

Voting Behind Bars: An Argument for Voting by Prisoners

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The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.¹

In 1999, just five years after the end of the reign of the apartheid government of South Africa, the country’s constitutional court ad-

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1. August v. Electoral Comm’n 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.) (Albie Sachs, J.) (striking down an administrative ban on prisoner voting).

dressed one of the most profound issues facing the new democracy. The case involved a challenge to the denial of voting rights for citizens incarcerated in South African prisons and raised the fundamental issue of the meaning of democracy, one that was particularly poignant in a society in which such questions had been restricted from public debate. In his written decision for the Constitutional Court of South Africa, Justice Albie Sachs declared, “Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”²

Few nations in recent years have considered issues of democracy with as much care as South Africa, so the public policy debates in that nation should be instructive to all. Yet in the United States, many would view the issue of voting rights for prisoners as an alien concept. Despite widespread reform campaigns on the issue of felony disenfranchisement in recent years, public and policymaker discussion on this topic has generally focused on the restoration of voting rights only after completing a felony sentence or in some instances for offenders currently on probation or parole supervision. Yet, as is true for criminal justice policy broadly speaking, disenfranchisement policies in the United States are very much out of line with world standards, and it behooves us to take a fresh look at the rationale and impact of policies that can only be described as aberrant by international norms.

This Essay makes the argument that felony disenfranchisement policies are inherently undemocratic no matter how applied, including for persons serving prison sentences. This Essay first presents an overview of the origins and impact of modern disenfranchisement practices. It then addresses the policy and philosophical concerns that are relevant in the particular case of prisoners’ voting rights.

A. Overview of Felony Disenfranchisement in the United States

Felony disenfranchisement policies can be traced back to the time of the founding of the nation, having been carried over from the Colonial period. Laws restricting the voting rights of persons with felony convictions were common practice in the new country, which in retrospect is hardly surprising. While the nation was founded as an experiment in democracy, it was in fact a very limited experiment. Essentially, wealthy white male property holders granted themselves

2. *Id.*

the right to vote. Estimates are that this group represented only about 6% of the population at the time.³ Excluded from the ballot box were women, African Americans, illiterates, poor people, and people with felony convictions. Over the course of some two hundred years all of those prohibitions save one have been eliminated, and we now look back on them with a great deal of national embarrassment. Thus, people with felony convictions remain the only category of citizens excluded as a group from electoral participation.

People convicted of felonies are largely excluded from the ballot box, and their numbers have been increasing substantially in recent decades. This is directly related to the unprecedented growth in the criminal justice system since the early 1970s. We can see this most dramatically among the incarcerated population, which rose from about 330,000 people in 1972 to 2.3 million today.⁴ As more people gain a felony conviction, not surprisingly the number of incarcerated persons rises as well.

Felony disenfranchisement laws are established by the states, each with its own determination of circumstances under which people with felony convictions lose their right to vote. As of 2010, incarcerated felons in forty-eight states (all but Maine and Vermont) and the District of Columbia are ineligible to vote; in thirty-five of these states, persons on probation and/or parole are also ineligible, and in twelve states even people who have completed their felony sentence may be ineligible to vote and are subject to lifetime disenfranchisement in four of those states.⁵ In the four most restrictive states—Iowa, Florida, Kentucky, and Virginia—all persons with a felony conviction permanently lose their voting rights, even if they never spend a day in prison.⁶ The only means by which their rights can be restored is through a pardon from the governor, a process which has generally been little known and cumbersome, and benefits only a relative handful of disenfranchised persons.

3. See Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Laws in the United States*, 2002 Wis. L. Rev. 1045, 1129 n.334 (2002).

4. MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 17 (2010); BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 18 tbl.15 (2010) [hereinafter PRISON INMATES AT MIDYEAR 2009], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

5. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2011) [hereinafter FELONY DISENFRANCHISEMENT LAWS], available at http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf.

6. *Id.* at 3.

Today, an estimated 5.3 million persons are ineligible to vote as a result of a current or previous felony conviction.⁷ The scale of disenfranchisement is now so broad that it is likely to be influencing electoral outcomes. To take the most extreme example, the historic 2000 Presidential election was decided by a mere 537 votes in the state of Florida.⁸ At the time, Florida had one of the most restrictive disenfranchisement laws in the country, and on the day of the election an estimated six hundred thousand ex-felons were ineligible to vote.⁹ If the state's policy had instead provided for restoration of voting rights after completion of a sentence, we can only surmise how many of the six hundred thousand would have voted and whom they would have voted for, but clearly the outcome of a significant national election may have turned on this policy.

Racial disparities in the criminal justice system translate into disparities in the disenfranchised population as well. An estimated 38% of the total disenfranchised population is African American,¹⁰ far greater than the black share of the national population, but in line with the black proportion of persons under correctional supervision. Overall, nearly two million African Americans are ineligible to vote.¹¹ As will be seen, racial disparities in disenfranchisement in part reflect greater involvement in criminal behavior, but also reflect biased policy and practice decision-making.

B. The Modern-Day Movement for Disenfranchisement Reform

Since the late 1990s, a significant movement for felony disenfranchisement reform has emerged around the country. This was spurred in large part by two policy reports produced early in that period. First, a 1997 report by The Sentencing Project estimated that 4.2 million Americans were not eligible to vote as a result of felony disenfranchisement laws.¹² That report received significant national attention and was followed the next year by a joint report of Human Rights Watch and The Sentencing Project, *Losing the Vote*, which provided

7. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006).

8. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 793 (2002).

9. *Id.*

10. MANZA & UGGEN, *supra* note 7, at 248-53.

11. *Id.*

12. MARC MAUER, THE SENTENCING PROJECT, INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT 12 (1997).

the first state-based estimates of the impact of disenfranchisement.¹³ That analysis provided civil rights leaders and others at a state level with often striking data demonstrating the large-scale impact of these policies.

Legislative reform activity since that time has been remarkable, resulting in some cases in the elimination of entire categories of disenfranchisement and in others in scaling back the extent of prohibitions. Overall, twenty-three states have enacted such reforms, while only a small handful have adopted more regressive measures.¹⁴ Among the reforms have been the extension of voting rights to ex-felons in Iowa, Maryland, and New Mexico; the expansion of voting rights to persons on probation in Connecticut and probation and parole in Rhode Island; the elimination of post-sentence waiting periods in Nevada and Texas; and the streamlining of the rights restoration process in Alabama, Florida, Tennessee, and Virginia.¹⁵ A 2010 analysis by The Sentencing Project estimated that more than eight hundred thousand persons had gained the right to vote as a result of the enacted reforms.¹⁶

Much of the concern regarding felony disenfranchisement policies has focused on the extreme racial effects of the policies. Many of the states with the most restrictive policies, those that impose bans on ex-felons as well as current felons, have been Southern states and often ones with documented histories of using disenfranchisement laws as a means of reducing black voter turnout. In the post-Reconstruction period, for example, states such as Alabama and South Carolina tailored their disenfranchisement policies with the specific intent of excluding the newly-eligible black male voters. They did so by imposing disenfranchisement for crimes believed to be committed by blacks, but not so for crimes perceived to be engaged in by whites. This set up the bizarre situation whereby a man convicted of beating

13. JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 8-10 (1998), available at http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.

14. NICOLE D. PORTER, THE SENTENCING PROJECT, *STATE FELONY DISENFRANCHISEMENT REFORMS, 1997-2010*, at 1 (2010), available at http://www.sentencingproject.org/doc/publications/publications/vr_ExpandingtheVoteFinalAddendum.pdf.

15. *Id.* at 2.

16. *Id.*

his wife would lose the right to vote, but not one convicted of killing his wife.¹⁷ Such was the racial logic of the time.

Not surprisingly, the bulk of the reforms to disenfranchisement law have taken place in states with the most restrictive policies, particularly those that bar persons from voting even after they have completed their felony sentence. Public opinion research has demonstrated strong support for restoration of rights to those who have “paid their debt to society.”¹⁸ There have also been persuasive arguments that engagement in the electoral process will facilitate successful reentry into the community from prison.

While the success of the reform movement in a relatively short period of time has been impressive, it nonetheless either directly or indirectly refrains from advocacy for a group of citizens that represents nearly a third of the disenfranchised population, the more than 1.6 million Americans incarcerated in the nation’s state and federal prisons. In the following section, I will address and challenge the commonly expressed rationale for denying the right to vote to this group of people. In doing so, I hope to help stimulate new thinking about whether these policies serve any legitimate function in our democracy.

C. Challenging Prisoner Disenfranchisement: The Philosophical Debate

The disenfranchisement of prisoners generally is premised on assumptions about people in prison that portray them as qualitatively distinct from citizens in the outside world. From this perspective flows a view that disenfranchisement is a reasonable penalty to be imposed upon this class of people. A closer look at these perspectives reveals flawed logic and troubling conclusions.

1. Is Prison “Different?”

Given the momentum for reform and the changing political environment on felony disenfranchisement, we should explore why this movement has not generally evolved to advocating for voting rights for persons in prison. Political considerations play into this, of course, but perhaps the more fundamental problem is the prevailing senti-

17. Marc Mauer, *Mass Imprisonment and the Disappearing Voter*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 52 (Marc Mauer & Meda Chesney-Lind eds., 2002).

18. Uggen & Manza, *Democratic Contradiction?*, *supra* note 8, at 794.

ment that somehow “prison is different,” and therefore, people in prison *deserve* to lose the right to vote. In this framing, prisoners are distinct from offenders who are not in prison, and further, disenfranchisement is seen as a reasonable aspect of the punishment that has been imposed on them. But does this rationale hold up to scrutiny?

In a broad sense, it seems clear that the imagery commonly ascribed to prisoners cannot help but stigmatize this group of people and lend a certain air of mystery to them. As many have noted, the walls of the prison are erected not only to keep prisoners locked in, but also to keep the outside world locked out. Few journalists venture into this massively funded public operation, and legislators largely take a “hands off” approach unless there is an eruption of violence. As a result, the image of the prisoner is one that is communicated largely through mass media marketing and Hollywood stories. Hannibal Lecter may be at the extreme edge of this portrayal, but cable TV series such as *Oz* and other depictions similarly communicate a picture of angry men (and sometimes women) capable of sudden and seemingly irrational acts of violence.

So we begin with a public mindset regarding prisoners that is largely based on overwrought stereotypes and therefore unlikely to be inclined to be supportive of anything perceived as “prisoners’ rights.” But in addition to this framing of the issue, there is also the problematic nature of how prison sentences are viewed as qualitatively distinct from other sanctions, a view that does not hold up to serious scrutiny. While it is true that the vast majority of persons convicted of serious violent crimes are sentenced to prison, in many cases of felony sentencings it is a close call between receiving a prison sentence or being placed on probation with conditions of supervision. Data from the Bureau of Justice Statistics, for example, demonstrate that of defendants convicted of a felony in the nation’s seventy-five largest counties in 2006 (most recent data), about a third each were sentenced to prison (35%), jail (36%), or probation or other non-incarcerative sanctions (30%).¹⁹ The differences in sentencing may reflect a variety of factors, including the relative severity of the crime, prior criminal history, availability of sentencing alternatives, and the sentencing judge; but many cases are essentially on the margins and could receive

19. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 12 tbl.12 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>.

either a prison term or a supervised sentence in the community. Therefore, the notion that “prison is different” does not really hold up in a substantial number of cases. Despite this, in twenty states persons in prison lose their right to vote while those on probation do not.

2. Disenfranchisement as an Aspect of Punishment

A key assumption that contributes to prisoner disenfranchisement is that it is generally assumed that disenfranchisement is merely a component of the punishment that is imposed upon conviction. But this assumption proves faulty on two grounds. First, unlike other aspects of punishment, disenfranchisement is neither imposed by a judge based on the individual characteristics of the offender and the offense, nor is it even acknowledged in the courtroom. Rather, it is imposed across the board depending on the type of sentence imposed in a given state, and most of the actors in the courtroom—including most notably, the defendant—are not even aware that this right of citizenship is being taken away.

A broader question lies in the nature of punishment itself. While imprisonment clearly represents a loss of liberty, we do not normally impose restrictions on the fundamental rights of citizenship for those who are incarcerated. If we conceive of voting as an aspect of free speech, the anomalous policy of restricting voting rights becomes clear. For example, someone in prison is free to subscribe to *Newsweek* magazine, but not to a magazine that describes how to make homemade bombs. The distinction here is between free speech and advancing public safety. People in prison are also free to communicate their thoughts to the outside world through letters, phone calls, and other forms of communication. Indeed, as some have done, they can submit op-ed articles to the *New York Times* or the *Washington Post*, and have their published words reach millions of readers. In almost all cases, such activity is far more influential than casting just one vote among millions in an election, yet there are relatively few restrictions placed on such communications.

3. Prisoners as “Untrustworthy”

There are those who contend that people who break the law are by definition untrustworthy and therefore should not be in a position to determine the laws that govern society. As commentator Roger Clegg reasons, “[p]eople who commit serious crimes have shown that they are not trustworthy. And, as to equity, if you’re not willing to

follow the rules yourself, you shouldn't be able to make the rules for everyone else."²⁰

Essentially, Clegg is suggesting that we establish a character test for voting qualification, one defined by a criminal conviction. In a previous era, such restrictions were only mildly disguised through literacy tests and poll taxes, but this modern day version is not much different. For a start, it suggests that "once a criminal, always a criminal" should govern access to the voting booth. It also rests on the dubious assumption that people who have been convicted of stealing a car, for example, cannot be trusted to participate in decision-making about which of two candidates has a more reasonable position on the war in Afghanistan, publicly-funded abortions, or health insurance policy. There is certainly no research that supports such a distinction. One might make an argument that persons convicted of electoral offenses might be barred from voting out of concern for not tainting the electoral process, but since more than 99% of persons in prison have *not* been convicted of such offenses this would hardly have any significant impact on the makeup of the electorate.²¹

4. Impact on Democracy

As the nation has struggled to advance the concept of democracy over two centuries, the increasingly anomalous policy of disenfranchisement becomes a glaring gap on the ideal of full citizen participation, particularly as the criminal justice population has risen to record numbers. Even as a number of states have moved to extend voting rights to people on probation or parole, or to those who have completed their sentences, the prison population of 1.6 million people becomes increasingly isolated from the ballot box.

Nevertheless, many people contemplating the prospect of voting in prison initially conjure images of "criminal voting" that imagines "criminals" subverting the interests of law-abiding citizens. But how likely is this in practice? On an anecdotal basis, as one who has visited and corresponded with many prisoners over the years, it is not at all clear that people in prison have markedly different perspectives on

20. Roger Clegg & Marc Mauer, *Should Ex-Felons Be Allowed to Vote?*, LEGALAFFAIRS (Nov. 1, 2004, 9:50 AM), http://www.legalaffairs.org/webexclusive/debateclub_disenfranchisement1104.msp.

21. See Pam Fessler, *Voter Fraud: A Tough Crime to Prove*, NPR (Mar. 15, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=8922947> (stating that there have only been eighty-seven convictions for ballot fraud since 2002).

key national concerns—economic issues, national defense, social policy—than the voting public in the free world. And on a practical basis, consider how political campaigns are waged and how issues are presented. While public safety issues are clearly of concern to voters, rarely are elections decided solely, or even significantly, on those policies. Candidates may portray themselves as “tough on crime,” of course, but it is difficult to imagine a candidate running on a “pro-criminal” platform gaining much traction in the electoral arena.

Further, to the extent that prisoners may in fact have strong views about incarceration and public safety issues, why should those views be denied access to the ballot box? Consider, for example, the voting rights of another notorious group: BP oil executives. In response to the Gulf oil spill, there have been varied calls for civil or criminal prosecution, payment of fines and damages, and other penalties, but no one has suggested that these executives should lose the right to vote. So, they are free to support candidates who they believe best represent their worldview, and if you or I disagree with them, then it is our job to develop support for our preferred alternatives.

In the area of incarceration policy specifically, with prisons in most states having been declared to be operating in an unconstitutional manner at various times, why would we not want to have the perspectives of the people who have experienced those conditions most directly incorporated into the electoral discussion? As law professor Debra Parkes argues, “[t]he reality that prisoners may have an impact on the outcome of elections is an argument in favour of allowing them to vote rather than against it.”²² Anecdotal evidence regarding prisoner input on the public debate suggests that enfranchisement may in fact encourage candidates to engage prisoners in dialogue. In a Canadian provincial election in Quebec in 1998 with prisoners eligible to vote, Parti Québécois candidate Raoul Duguay met with inmates at Cowansville Penitentiary, home to many long-term inmates.²³ With ninety-two prisoners having registered to vote at the prison, Duguay considered these numbers sufficient enough to warrant a meeting with them.²⁴

To bring a real world perspective into this analysis, there are in fact two states, Maine and Vermont, that have long permitted prison-

22. Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 *TEMPLE POL. & CIV. RTS. L. REV.* 71, 76 (2003).

23. *Id.* at 100-01.

24. *Id.* at 101.

ers to vote.²⁵ In addition, Utah and Massachusetts had previously permitted prisoner voting, but imposed a ban following referenda in 1998 and 2000, respectively.²⁶ There is little data by which to assess what this practice looks like, but available evidence suggests that a modest number of prisoners do vote, and the process is relatively low-key. Interested prisoners are able to use an absentee ballot to vote in their home jurisdiction and there are no indications of practical problems arising on election days. Looking at electoral outcomes, one would be hard pressed to argue that these states have somehow become “pro-criminal” in their orientation as a result of this practice.

D. Disenfranchisement of Prisoners Is Counterproductive for Democracy and Public Safety

In addition to the philosophical challenges raised by disenfranchising people in prison, such policies exacerbate many of the problems associated with disenfranchisement in general. In particular, they create significant limitations on full democratic participation by citizens, run counter to efforts to promote public safety, and exacerbate existing inequalities in the criminal justice system. These include limitations on the electorate, enhanced racial disparity, and exacerbating challenges for reentry.

1. Limitations on the Electorate

Over the course of more than two hundred years the United States has become a far more inclusive society than at the time of its founding. The right to vote has been extended to women, African Americans, and poor people, and earlier restrictions are now almost uniformly looked back upon with regret. Therefore, the only major restriction on the right to vote is for persons with current or previous felony convictions. (Other ongoing voting rights issues remain, such as the movement to secure Congressional representation for citizens of the District of Columbia, though these citizens do have the right to vote for other offices.) As noted above, felony disenfranchisement affects a growing number of people as a result of the dramatic expansion of the criminal justice system in recent decades, with the disenfranchised population in state and federal prisons now numbering 1.6 million.

25. Mauer, *Mass Imprisonment and the Disappearing Voter*, *supra* note 17, at 51.

26. FELONY DISENFRANCHISEMENT LAWS, *supra* note 5, at 2.

The legal exclusion of virtually all prisoners from the electoral arena contributes as well to the *de facto* disenfranchisement of most of the seven hundred thousand persons confined in local jails. The vast majority of this population is not legally disenfranchised since they are generally not serving a felony sentence or residing in one of the states that disenfranchises ex-felons. The majority (about 62%) of this population is awaiting trial, with the remainder generally serving a sentence of less than one year for misdemeanor convictions.²⁷ In practice, however, few jail inmates are ever permitted to vote, primarily because of bureaucratic obstacles. Since inmates by definition cannot get to a voter registration office, and also have difficulty securing absentee ballots, the practical obstacles to their electoral participation in effect lead to widespread disenfranchisement. Notable exceptions include jails in Washington, D.C.; Philadelphia, PA; and Montgomery County, MD, where jail officials and voting rights groups have joined to make registration materials and absentee ballots widely available within the jail to interested inmates.²⁸ If prisoners housed in state and federal prisons were permitted to vote, then it is likely that mechanisms to facilitate this would be in place in these institutions, and therefore could easily be adopted at the jail level as well.

2. Enhanced Racial Disparity

While disenfranchisement policies are theoretically race-neutral in their intent, in practice they produce a severely disproportionate racial effect. In large part, this results from disproportionate rates of felony arrests and convictions among African Americans and other minority groups. But, as a host of research has documented, disparities in imprisonment by race vary significantly in the extent to which they reflect criminal behavior. Criminologist Robert Crutchfield, for example, concludes that:

A growing literature shows empirically that racial differences in criminal involvement contribute substantially less to racial difference in criminal justice processing in some jurisdictions Unwarranted disparities in imprisonment and in criminal justice processing generally have been shown to correlate with social, demographic, and economic characteristics of jurisdictions. In other words, the

27. BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2010—STATISTICAL TABLES, at 17 tbl.13, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>.

28. See generally ACLU, VOTING WHILE INCARCERATED 12 (2005), available at http://www.aclu.org/pdfs/votingrights/votingwhileincarc_20051123.pdf (providing examples of exceptions).

extent to which racial differences in imprisonment can be accounted for by higher African American involvement in imprisonable offenses . . . is dependent on the social and economic climate of states and of particular localities.²⁹

Nowhere is this more significant than in the area of drug law enforcement, the largest source of growth in incarceration since the 1980s. Looking at state and federal prisons, there has been an 1100% increase in the number of imprisoned drug offenders since 1980,³⁰ far greater than the overall inmate population increase of about 350%.³¹ And this increase has particular resonance for disparity issues, with two-thirds of imprisoned drug offenders being African American or Hispanic. Much of this effect reflects disparate law enforcement practices regarding drug offenses, with African Americans being arrested for both drug possession and sale offenses at considerably higher rates than their proportion of drug use or sales.³² Therefore, while disenfranchisement policies generally affect people of color disproportionately, this is even more true in regard to disenfranchisement of incarcerated people since the racial/ethnic disparities in prison are the most extreme within the criminal justice system.

The racial effects of disenfranchisement extend well beyond the individual who is currently disenfranchised, though. While not all members of a given racial or ethnic group vote as a uniform bloc, there are nonetheless strong patterns of party affiliation or issue identification in such communities. Therefore, to the extent that felony disenfranchisement reduces the scale of the black electorate in particular, it also reduces the political impact of the larger black community, including those who have never been convicted of a felony themselves. Further, it is possible that large-scale disenfranchisement may reduce overall voter participation among eligible voters in some communities. Since voting is in large part a communal activity—we frequently discuss upcoming elections with family members and friends, or drive to the voting polls together—then any diminution of this activity may have a spillover effect. A study examining this issue found

29. Robert D. Crutchfield, *Warranted Disparity? Questioning the Justification of Racial Disparity in Criminal Justice Processing*, 36 COLUM. HUM. RTS. L. REV. 15, 22-23 (2004).

30. See MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2* (2007), available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

31. BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE U.S. 1992*, at 5 (1995); *PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES*, *supra* note 4, at 18 tbl.15.

32. MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 55 (2011).

that states with more punitive disenfranchisement policies do in fact have lower electoral participation even among legally eligible voters.³³

3. Exacerbating Challenges for Reentry

The widespread engagement with reentry policy and planning over the past decade has marked a renewed interest in producing effective outcomes for people transitioning from prison back into the community. While successful reentry is largely conditioned upon access to employment, housing, and other services, a key ingredient lies in developing positive connections to institutions in the community. By encouraging ex-offenders to become engaged in pro-social activities it is expected that they will then come to value the rewards of these connections more so than by engaging in anti-social behavior. In this regard, participation in the electoral process is clearly a strong means of connecting with the larger community and affirming one's commitment to that larger community. By so doing, it appears that there are positive public safety benefits for the community as well. An assessment of this issue by Christopher Uggen and Jeff Manza finds that among people with prior felony convictions, there are "consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior,"³⁴ and that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime."³⁵

But the reentry rationale is equally true in regard to voting in prison. As corrections officials around the country now recognize, reentry planning needs to begin not on the day of release to the community, but ideally on the day of admission to prison. Therefore, we can imagine the potential energizing effect of hundreds of thousands of people in prison casting their (often first-time) votes for President and other offices. Given the extreme isolation of prisons from outside society, what better way of bridging that gap than participating in one of the few areas of public life that bring all Americans together?

Disenfranchisement can also be viewed as one element of the growing scope of the collateral consequences of a criminal conviction

33. See Aman McLeod, Ismail K. White & Amelia R. Gavin, *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 81 (2003).

34. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 213 (2004).

35. *Id.* at 214.

that make it increasingly difficult for persons coming out of prison to rejoin the community in a productive manner. In addition to the loss of voting rights, various state and federal policies now impose restrictions on access to welfare and food stamp benefits, residence in public housing, financial aid for higher education, and access to employment. The collective impact of such policies, along with the longstanding stigma attached to a person with a prison record, creates a set of hurdles to successful reentry that are truly daunting.

E. International Perspective

As is true with criminal justice policies broadly speaking, so is it also the case that felony disenfranchisement policy in the United States is far more extreme than in other nations. The United States leads the world in its use of imprisonment, is one of the only industrialized nations to still employ the death penalty, is virtually unique in sentencing juveniles to life without parole, and also maintains restrictions on voting rights greater than in any other democratic nation.³⁶

The extreme nature of U.S. disenfranchisement policies can be seen in the fact that to the extent there is debate about this issue elsewhere, the only significant distinction is whether *any* restrictions at all should be placed on people with felony convictions and if so, only to prohibit those persons in prison from voting. So, it is virtually unheard of in the rest of the Western world for an offender on probation or parole to lose the right to vote and certainly not for someone who has completed serving a sentence. The only exceptions to this are relatively trivial ones, such as the German provision of permitting a maximum five-year post-sentence loss of voting rights for offenses connected to voting fraud or misuse of the ballot box.³⁷ In 2003, only two persons in Germany were disenfranchised under these provisions.³⁸

36. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1, available at <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html>; Press Release, Child Rights Info. Network, Supreme Court Limits Use of Life Without Parole Sentences for Children in Conflict with the Law (May 19, 2010) (on file with author), available at <http://www.crin.org/resources/infodetail.asp?id=22609>; *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last visited Mar. 21, 2011).

37. Nora V. Demleitner, *U.S. Felon Disenfranchisement: Parting Ways with Western Europe*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 79, 86 (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

38. *Id.*

A survey published by Laleh Ispahani in 2009 examined the disenfranchisement practices of European nations.³⁹ She found that seventeen nations imposed no ban on prisoner voting, twelve (mostly former Eastern bloc nations) barred prisoner voting, and eleven employed a limited ban, generally applying to those convicted of serious crimes or serving long sentences.⁴⁰

Further, in those nations where data were available, prisoners generally displayed an active interest in electoral participation. For example, in Belgium, Lithuania, and Romania, more than 60% of inmates vote, while in Italy and the Netherlands between 20-60% do so.

Recently, the right of prisoners to vote has been strongly affirmed by constitutional court decisions in a number of nations. In two rulings in 1993 and 2002, the Supreme Court of Canada upheld the importance of prisoner voting rights, arguing that “[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*.”⁴¹ In South Africa, shortly after the dismantling of the apartheid government, the Constitutional Court also upheld the right of prisoners to vote in two separate cases.⁴² And in Israel, the issue of prisoner voting rights arose in the case of Yigal Amir,⁴³ the assassin of Prime Minister Yitzak Rabin, and clearly one of the most despised citizens in the country. Yet the court upheld his right to vote as well, along with other incarcerated persons, in the case of *Alrai v. Minister of the Interior*,⁴⁴ declaring that we must separate “contempt for this act” from “respect for his right.”⁴⁵

A case brought before the European Court of Human Rights (“ECHR”) challenged the blanket denial of voting rights to all sentenced prisoners in the United Kingdom. The case was brought by John Hirst, who was serving a life sentence and had been barred from voting in any parliamentary or local elections.⁴⁶ While the court did not unambiguously uphold the right of all prisoners to vote, it de-

39. Laleh Ispahani, *Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, *supra* note 37, at 25.

40. *Id.* at 25, 27.

41. *Sauvé v. Canada*, [2002] 3 S.C.R. 519 at para. 44 (Can.); *Sauvé v. Canada*, [1993] 2 S.C.R. 438 (Can.).

42. Ispahani, *supra* note 39, at 48.

43. *Id.* at 49.

44. H CJ 2757/06 *Alrai v. Minister of the Interior* 50(2) PD 18 [1996] (Isr.).

45. Ispahani, *supra* note 39, at 45.

46. *Id.* at 41-45.

clared in 2005 that a blanket denial such as that practiced in the UK was in violation of protocols of the ECHR.⁴⁷ The court left open the possibility that a member state could prohibit certain categories of prisoners from voting, such as those whose crimes involve abuse of a public position, but only after deliberation by a legislative body to develop a rationale for a compelling public interest in doing so.⁴⁸

Finally, courts in Australia and Kenya have also affirmed the right of some or all prisoners to participate in the electoral process. A 2007 ruling by the Australian High Court rejected a blanket ban on voting by prisoners and reinstated the previous policy of permitting voting by anyone serving a prison term of less than three years.⁴⁹ And in 2010, a Kenyan court affirmed the right of fifty thousand prisoners to vote in an upcoming national referendum.⁵⁰ While the ruling only applied to the initial vote, it was expected that its impact might extend to future elections as well.⁵¹ Thus, in all these cases, and even in regard to petitioners hardly viewed as sympathetic in the public eye, constitutional courts have strongly affirmed the rights of citizenship, even for those behind bars.

F. Moving Toward Prisoner Enfranchisement

To make the argument that prisoners should be able to vote does not necessarily suggest that such an outcome is on the near horizon in the United States. Most states have banned this practice for many years and in fact go well beyond it by barring people on probation, parole, and ex-felons in many states. Currently, only thirteen states limit their disenfranchisement policy to those who are incarcerated, with two others not imposing any limits on voting.⁵²

Nonetheless, if we are to attempt to move toward universal enfranchisement we would do well to consider the strategies and messages that can help to create the support for such a movement. Among other considerations is the need to consider whether language or arguments that may be perceived as strategic in the short run can be counterproductive later. A prime example in regard to advocacy of

47. *Id.*

48. *Id.*

49. VICTORIAN ELECTION COMM'N, PRISONERS AND VOTING 3 (2010), available at <http://www.vec.vic.gov.au/files/RP-PrisonersVoting.pdf>.

50. *Kenya Prisoners Win Right to Vote in Landmark Ruling*, BBC NEWS (June 23, 2010), <http://www.bbc.co.uk/news/10395633>.

51. *Id.*

52. FELONY DISENFRANCHISEMENT LAWS, *supra* note 5, at 3.

voting rights for ex-felons is the concept that voting rights should be restored “once you have paid your debt to society.” But while such an argument may be effective in gaining public support for reform, it also reinforces the notion that losing the right to vote is a part of that “debt” to society, and therefore, a legitimate aspect of the punishment that is imposed. If this is the case, then not only have people in prison not finished paying their debt, but neither have people on probation or parole, since they are still under supervision and could be returned to prison for violations. Thus, advocates for reform should carefully consider how to achieve short-term change while also laying the groundwork for a philosophical shift in our thinking about punishment that can produce fundamental long-term change.

While it is unlikely that many states would consider extending voting rights to people in prison in the short run, one can be cautiously optimistic about the prospects for doing so in the not too distant future. As noted, twenty-three states have enacted some type of reform to their felony disenfranchisement practices since 1997—a remarkable pace of activity in a relatively short time frame.⁵³ In addition, in an increasingly interdependent global world, public policy discussions within the United States are moving at least modestly to take into account practices in other nations for the insight they may lend to our national perspective. In recent years, United States Supreme Court decisions involving the death penalty and life without parole for juveniles, for example, have made note of the practice of other nations as a point of reference for consideration.

Finally, just as advocates in all social movements maintain a vision for long-term change while striving for short-term victories, so too should the movement for disenfranchisement reform engage the public in thinking about the full meaning of democratic participation in regard to felony disenfranchisement. Such discussions need to be strategic in relation to time and place, and if consciously incorporated into a reform strategy, we may yet see progress toward this goal before long.

53. See *supra* note 14 and accompanying text.