on voting rights. At the federal level, Congress should enact legislation to restore voting rights in federal elections

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

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

⁸¹ See CERD, Art.5(c).

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

to citizens convicted of a felony, so that the ability to vote in federal elections is not subject to varying state laws. State legislatures should also eliminate state laws that curtail the franchise for persons with felony convictions within their states.

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

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

APPENDIX Methodology

In order to determine the total population and total black male population who are disenfranchised due to felony status in each state we utilized the 1996 Department of Justice publication, *Civil Disabilities of Convicted Felons* as a reference for the states' criteria for disenfranchisement. The criteria for disenfranchisement are not always precise in each state and sometimes are defined by offense. In a few states where a number of common felonies were listed as disqualifying offenses, it was assumed that all felons would generally be subject to these restrictions in practice. In Mississippi, for example, the state Constitution defines a number of specific felonies as voting disqualifications. In 1996 two prison inmates who contended that their crimes were not covered by the ban were turned down by the Department of Corrections in their request to vote by absentee ballot. In response to the challenge, a constitutional amendment was introduced in the state legislature to add additional crimes to the disqualifying offenses.¹³

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

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

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

Racial composition data were available by state only for 1995. In order to estimate the number of disenfranchised black males in 1996 we first estimated the share of each appropriate category (prison, probation, or parole) in 1995 who were black males, and then applied those proportions to the 1996 totals. Racial breakdowns were reported for the majority of states based on counts or estimates. When states reported some offenders of an unknown racial category, the black share was estimated whenever possible.

¹³Beverly Pettigrew Kraft, "Legislators to address inmates' right to vote," *Clarion Ledger*, January 26, 1997, p. 1A.

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

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

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

The laws concerning disenfranchisement in Arizona and Maryland necessitated a slightly different method of estimating persons with felony convictions. In these states one becomes disenfranchised only after a second felony conviction. In order to avoid counting those with no prior convictions and those who had already received a second felony conviction, it was necessary to estimate for each year the proportion of offenders convicted of a second felony. The national figure derived from the three BJS estimates described above is 17.6 percent. To obtain the total disenfranchised population for these states it was necessary to add the total number of second time felons to the number of first-time felons currently under correctional supervision. The share of first time parolees, probationers, and prisoners was based on national data on sentencing of felony offenders broken down by the number of prior felony convictions.

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

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

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

H. R. 568

To secure the voting rights of former felons who have been released from incarceration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1997

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To secure the voting rights of former felons who have been released from incarceration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voting Rights of Former Offenders Act".

SEC. 2. RIGHTS OF CITIZENS.

The right of a citizen of the United States, who otherwise is qualified, to vote in any election for Federal office shall not be denied or abridged because he has committed a criminal offense unless such citizen is imprisoned in a

correctional institution or facility at the time of such election.

SEC. 3. STATE REQUIREMENTS.

Nothing in this Act shall be construed to prohibit the States from establishing requirements for the holding of State or local elective office; nor from enacting any State law which affords the right to vote in any election for Federal office on terms less restrictive than those established by this Act.

SEC. 4. OFFENSE.

Whoever intentionally denies or attempts to deny any person any right secured by this Act shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

SEC. 5. DEFINITIONS.

For purposes of this Act:—

(1) the term "correctional institution or facility" means any prison, penitentiary, jail, or other institution or facility for the confinement of individuals convicted of criminal offenses, except that such term does not include any residential community treatment center (or similar public or private facility);

(2) the term "election" means (A) a general, special, primary, or runoff election, (B) a convention

or caucus of a political party held to nominate a candidate, (C) a primary election held for the selection of delegates to a national nominating convention of a political party, or (D) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and

(3) the term "Federal office" means the office of President or Vice President of the United States, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States.