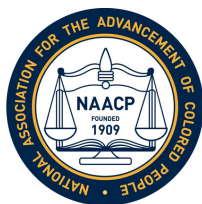


# DEMOCRACY IMPRISONED:

## A REVIEW OF THE PREVALENCE AND IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES

A Shadow Report Submitted to the United Nations Human Rights Committee in Preparation for the Fourth Periodic Review of the United States under the International Covenant on Civil and Political Rights

September 2013



## I. Reporting Organizations

This report has been authored by a coalition of non-profit organizations working on civil rights and criminal justice issues in the United States. The following organizations contributed to this report: the American Civil Liberties Union (ACLU), the ACLU of Florida, the Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil and Human Rights, the National Association for the Advancement of Colored People (NAACP), the NAACP Legal Defense and Educational Fund, Inc. and The Sentencing Project (collectively, the "Reporting Organizations"). Descriptions of each organization are attached as Appendix A.

## II. Introduction and Issue Summary

Some of the Reporting Organizations made List of Issues Submissions to the Human Rights Committee (the "Committee") in December 2012. This report updates items from those submissions and provides additional information to aid in the Committee's review of the United States' ("U.S." or "Government") felony disenfranchisement practices.<sup>1</sup> As a supplement to those Submissions, this report includes an overview of the history of and rationale for felony disenfranchisement laws in the United States, considers the U.S.' disenfranchisement practices in the context of other nations, and discusses recent state law developments.

After its review of the United States' second and third periodic report, the Committee expressed concern that the country's felony disenfranchisement practices have "significant racial implications." It also noted that "general deprivation of the right to vote for persons who have received a felony conviction, and in particular for those who are no longer deprived of liberty, do not meet the requirements of articles 25 and 26 of the Covenant, nor serves the rehabilitation goals of article 10(3)."<sup>2</sup> The Reporting Organizations are encouraged by the Committee's interest in felony disenfranchisement practices in the United States and share the Committee's concerns about the extent to which these laws and their impact are consistent with the critical human rights protections enshrined in the Convention.

The United States continues to lead the world in the rate of incarcerating its own citizens. The reach of the American correctional system has expanded over the course of the past half-century. In 1980, fewer than two million individuals were either incarcerated or on probation or parole; in 2011, that number was over seven million.<sup>3</sup> Despite a decrease in the prison population over the past three years and substantial reform efforts in some states, the overall disenfranchisement rate has increased dramatically in conjunction with the growing U.S. corrections population, rising from 1.17 million in 1976 to 5.85 million by 2010.<sup>4</sup> The growing incarceration rate has been mirrored by the disenfranchisement rate, which has increased by about 500% since 1980.<sup>5</sup> The fact that felony disenfranchisement is so wide-reaching is deeply disturbing, and indicates that these laws undermine the open, participatory nature of our democratic process.

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<sup>1</sup> The authors refer the Committee to the List of Issues Submissions from the ACLU of Florida, the Lawyers' Committee for Civil Rights Under Law and the Leadership Conference on Civil and Human Rights.

<sup>2</sup> Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, CCPR/C/USA/CO/3/Rev.1 (2006) 35.

<sup>3</sup> Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011*, BUREAU OF JUSTICE STATISTICS (Nov. 2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

<sup>4</sup> E. Ann Carson & Daniela Golinelli, *Prisoners in 2012-Advance Counts*, BUREAU OF JUSTICE STATISTICS (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>; Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (July 2012), THE SENTENCING PROJECT, [http://www.sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf).

<sup>5</sup> Uggen et al., *supra* note 4.

## A. Disproportionate Impact of Felony Disenfranchisement Laws on Minorities

There is clear evidence that state felony disenfranchisement laws have a disparate impact on African Americans and other minority groups. At present, 7.7% of the adult African-American population, or one out of every thirteen, is disenfranchised. This rate is four times greater than the non-African-American population rate of 1.8%.<sup>6</sup> In three states, at least one out of every five African-American adults is disenfranchised: Florida (23%), Kentucky (22%), and Virginia (20%).<sup>7</sup> Nationwide, 2.2 million African-Americans are disenfranchised on the basis of involvement with the criminal justice system, more than 40% of whom have completed the terms of their sentences.<sup>8</sup>

Information on the disenfranchisement rates of other groups is extremely limited, but the available data suggests felony disenfranchisement laws may also disproportionately impact individuals of Hispanic origin and others. Hispanics are incarcerated in state and federal prisons at higher rates than non-Hispanics: about 2.4 times greater for Hispanic men and 1.5 times for Hispanic women.<sup>9</sup> If current incarceration trends hold, 17% of Hispanic men will be incarcerated during their lifetimes, in contrast to less than 6% of non-Hispanic white men.<sup>10</sup> Given these disparities, it is reasonable to assume that individuals of Hispanic origin are likely to be barred from voting under felony disenfranchisement laws at disproportionate rates.

## B. History and Rationale of Felony Disenfranchisement Laws

In one form or another, laws that disenfranchise individuals with felony convictions have existed in the United States since its founding. In fact, twenty-nine states had such laws on the books at the time of the ratification of the Constitution.<sup>11</sup> These laws were borne out of the concept of a punitive criminal justice system – those convicted of a crime had violated social norms, and, therefore, had proven themselves unfit to participate in the political process. Beginning around the end of Reconstruction – about 1870 – many southern states significantly broadened felony disenfranchisement and began focusing on crimes believed to be disproportionately committed by African Americans.<sup>12</sup> It was used along with a bevy of other measures as a means to circumvent the requirements of the Fifteenth Amendment,<sup>13</sup> which prohibited states from preventing individuals from voting on the basis of “race, color, or previous condition of servitude.”<sup>14</sup> The justifications for disenfranchising individuals with felony convictions were ostensibly based on fears over the “purity of the ballot box” and concern that allowing certain current or even former inmates to vote would “pervert” the political process.<sup>15</sup> These laws were often upheld by reference to an exemption for felony disenfranchisement in Section 2 of the Fourteenth Amendment –

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<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 17.

<sup>9</sup> Paul Guerino et al., *Prisoners in 2010*, BUREAU OF JUSTICE STATISTICS, 27 (Feb. 9, 2012), <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

<sup>10</sup> Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, 71 (2006).

<sup>11</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 901 (4th ed. 2011).

<sup>12</sup> Reuven Ziegler, *Article: Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 217 (2011).

<sup>13</sup> Angela Behrens, *Voting--Not quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).

<sup>14</sup> U.S. CONST. amend. XV, § 1.

<sup>15</sup> *Washington v. State*, 75 Ala. 582, 585 (Ala. 1884) (arguing that felony disenfranchisement is designed to “preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny.”).

“participation in rebellion, or other crime.”<sup>16</sup> Rather than punitive – focusing on the individual– these laws were deemed by the Supreme Court to be regulatory – focusing on the ballot and election itself.<sup>17</sup>

Over the course of the twentieth century, attitudes towards criminality have gradually come to include recognition of the possibility of the rehabilitation and reintegration of former prisoners into society upon their release.<sup>18</sup> However, there has not been a corresponding realignment of felony disenfranchisement laws to make them consistent with more contemporary goals of the criminal justice system – increasing public safety and reducing reoffending.

Proponents of felony disenfranchisement argue that such laws may deter crime,<sup>19</sup> though disenfranchisement has not been shown to actually accomplish the goal of deterrence. One commentator, for example, has observed that, “[r]ecent research suggests a negative correlation between voting and subsequent criminal activity among those with and without prior criminal history.”<sup>20</sup> Disenfranchisement, on the other hand, is likely to have the opposite effect by further marginalizing and alienating formerly incarcerated individuals from civil society. Other arguments in support of felony disenfranchisement are unpersuasive, as well. For example, some suggest that, if allowed to vote, individuals with felony convictions would constitute a cohesive voting bloc, which would distort criminal law.<sup>21</sup> However, the fear that individuals with felony convictions may “distort” the law through voting is unfounded and certainly not an acceptable ground to prevent them from exercising that right.<sup>22</sup> The Supreme Court, for example, has previously held – although not in a felony disenfranchisement case – that “[f]encing out” from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.<sup>23</sup> In addition, little evidence exists to suggest that former inmates of any sort would cohere into a constituency, or that, if they did, any viable candidate would specifically court their votes.<sup>24</sup>

The arguments against felony disenfranchisement are strong. Felony disenfranchisement operates contrary to the goals of ensuring public safety and reducing reoffending by alienating from society those individuals that the criminal justice system is simultaneously attempting to reintegrate. Further, as the Committee has noted, state disenfranchisement laws are problematic not only due to the vast numbers of potential voters they affect, but also their disproportionate impact on racial minorities, particularly African Americans and Hispanics. Further, many of these laws extend punishment beyond the walls of the prison by continuing to disenfranchise individuals who are on probation, parole or have completed their full sentences. For this reason, it is particularly important that the Committee urge the United States to provide its rationale for continuing to deprive individuals with felony convictions of the right to vote after they are no longer incarcerated.

### C. The United States in International Context

Not only does the sheer number of individuals the United States imprisons set it apart from most nations, the United States has further distinguished itself from other countries through the widespread practice of depriving individuals with felony convictions of the right to vote. Disenfranchisement is a

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<sup>16</sup> U.S. CONST. amend. XIV, § 2.

<sup>17</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>18</sup> Ziegler, *supra* note 12 at 203.

<sup>19</sup> Behrens, *supra* note 13 at 236.

<sup>20</sup> Ziegler, *supra* note 12 at 207.

<sup>21</sup> Guy Padraic Hamilton-Smith & Matt Vogel, *The Ballot as a Bulwark: The Impact of Felony Disenfranchisement on Recidivism*, 23 BERKELEY LA RAZA L.J. \* (2013) (previous version available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1919617](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919617)).

<sup>22</sup> *Id.*

<sup>23</sup> *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (citing *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)).

<sup>24</sup> Ziegler, *supra* note 12 at 206.

rarity in the democratic world, both for the incarcerated and for those released.<sup>25</sup> Under article 25, governments may impose reasonable restrictions on the right to vote, such as prohibiting voting by inmates. However, permanent disenfranchisement for a felony conviction—the policy in Florida, for example—fails to meet the requirements of article 25 of the ICCPR. Lifetime disenfranchisement does not satisfy the requirement that the grounds for the deprivation of voting rights be “objective and reasonable” or that the suspension of rights be “proportionate” to the offense and sentence.<sup>26</sup> This conclusion is consistent with the Committee’s 2006 Concluding Observations after the U.S.’ review.

The United States’ status as an outlier is further affirmed by the growing reluctance of other nations to accept felony disenfranchisement. Even when such laws have been promulgated, they have often been struck down in the courts.<sup>27</sup> For example, in 1999, the South African high court struck down legislation disenfranchising all prisoners, noting that a republic is “founded on . . . universal adult suffrage” which is “one of the fundamental values of the constitutional order.”<sup>28</sup> Likewise, the European Court of Human Rights has struck down similar laws in both the United Kingdom and Austria as incompatible with the European Convention on Human Rights.<sup>29</sup> This approach has been echoed by the Canadian Supreme Court, as well. Striking down a law providing for blanket disenfranchisement of prisoners, the Court held that the “universal franchise has become . . . an essential part of democracy.”<sup>30</sup> It continued, “if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows.”<sup>31</sup> Yet despite growing international consensus around the elimination or even limitation of felony disenfranchisement laws, these antiquated practices continue in the United States.

#### **D. State Felony Disenfranchisement Laws**

Currently, individuals with felony convictions in the United States are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disenfranchisement, despite completion of one’s full sentence. The Table in Appendix B provides an overview of the various state laws.

While some states provide only for the disenfranchisement of those currently serving their sentence, the vast majority of disenfranchised individuals have completed their prison term.<sup>32</sup> Of the estimated 5.85 million American adults barred from voting, only 25% are in prison. By contrast, 75% of disenfranchised individuals reside in their communities while on probation or parole or after having completed their sentences.<sup>33</sup> Approximately 2.6 million individuals who have completed their sentences remain disenfranchised due to restrictive state laws.<sup>34</sup> Although voting rights restoration is possible in many states, it is frequently a difficult process that varies widely across states. Individuals with felony

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<sup>25</sup> For example, one scholar argues that “an identifiable global trajectory has emerged towards the expansion of felon suffrage. American jurisprudence lies outside of this global trajectory...” Ziegler, *supra* note 12 at 210.

<sup>26</sup> Human Rights Comm., 57th Sess., General Comment No. 25, The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service (Article 25), ¶14, U.N. Doc. CCPR/C/21/Rev.1/Add.7 available at <http://www.unhcr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb>.

<sup>27</sup> Internationally, what is referred to in the United States as “felony disenfranchisement” is often termed “convict disenfranchisement.” Although within the United States a “felon” is a particular subclass of convict, internationally this distinction is rarely made. Hamilton-Smith & Vogel, *supra* note 21.

<sup>28</sup> August v. Electoral Commission, 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).

<sup>29</sup> Ziegler, *supra* note 12 at 223.

<sup>30</sup> Sauve v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, paras. 31-33 (Can.).

<sup>31</sup> *Id.*

<sup>32</sup> Uggen et al., *supra* note 4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

convictions are typically unaware of their restoration rights or how to exercise them. Further, confusion among elections officials about state law contributes to the disenfranchisement of eligible voters.<sup>35</sup> Reliable information on the rate and number of individuals whose rights have been restored is difficult to obtain, but preliminary data suggests that in states that continue to disenfranchise after the completion of an individual's sentence, the percentage of restoration ranges from less than 1% to 16%. This data indicates that the vast majority of individuals in these states remain disenfranchised.<sup>36</sup>

### E. Recent Developments in State Felony Disenfranchisement Laws

In the past fifteen years there has been a general trend toward liberalization of felony disenfranchisement laws. Since 1997, twenty-three states have changed their felony disenfranchisement policies with the goal of expanding voter eligibility and reducing the restrictiveness of these laws.<sup>37</sup> In some states, this momentum has continued in recent years, while in others, lawmakers have moved in a more restrictive direction.

One of the most recent developments was in **Virginia**, which, historically, has had one of the most restrictive felony disenfranchisement laws in the country: persons convicted of felonies are barred from voting for life. Voting rights can be restored to individuals on a case-by-case basis, but this has required application to and affirmative intervention by the governor.<sup>38</sup> Virginia also has an extraordinarily high rate of disenfranchisement among adult African-Americans—at least 20%.<sup>39</sup> Given this historically restrictive policy and its disparate impact on communities of color, it is notable that Virginia's Governor Bob McDonnell announced positive changes to the voting rights restoration procedure. As of July 15, 2013, Virginia started automatically (albeit individually) restoring the voting rights of any person convicted of a non-violent felony who is no longer under state supervision, does not have pending felony charges, and has paid off any financial obligations imposed by the court.<sup>40</sup> As many as 100,000 people could be eligible to have their voting rights restored under Governor McDonnell's new policy.<sup>41</sup> While Virginia's new procedure will restore voting rights to a substantial number of people, the fact that the change was achieved through a gubernatorial policy means it may be revoked or revised by future administrations.

In April 2013, **Delaware** amended the state constitution to repeal a voter disenfranchisement provision. As a result, individuals convicted of most felonies will no longer have to wait five years after completion of their full sentences (including probation and parole) to regain their voting rights. Instead,

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<sup>35</sup> *The Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices on Minority Civic Participation in the United States* (2009); *Our Broken Voting System and How to Repair It: The 2012 Election Protection Report*, <http://www.866ourvote.org/newsroom/publications/the-2012-election-protection-report-our-broken-voting-system-and-how-to-repair-it>).

<sup>36</sup> See List of Issues Submission by the Leadership Conference on Civil and Human Rights at 6.

<sup>37</sup> Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010*, THE SENTENCING PROJECT, 1 (2010). Notable changes include the following: nine states eliminated or changed lifetime disenfranchisement laws; eight states simplified the rights restoration process for individuals who are no longer under state supervision; and two states extended voting rights to people on probation or parole.

<sup>38</sup> *Id.* at 28.

<sup>39</sup> Uggen et al., *supra* note 4 at 11.

<sup>40</sup> Press Release, *Governor McDonnell Announces Automatic Restoration of Voting and Civil Rights on Individualized Basis for Non-Violent Felons*, VIRGINIA.GOV (May 29, 2013), <http://www.governor.virginia.gov/news/viewRelease.cfm?id=1829>.

<sup>41</sup> Editorial, *Restoring the Vote in Virginia*, N.Y. TIMES (June 1, 2013), <http://www.nytimes.com/2013/06/02/opinion/sunday/restoring-the-vote-in-virginia.html>.

they will be automatically eligible to vote. However, some other felony convictions will result in permanent disqualification from voting, unless a pardon is secured from the governor.<sup>42</sup>

Other states have also relaxed felony disenfranchisement restrictions, but have seen the policy reversed by subsequent administrations. For example, in 2005 **Iowa** Governor Tom Vilsack issued an executive order that changed Iowa's felony disenfranchisement policy from lifetime disenfranchisement with the possibility of individualized gubernatorial pardon to a more moderate policy of automatic restoration of voting rights upon completion of a criminal sentence.<sup>43</sup> Governor Vilsack's action led to an 81% reduction in the number of people disenfranchised in Iowa and an estimated 100,000 individuals regained the right to vote.<sup>44</sup> In 2011, however, a new governor, Terry Branstad, reversed this policy and reinstated the former process of individualized executive review. Two years later, the Associated Press reported that although 8,000 individuals had completed their sentences since Governor Branstad took office, less than a dozen had successfully regained their voting rights.<sup>45</sup>

The state of **Florida** has also experienced both advances and setbacks in its felony disenfranchisement policy during the course of the last two decades. However, the net result is that Florida's disenfranchisement rate remains the highest and most racially disparate in the United States. Florida permanently disenfranchises all individuals with a felony conviction, unless they receive discretionary executive clemency. As described in the ACLU of Florida's List of Issues Submission, the United States singled out Florida's record on felony disenfranchisement as one of the most restrictive in the nation. As of 2010, Florida has disenfranchised 1,541,602 citizens due to a felony conviction. This amounts to the disenfranchisement of 10.42% of the state's voting age population and 23.3% of Florida's African-American voting age population. Compare that to the U.S. rates of 2.4% of the 238 million voting age Americans disenfranchised, and 7.7% of the nation's 29 million voting age African Americans, disenfranchised. As this data demonstrates, Florida's status as an outlier among the states is particularly pronounced in terms of the absolute number of disenfranchised citizens and racial disparities in rates of disenfranchisement.

Following a felony conviction, the clemency process provides the only route to rights restoration in Florida. Citizens' eligibility to apply for voting rights restoration ebbs and flows with changes in the state administration, leaving Floridians susceptible to political manipulation. For example, soon after Charlie Crist became governor in 2007, he amended the Clemency Board rules such that citizens convicted of non-violent offenses became eligible for voting rights restoration following release from incarceration. From the 2007 amendments through the end of Crist's term in 2010, 155,312 people had their rights restored. When Florida's next Governor, Rick Scott, took office in 2011, he amended the Clemency Board rules to severely restrict eligibility for rights restoration. The impact of Governor Scott's rollbacks has been striking. In 2011, Florida's Board of Executive Clemency restored the voting rights of only seventy-eight people, while in 2012 the voting rights of just 342 people were restored.<sup>46</sup>

## **F. Legal Challenges to Felony Disenfranchisement Laws**

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<sup>42</sup> Doug Denison, *Voter Rights will be Expanded for Felons in Delaware*, DELAWARE ONLINE.COM (Apr. 16, 2013, 5:50 PM), <http://www.delawareonline.com/article/20130416/NEWS02/130416019/Voter-rights-will-expanded-felons-Delaware>.

<sup>43</sup> Porter, *supra* note 38, at 12.

<sup>44</sup> *Id.*

<sup>45</sup> Ryan J. Foley, *Iowa Felons' Voting Rights: Terry Branstad Executive Order Disenfranchises Thousands*, HUFFINGTONPOST.COM (June 24, 2012, 3:57 PM), [http://www.huffingtonpost.com/2012/06/24/iowa-felons-voting-rights-terry-branstad\\_n\\_1622742.html](http://www.huffingtonpost.com/2012/06/24/iowa-felons-voting-rights-terry-branstad_n_1622742.html).

<sup>46</sup> *Restoration of Civil Rights' Recidivism Report for 2011 and 2012*, FLA. PAROLE COMM'N, 5 (2013), <https://fpc.state.fl.us/PDFs/2011-2012ClemencyReport.pdf>.

Legal challenges to felony disenfranchisement laws in the United States have been mostly unsuccessful because courts have refused to apply the same legal principles regarding the fundamental right to vote to individuals with criminal convictions. As a result, there has not been an adequate judicial response to the disproportionate racial impact of felony disenfranchisement laws on minorities or the unreasonableness of state requirements regarding the restoration of voting rights - claims which fall squarely within the province of Section 1 of the Fourteenth Amendment which ensures equal protection under the law for all people.

The U.S. Supreme Court's decision in *Richardson v. Ramirez*, in which individuals with felony convictions who had completed their sentences argued that California's felony disenfranchisement law violated their equal protection rights, cemented this dichotomy.<sup>47</sup> The Court held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," which was not present in other cases involving restrictions on the franchise.<sup>48</sup> This ruling is especially difficult to reconcile because the Fourteenth Amendment's Equal Protection Clause has been successfully used to challenge laws that appear racially neutral on their face, but are racially discriminatory in practice. Despite this grim legal landscape, civil rights attorneys have tried to fight these laws by focusing on the misapplication of felony disenfranchisement laws<sup>49</sup>, the ambiguity which exists in some state laws regarding which crimes are disenfranchising in the first place<sup>50</sup>, and the racial disparities inherent in the criminal justice system that result in minorities being disproportionately prosecuted, convicted and, consequently, disenfranchised.<sup>51</sup>

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<sup>47</sup> 418 U.S. 24 (1974).

<sup>48</sup> *Id.* at 54.

<sup>49</sup> In South Dakota, for example, election officials removed hundreds of individuals with felony convictions from the voter rolls for the 2008 election without regard to their sentences. At the time, state law only disenfranchised individuals sentenced to prison. In 2009, two American Indian women serving sentences of probation were denied the right to vote in the 2008 election and successfully sued government officials. *Janis v. Nelson*, Civil Action No. 5:09-05019 (D. S.D Dec. 30, 2009). However, following the lawsuit, the South Dakota legislature amended law (SDCL § 12-4-18), and now anyone convicted of a felony on or after July 1, 2012 loses the right to vote until completion of his or her entire sentence, including probation and parole.

<sup>50</sup> Alabama and Georgia deny voting rights to anyone convicted of a "felony involving moral turpitude," but neither state has created an exhaustive or final list of which crimes fall under that umbrella category. Georgia's response to questions regarding the lack of uniformity in the application of the law was to issue an Attorney General's opinion, which concluded that, until the state legislature provides a more adequate response, "all felonies," are considered to involve moral turpitude and, therefore, are disenfranchising offenses. Alabama, on the other hand, was sued for the lack of uniformity in the application of the state's felony disenfranchisement law, but the case was dismissed on jurisdictional grounds. *Baker v. Chapman*, Civ. Action No. 03-cv-2008-900749.00 (Cir. Ct. Montgomery Co., Ala. Oct. 9, 2008).

<sup>51</sup> In Washington state, several minorities with felony convictions challenged the state's felony disenfranchisement law under the Fourteenth and Fifteenth Amendments of the U.S. Constitution, as well as Section 2 of the Voting Rights Act of 1965, which prohibits racial discrimination in voting. *Farrakhan v. Gregoire*, 523 F.3d 990, (9th Cir. 2010). After a long and expensive legal battle, the plaintiffs' constitutional claims were ultimately dismissed and the Ninth Circuit Court of Appeals ruled that plaintiffs could not prevail on their Voting Rights Act claim without proof of intentional discrimination in the state's criminal justice system - essentially incorporating an "intent" requirement into the statute, which Congress never intended. *Id.* at 994. This standard of intentional discrimination is generally very difficult to prove. Similar cases brought under Section 2 of the Voting Rights Act challenging various state felony disenfranchisement laws also have failed. See *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009) (Massachusetts); *Hayden v. Pataki*, 449 F.3d 305, 323 (2d Cir. 2006) (en banc) (New York); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (New York); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (Tennessee); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005).



Individuals with criminal convictions also have argued in court that state laws that condition the restoration of voting rights on the payment of legal financial obligations, namely court fines, fees and restitution, are a form of wealth-based discrimination in violation of not only the Fourteenth Amendment's Equal Protection Clause, but also the Twenty-Fourth Amendment to the U.S. Constitution. The Twenty-Fourth Amendment prohibits Congress and states from denying voting rights based on one's "failure to pay any poll tax or other tax."<sup>52</sup> Unfortunately, cases with this specific claim have been unsuccessful as well.

Overall, courts should examine the actual practice and operation of felony disenfranchisement laws and the unequal treatment they exact. However, until they do, federal legislation is still necessary to address the issue.

## **G. Conclusion**

The last few decades have been a time of movement toward relaxation of the restrictions surrounding felony disenfranchisement in many states. This is in keeping with American public opinion, as surveys show that eight of every ten Americans support the restoration of voting rights to persons convicted of felonies who are no longer under state supervision.<sup>53</sup> In addition, six of ten Americans support the restoration of voting rights to individuals on probation or parole.<sup>54</sup> There have been setbacks alongside the victories, however, both in the courts and at the state level. Furthermore, despite the relaxation of restrictions in some states, disenfranchisement policies in the United States are extreme by international standards, and an estimated 5.85 million Americans are still disenfranchised.<sup>55</sup> Additionally, the reforms to date have not eliminated the disparate impact that felony disenfranchisement policies have on minority communities.

## **III. Relevant Question in List of Issues**

This report focuses on Question 26(a) in the Committee's List of Issues, concerning felony disenfranchisement laws and article 25 of the Convention and the right to take part in the conduct of public affairs.

## **IV. U.S. Government Response<sup>56</sup>**

In its July 2013 response to the Committee's List of Issues, the U.S. Government failed to directly respond to the Committee's inquiries on felony disenfranchisement in Question 26(a). The Government failed to directly address the Committee's questions regarding the rationale for post-incarceration disenfranchisement, did not discuss steps it has taken to ensure states restore voting rights to

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<sup>52</sup> In *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), the plaintiffs argued that Tennessee's law conditioning voting rights restoration on the payment of restitution, court fines, and child support was equivalent to a "poll tax or other tax," in violation of the Twenty-Fourth Amendment of the U.S. Constitution. The Sixth Circuit Court of Appeals affirmed the dismissal of the plaintiffs' claim reasoning that it was rational for Tennessee to require completion of one's sentence before restoring the right to vote, regardless of whether that sentence also included financial penalties. 624 F.3d at 751. See also *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (upholding Arizona law that requires payment of restitution and court fines and fees), and *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1343 (S.D. Fla. 2002) (dismissing plaintiffs' poll tax claim related to Florida's restoration process).

<sup>53</sup> Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 283 (2004).

<sup>54</sup> *Id.*

<sup>55</sup> Uggen et al., *supra* note 4 at 1.

<sup>56</sup> Please see the List of Issues Submissions from the Reporting Organizations, referenced in note 1, for additional discussion of the Committee's 2006 Concluding Observations and the U.S.' responses in its Fourth Periodic Report.

individuals who have completed their sentences or have been released on parole, and did not provide information on the discriminatory impact of felony disenfranchisement laws on minority populations.<sup>57</sup>

The Government noted that under the U.S. Constitution, states generally determine eligibility to vote, and, while it recognized Congress' power to regulate elections for federal office and enact legislation under the anti-discrimination provisions of the Fourteenth and Fifteenth Amendments, the Government did not express support for Congressional legislation, such as the Democracy Restoration Act of 2011, previously introduced in both houses.

The U.S. Government did note that the majority of the forty-eight states that restrict voting by individuals with felony convictions also have restoration processes for those that have completed their sentences or have been released on parole. However, it failed to acknowledge how burdensome, confusing and costly the restoration process can be in some states. Further, the Government did not mention what steps it plans to take to ensure that states are implementing fair, uniform processes for restoring voting rights.

## **V. Recommended Questions**

The Reporting Organizations recommend that the Committee ask the U.S. Government the same questions posed in Question 26(a) on its List of Issues. These questions capture our major concerns, as well as those raised in the U.S. review in connection with its second and third periodic report. The Reporting Organizations do not believe that the U.S. Government has provided a satisfactory response to these questions.

## **VI. Suggested Recommendations**

We ask the Committee to recommend the following:

1. That the U.S. Government publicly support the automatic restoration of voting rights to citizens upon their release from incarceration for felony convictions. This should include urging Congress to reintroduce and pass the Democracy Restoration Act, which would restore voting rights in federal elections to disenfranchised individuals upon their release from incarceration.
2. That the U.S. Government investigate the disproportionate impact of felony disenfranchisement laws on minority populations and issue a report of its findings.
3. That the U.S. Government encourage states to inform criminal defendants of the voting rights implications of their arrest or sentencing and to provide information on the voting rights restoration process upon release from prison and/or completion of criminal sentences.

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<sup>57</sup> See United States Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights (ICCPR).

## Appendix A – Reporting Organizations

The **American Civil Liberties Union** was founded in 1920 and is our nation's guardian of liberty. The ACLU works in the courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. The ACLU today is the nation's largest public interest law firm, with a 50-state network of staffed, autonomous affiliate offices. We appear before the United States Supreme Court more than any other organization except the U.S. Department of Justice. About 100 ACLU staff attorneys collaborate with about 2,000 volunteer attorneys in handling close to 6,000 cases annually. The ACLU of Florida, with headquarters in Miami, is the local affiliate of the national organization. Chartered in 1965, the **ACLU of Florida** operates with the help of 25 staff members and 18 volunteer-run chapters across the state. The organization's oldest chapter — the Greater Miami Chapter of the ACLU of Florida — was founded in 1955. The newest chapters — in Collier and Bay Counties – were chartered in May 2007. [www.aclu.org](http://www.aclu.org); [www.acluf.org](http://www.acluf.org)

Founded in 1963 at the request of President John Kennedy, the principal mission of the **Lawyers' Committee for Civil Rights Under Law** is to secure, through the rule of law, equal justice under law by marshaling the pro bono resources of the private bar for litigation, public policy advocacy and other forms of service to promote the cause of civil rights. Its primary focus is to represent the interests of racial and ethnic minorities and other victims of discrimination through programs that promote economic development of minority communities, and ensure voting rights, fair housing, equal access to education and employment, and environmental justice. The Lawyers' Committee is a national organization with 8 independent affiliates across the country. [www.lawyerscommittee.org](http://www.lawyerscommittee.org)

**The Leadership Conference on Civil and Human Rights** is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. Since its inception, The Leadership Conference has worked to ensure that all persons in the United States are afforded civil and human rights protections under the U.S. Constitution and in accordance with international human rights obligations. [www.civilrights.org](http://www.civilrights.org)

The mission of the **National Association for the Advancement of Colored People** is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The vision of the NAACP is to ensure a society in which all individuals have equal rights without discrimination based on race. Founded February 12, 1909, the NAACP is the nation's oldest, largest and most widely recognized grassroots based civil rights organization. Its more than half-million members and supporters throughout the United States and the world are the premier advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors. [www.naacp.org](http://www.naacp.org)

**The NAACP Legal Defense and Educational Fund, Inc.** is America's premier legal organization fighting for racial justice. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF also defends the gains and protections won over the past 70 years of civil rights struggle and works to improve the quality and diversity of judicial and executive appointments. [www.naacpldf.org](http://www.naacpldf.org)

Established in 1986, **The Sentencing Project** works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. The Sentencing Project was founded in 1986 to provide defense lawyers with sentencing advocacy training and to reduce the reliance on incarceration. Since that time, The Sentencing Project has become a leader in the effort to bring national attention to disturbing trends and inequities in the criminal justice system with a successful formula that includes the publication of groundbreaking research, aggressive media campaigns and strategic advocacy for policy reform. [www.sentencingproject.org](http://www.sentencingproject.org)

## Appendix B—State Felony Disenfranchisement Laws

Table 1. Summary of Felony Disenfranchisement Restrictions in 2013<sup>1,2</sup>

No restriction (2)	Prison (14)	Prison & parole (4)	Prison, parole & probation (20)	Prison, parole, probation & post-sentence – some or all (11)
Maine	District of Columbia	California	Alaska	Alabama <sup>a</sup>
Vermont	Hawaii	Colorado	Arkansas	Arizona <sup>b</sup>
	Illinois	Connecticut	Delaware	Florida <sup>c</sup>
	Indiana	New York	Georgia	Iowa <sup>d</sup>
	Massachusetts		Idaho	Kentucky
	Michigan		Kansas	Mississippi <sup>a</sup>
	Montana		Louisiana	Nebraska <sup>e</sup>
	New Hampshire		Maryland	Nevada <sup>f</sup>
	North Dakota		Minnesota	Tennessee <sup>g</sup>
	Ohio		Missouri	Virginia <sup>h</sup>
	Oregon		New Jersey	Wyoming <sup>c</sup>
	Pennsylvania		New Mexico	
	Rhode Island		North Carolina	
	Utah		Oklahoma	
			South Carolina	
			South Dakota	
			Texas	
			Washington	
			West Virginia	
			Wisconsin	

- Notes: <sup>a</sup> State disenfranchises post-sentence for certain offenses.  
<sup>b</sup> Arizona disenfranchises post-sentence for a second felony conviction.  
<sup>c</sup> State requires a five-year waiting period.  
<sup>d</sup> Governor Tom Vilsack restored voting rights to individuals with former felony convictions via executive order in 2005. Governor Terry Branstad reversed this executive order in 2011.  
<sup>e</sup> Nebraska reduced its indefinite ban on voting to a two-year waiting period in 2005.  
<sup>f</sup> Nevada disenfranchises post-sentence except for first-time non-violent offenses.  
<sup>g</sup> Tennessee disenfranchises those convicted of felonies since 1981, in addition to those convicted of select offenses prior to 1973.  
<sup>h</sup> Virginia requires a five-year waiting period for violent offenses and some drug offenses. As of July 15, 2013, the state will no longer require a two-year waiting period for non-violent offenses.

<sup>1</sup> Ibid.

<sup>2</sup> The Sentencing Project. (2010). *Felony disenfranchisement laws in the United States*. Washington, D.C.: The Sentencing Project. Retrieved from [http://sentencingproject.org/doc/publications/fd\\_bs\\_fdlawsinus\\_Nov2012.pdf](http://sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Nov2012.pdf)