# LEGAL OUTLIER, AGAIN? U.S. FELON SUFFRAGE: COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS PERSPECTIVES

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## Abstract

The judiciousness of American felon suffrage policies has long been the subject of scholarly debate, not least due to the large number of affected Americans: an estimated 5.3 million citizens are ineligible to vote as a result of a criminal conviction. This article offers comparative law and international human rights perspectives and aims to make two main contributions to the American and global discourse.

After an introduction in Part I, Part II offers comparative law perspectives on challenges to disenfranchisement legislation, juxtaposing U.S. case law against recent judgments rendered by courts in Canada, South Africa, Australia, and by the European Court of Human Rights. The article submits that owing to its unique constitutional stipulations, as well as to a general reluctance to engage foreign legal sources, U.S. jurisprudence lags behind an emerging global jurisprudential trend that increasingly views convicts' disenfranchisement as a suspect practice and subjects it to judicial review. This transnational judicial discourse follows a democratic paradigm and adopts a "residual liberty" approach to criminal justice that considers convicts to be rights-holders. The discourse rejects regulatory justifications for convicts' disenfranchisement, and instead sees disenfranchisement as a penal measure. In order to determine its suitability as a *punishment*, the adverse effects of disenfranchisement are weighed against its purported social benefits, using balancing or proportionality review.

Part III analyzes the international human rights treaty regime. It assesses, in particular, Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"), which proclaims that "every citizen" has a right to vote without "unreasonable restrictions." The analysis concludes that the phrase "unreasonable restrictions" is generally interpreted in a manner which tolerates certain forms of disenfranchisement, whereas other forms (such as life disenfranchisement) may be incompatible with treaty obligations.

This article submits that disenfranchisement is a normatively flawed punishment. It fails to treat convicts as politically-equal community members, degrades them, and causes them grave harms both as individuals and as members of social groups. These adverse effects outweigh the purported social benefits of disenfranchisement. Furthermore, as a *core* component of the right to vote, voter eligibility should cease to be subjected to balancing or proportionality review.

The presumed facilitative nature of the right to vote makes suffrage less susceptible to deference-based objections regarding the judicial review of legislation, as well as to cultural relativity objections to further the international standardization of human rights obligations. In view of this, this article proposes the adoption of a new optional protocol to the ICCPR proscribing convicts' disenfranchisement. The article draws analogies between the proposed protocol and the ICCPR's "Optional Protocol Aiming at the Abolition of the Death Penalty." If adopted, the proposed protocol would strengthen the current trajectory towards expanding convicts' suffrage that emanates from the invigorated transnational judicial discourse.

## I. Introduction: Convicts' Suffrage in Context

> "No right is more precious in a free society than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[1]

### A. *General Overview*

Recent history has witnessed a profound transformation in the perception of suffrage from a privilege to an entitlement.[2] Race, gender, financial wealth, literacy, and similar criteria are no longer considered acceptable qualifications for voting. Electoral democracy, premised on the maxim that ordinary people are qualified to govern themselves, is increasingly practiced globally,[3] and universal suffrage has largely become a democratic ideal.[4]

The right to vote, however, is still qualified. There are, broadly speaking, two categories of voting qualifications: *community membership* and *competence*.[5] This article appraises the disenfranchisement of convicted adult citizens (also referred to below as convicts or felons).[6] The article makes two operating assumptions. First, convicts remain *citizens*.[7] Sec-

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[1] Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (Black, J.).

[2] *See* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States XVIII (2000).

[3] Robert A. Dahl, Democracy and its Critics 97 (1989).

[4] Louis Massicotte, André Blais & Antoine Yoshinaka, Establishing the Rules of the Game: Election Laws in Democracies 232-33 (2004).

[5] *But cf.* Richard S. Katz, Democracy and Elections 232 (1997) (suggesting autonomy, or the ability to make an independent, pressure-free decision, as a possible third type of qualification).

[6] Disenfranchisement of convicts takes different forms across jurisdictions; nonetheless, it is most commonly linked to incarceration. Incarcerated convicts are housed either in secure facilities such as jails, prisons or penitentiaries, or in community facilities that they must return to every evening. Less frequently, disenfranchisement is inflicted on individuals on probation (court-imposed criminal sentences that subject to conditions, release convicted persons instead of sentencing them to incarceration), on parole (the release of prisoners before their full sentence has been served), or on persons who have completed their sentence (the latter are disenfranchised for periods ranging from several years to life). S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 Fordham Urb. L.J. 833, 835-36 (2007). Many scholars and judicial decisions address only disenfranchisement of incarcerated convicts; indeed, some common justifications for the practice are applicable only for incarceration. In the interest of comprehensiveness, this article's analysis engages all forms of convicts' disenfranchisement.

[7] Many countries proscribe the involuntary revocation of citizenship. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967) (holding that Congress has no general power to involuntarily revoke citizenship). Most other countries allow an involuntary

ond, *conviction* is the sole reason for the convicts' disenfranchisement—otherwise, they would remain eligible voters. Consequently, this article does not address other voting qualifications, such as a citizenship requirement (affecting non-citizens), an age requirement (affecting minors) or a mental capacity requirement (affecting the mentally impaired).[8]

The judiciousness of American felon suffrage policies has long been the subject of scholarly debate,[9] not least due to the large number of affected Americans: an estimated 5.3 million citizens are currently disenfranchised as a result of a criminal conviction.[10] The political implications have brought the issue to the 111th Congress: on July 24, 2009, The Democracy Restoration Act of 2009 (DRA) was submitted to the House of Representatives.[11] The proposed bill provided that states shall not deny or abridge the right of formerly incarcerated convicts to vote in any federal election;[12] it thereby implicitly permitted the disenfranchisement of currently incarcerated convicts. The House Judiciary Committee held hearings on the bill on March 16, 2010,[13] though no action was taken before the 111th Congress adjourned in January 2011.

By offering comparative and international human rights perspectives on felon suffrage, this article aims to make two main contributions to the American and global discourse: first, an analysis of why American jurisprudence differs from the emerging global paradigm on convicts' disenfranchisement; and second, an argument for adopting a new optional

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revocation of citizenship only in very rare cases, and condition it upon not rendering that person stateless. *See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBl. I, art. 16 (Ger.).

[8] For a survey of election laws analyzing, inter alia, the status of denizens (non-citizen residents) and the mentally impaired, see André Blais, Louis Massicotte & Antoine Yoshinaka, *Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws*, 20 ELECTORAL STUD. 41 (2001).

[9] *See, e.g.*, Alec Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (2002); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "the Purity of the Ballot Box"*, 102 HARV. L. REV. 1300 (1989); Zdravko Planinc, *Should Imprisoned Criminals Have a Constitutional Right to Vote*, 2 CANADIAN J. LAW & SOC'Y 153 (1987).

[10] Democracy Restoration Act of 2009, H.R. 3335, 111th Cong. § 2(6) (2009).

[11] *Id.*

[12] *Id.*

[13] *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009).

protocol to the International Covenant on Civil and Political Rights[14] that would proscribe disenfranchisement.

Following this introduction, Part II offers comparative perspectives on challenges to felon suffrage legislation, juxtaposing American case law against recent judgments rendered by courts in Canada, South Africa, Australia, and by the European Court of Human Rights.

As a result of courts interpreting the Fourteenth Amendment's language to condone state-sanctioned convicts' disenfranchisement,[15] direct challenges to legislation in the United States have been unsuccessful.[16] Instead, litigation aims to scrutinize legislation by establishing links between alleged disproportionate effects on marginalized social groups and the historical roots of mass disenfranchisement.[17] This article argues that America's unique constitutional stipulations, coupled with its general reluctance to engage foreign legal sources, has resulted in U.S. jurisprudence lagging behind an emerging global jurisprudential trend that increasingly views disenfranchisement as a suspect practice and subjects it to searching judicial review.

Recent non-American jurisprudence demonstrates a common democratic paradigm and a rejection of regulatory justifications for disenfranchisement.[18] Such jurisprudence adopts a "residual liberty" approach that presumes that convicts remain rights-holders. This approach views disenfranchisement as a prima facie infringement of convicts' right to vote.[19] Disenfranchising legislation is subsequently either rejected, due to the unacceptable nature of the purported legislative aims, or (more commonly) subjected to balancing or proportionality judicial review.[20] A vibrant transnational judicial discourse is evident; judges in one jurisdiction explicitly refer to and rely on arguments advanced in others.

Part III analyzes the international human rights treaty regime. It assesses, in particular, Article 25 of the ICCPR that proclaims that "every

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[14] International Covenant on Civil and Political Rights, art. 25, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf (last visited Feb. 13, 2011) [hereinafter ICCPR].

[15] *See infra* Part II.B.2.

[16] *See infra* Part II.B.2.

[17] *See infra* Part II.B.3.

[18] *See infra* Part III.C.

[19] *See infra* Part III.C.

[20] The similarities and differences between balancing and proportionality are widely explored by scholars and judiciaries worldwide. For this article's purposes, it is sufficient to illustrate that some form of balancing or proportionality is taking place in disenfranchisement adjudication. Namely, across jurisdictions, when disenfranchisement is prescribed by law, legislative aims are assessed in view of their importance and necessity, and if courts find the aims to be suitable, the benefits brought by the impugned legislation are balanced against the harms that it causes. For a general discussion of proportionality, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 394-425 (2002).

citizen" has the right to vote "without unreasonable restrictions."[21] The analysis concludes that the phrase "unreasonable restrictions" is generally interpreted in a manner which tolerates certain forms of convicts' disenfranchisement, whereas other forms (such as life disenfranchisement) may be incompatible with treaty obligations.

Against this background, this article advocates the adoption of a new optional protocol to the ICCPR that would categorically proscribe convicts' disenfranchisement. It is argued that the normative framework presented *infra*, which has been applied in the transnational judicial discourse and is commonly used in interpreting the ICCPR, implies that disenfranchisement should be viewed not as a regulatory measure, but as a punitive one. As such, this article submits that disenfranchisement is a normatively flawed punishment that fails to treat convicts as politically equal community members, degrades them, and causes convicts grave harms both as individuals and as members of social groups. The proposed protocol should thus fully proscribe disenfranchisement rather than subjecting it to balancing or proportionality judicial review.

Due to its facilitative nature, the right to vote does not generally pose cultural relativity objections to an international standardization of human rights obligations. Moreover, it is contended that deference should not be given to national legislation concerning disenfranchisement, as such national legislation directly affects participation in democratic decision-making. Finally, the article draws analogies between the proposed protocol and the 1990 Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty ("Death Penalty Protocol").[22]

### B. *Normative Framework*

This article aims to contribute to the convicts' disenfranchisement discourse by providing comparative and international legal analyses. These analyses, coupled with the proposed new optional protocol to the ICCPR, are based on perceptions of convicts as rights-bearers who retain their "residual liberty," on the penal, rather than regulatory, nature of disenfranchisement, and on the acceptable or desirable goals of punishment. These notions are briefly discussed below.

In the past, legislatures commonly invoked "civil death"[23] and similar notions of forfeiture of rights to justify disenfranchisement following conviction for certain offenses, especially those involving "moral turpitude."[24] Recent decades have witnessed a noticeable shift in perception:

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[21] ICCPR, *supra* note 14, art. 25.

[22] U.N. Doc. A/RES/44/128 (Dec. 15, 1989).

[23] Howard Itzkovitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 723 n.15 (1973).

[24] ALA. CONST. art. VIII, § 177 (1901), *repealed by* ALA. CONST. amend. 579; *see also* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1064 (2002).

convicts are no longer considered "slaves of the State"[25] whose deprivation of liberty entails the revocation of all (other) rights.[26] Instead, they are increasingly perceived as rights-bearers who retain after their conviction all the rights "which are not taken away expressly or by necessary implication."[27]

Note the key conceptual distinction between *personal* and *residual* liberty.[28] This article rejects the view that the offender's liberty, along with the rest of her rights, is removed *in its entirety* when a custodial sentence is passed; instead, although a custodial sentence inevitably entails the deprivation of some elements of liberty, a serving prisoner retains her *residual* liberty.[29] Restrictions on convicts' rights that are not an "inevitable consequence of lawful detention"[30] should not be assumed to follow automatically from the imposition of a criminal sentence. Instead, such restrictions require independent justifications.

Part II *infra* suggests that contemporary jurisprudence does not consider disenfranchisement to be an inevitable consequence of custodial sentences. The same applies a fortiori to non-custodial sentences. Indeed, technological advantages have enabled incarcerated convicts to vote by postal ballot or to use mobile voting booths without adverse effects on prison authorities, guards or other prisoners.[31] Disenfranchisement of convicts consequently requires either regulatory or penal justifications. The former is based on the contention that convicts' disenfranchisement serves the electoral process, whereas the latter con-

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[25] Ruffin v. The Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

[26] David Garland, *Foreword*, *in* PRISONERS AS CITIZENS: HUMAN RIGHTS IN AUSTRALIAN PRISONS, at v (David Brown & Meredith Wilkie eds., 2002).

[27] Raymond v. Honey, [1983] A.C. 1, 10 (appeal taken from the Divisional Court of the Queen's Bench Division) (U.K.); *see also* R. v. Board of Visitors of Hull Prison, Ex parte St. Germain (No 1) [1979] Q.B. 425, 455 (appeal taken from the Divisional Court of the Queen's Bench Division) (U.K.); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974); Solosky v. The Queen, [1980] 1 S.C.R. 821, 839 (Can.); LIORA LAZARUS, CONTRASTING PRISONERS' RIGHTS: A COMPARATIVE EXAMINATION OF ENGLAND AND GERMANY 194 (2004) (referring to Golder v. U.K, 18 Eur. Ct. H.R. (ser. A) 17, 21-22 (1975)).

[28] Liora Lazarus, *Conceptions of Liberty Deprivation*, 69 MOD. L. REV. 738, 744 (2006).

[29] For further exploration, see David Garland, *Foreword*, *in* PRISONERS AS CITIZENS: HUMAN RIGHTS IN AUSTRALIAN PRISONS (David Brown & Meredith Wilkie eds., 2002).

[30] R. v. Secretary of State, Ex parte Simms [2000] 2 A.C. 115 (H.L.) 120 (appeal taken from Eng.).

[31] *See, e.g.*, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 133 (2006) (noting that evidence from Maine and Vermont, where serving prisoners are enfranchised, support this contention).

ceives of disenfranchisement as a penal measure that furthers one or more punitive goals.

The analysis *infra* suggests that regulatory justifications for convicts' disenfranchisement emanating from liberal and republican theories of politics remain pervasive in American jurisprudence. In a judgment invalidating a statute that stripped some convicts of their citizenship, the U.S. Supreme Court held that a provision is regulatory if it "imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."[32] The opinion noted, in dicta, that disenfranchisement provisions are regulatory, because they purport to designate reasonable grounds of voting eligibility.[33] Thus, the Court inconsistently determined that revocation of citizenship is a "cruel and unusual punishment,"[34] while disenfranchisement, the denial of a fundamental citizenship right, is an acceptable regulatory measure, when both measures follow the same criminal conviction.

Convicts' disenfranchisement could be justified according to a liberal theory of politics as a reasonable reaction by society to breaches of its "social contract."[35] However, if law obedience is invoked as a voting qualification, then the selective disenfranchisement of some law-breakers, but not of others, would seem unprincipled or at the least, suffer from serious line-drawing problems.[36] Moreover, the legitimacy of punishments, arguably, depends on the legitimacy of political processes that produce and enforce criminal law, which in turn depends on citizens' ability to participate equally in choosing representatives who decide what behavior to outlaw, which individuals to prosecute, and what punishments to impose.[37]

Some theorists have advocated for disenfranchisement as a legitimate means to avert the danger of convicts voting in a manner "subversive of the interests of an orderly society"[38] (for instance, by voting en bloc for

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[32] Trop v. Dulles, 356 U.S. 86 (1958).

[33] *Id*. at 96-97.

[34] *Id.* at 86 (referring to U.S. CONST. amend. VIII).

[35] *See, e.g.*, Green v. Bd. of Elections of N.Y.C., 380 F.2d 445, 451 (1967).

[36] *See, e.g.*, Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 80 (2006); Heather Lardy, *Prisoner Disenfranchisement: Constitutional Rights and Wrongs*, 2002 PUB. L. 524, 530 (2002).

[37] JOHN RAWLS, A THEORY OF JUSTICE 221-22 (2005); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1169 (2004).

[38] Richardson v. Ramirez, 418 U.S. 24, 81 (Marshall, J., dissenting); *see also* Jean Hampton, *Punishment, Feminism and Political Identity*, 11 CAN. J.L. & JURIS. 23, 41 (1998). For an attenuated version, see generally Richard Lippke, *Toward a Theory of Prisoners' Rights*, 15 RATIO JURIS 122 (2002).

candidates who are considered "soft on crime"[39]). However, it is uncertain that convicts necessarily vote based on candidates' positions on penal issues. Moreover, convicts' views on penal matters may not necessarily be fundamentally different from those of the general population. Even if convicts decide to support candidates who advocate a more lenient approach to criminal justice, such candidates still have to garner enough support among the general population in order to prevail, as convicts represent a relatively small percentage of the eligible voting population.[40] More fundamentally, disenfranchising convicts merely because they have a stake in the criminal justice system is inapposite; voting inherently involves the expression of "biases, loyalties, commitments, and personal values."[41]

Another line of regulatory justification advocates felon disenfranchisement as a means of furthering the aim of protecting the body politic from corruption, immorality, and untrustworthy behavior.[42] According to a republican theory of politics, voters are expected to be morally competent and to desire the common good.[43] Convicts, allegedly, have a higher propensity to commit electoral fraud, and possess negative character traits such as impulsiveness and lack of empathy, which may undermine a healthy democracy.[44] Disenfranchisement thus helps to preserve "the purity of the ballot box."[45] However, regarding electoral fraud, convicts who commit *non*-electoral offenses do not necessarily possess a higher propensity than the general population to commit electoral offenses.[46]

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[39] *See, e.g.*, John Kleinig & Kevin Murtagh, *Disenfranchising Felons*, 22 J. APPLIED PHIL. 217, 226 (2005).

[40] Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and "the Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1303 (1989); Saul Brenner & Nicholas J. Caste, *Granting the Suffrage to Felons in Prison*, 34 J. SOC. PHIL. 228, 237 (2003).

[41] George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Radical Uses of Infamia*, 46 UCLA L. REV. 1895, 1906 (1999). Regina Austin posits that we are all self-interested and that emphasizing the impact that enfranchising convicts will have on the criminal justice system serves to enhance a stigma. Regina Austin, *The Shame of it all: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 184 (2004-2005). *Cf.* Carrington v. Rash, 380 U.S. 89, 94 (1965) (holding, in the context of legislation barring soldiers from voting in a Texan district, that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible").

[42] Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1088 (2002).

[43] Schall, *supra* note 36, at 85.

[44] Christopher Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 REV. POL. 277, 302 (1998).

[45] Washington v. State, 75 Ala. 582, 585 (1884).

[46] Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, 5 ANALYSES OF SOC. ISSUES & PUB. POL'Y 235, 240 (2005).

Moreover, authorities could employ less rights-infringing means than disenfranchisement to prevent electoral fraud.[47] The concept of voter virtuousness seems anachronistic—today's voters are heterogeneous and possess diverse personal traits, and voting eligibility is based on political equality rather than on possessing particular moral virtues.[48] Moreover, the "purity of the ballot box" requirement is an even stricter voting qualification than prevention of "subversive voting;" the critique regarding the latter thus applies a fortiori to the former.

A republican theory of convicts' disenfranchisement may also assert that convicts fail to satisfy the voting competence qualification, arguing that "like insane persons[,] [convicts] . . . have raised questions about their ability to vote responsibly"[49] and that "criminals who break laws cannot govern themselves, and hence are not fit to govern others."[50] However, the implicit suggestion that (all) convicts are irresponsible voters, whereas (all) non-convicts are responsible voters, seems to derive from an exaggerated notion of a fundamental difference between convicts and their fellow citizens.[51]. The analogy between convicts and the mentally impaired does not hold; the latter are assumed to lack the mental capacity that is necessary to comprehend the act of voting,[52] whereas the former are assumed to be sufficiently competent to be held criminally responsible.[53] Criminal conviction does not imply that convicts lack an ability to understand what voting means.[54]

This article submits that convicts' disenfranchisement falls under a definition of punishment consisting in "loss, deprivation, or suffering directly imposed by a public authority as a consequence of criminally unlawful behavior."[55] Accordingly, disenfranchisement as punishment must satisfy one or more of the goals of punishment. Duff outlines the main contemporary penal theories: consequentialism (with rehabilitation, incapacitation and deterrence being the main goals); punishment as a form of communication; and retribution (or just deserts).[56]

Consider first the consequentialist goals of punishment: it is unclear how disenfranchisement could serve a rehabilitative purpose, and such a claim is hardly invoked in the literature or popular discourse. On the

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[47] Richardson v. Ramirez, 418 U.S. 24, 80 (Marshall, J., dissenting).

[48] Lardy, *supra* note 36, at 527-28.

[49] Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

[50] Zdravko Planinc, *Should Imprisoned Criminals Have a Constitutional Right to Vote?*, 2 CAN. J. L. & SOC. 153, 160 (1987).

[51] *See, e.g.*, Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "the Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1313 (1989).

[52] Greame Orr, *Ballotless and Behind Bars: The Denial of the Franchise to Prisoners*, 26 FED. L. REV. 55, 59 (1998).

[53] Lardy, *supra* note 36, at 533-34.

[54] *See* Orr, *supra* note 52, at 59.

[55] Michael J. Cholbi, *A Felon's Right to Vote*, 21 L. & PHIL. 543, 544 (2002).

[56] R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 4-16 (2001).

contrary, disenfranchisement seems likely to exacerbate feelings of marginalization and alienation[57] among convicts and to inhibit their reintegration into society. Recent research suggests a negative correlation between voting and subsequent criminal activity among those with and without prior criminal history.[58]

Incapacitation generally aims to prevent convicts from committing future offenses, especially by incarceration, which limits their interaction with general society. Denying individuals convicted of electoral offenses access to the ballot box is indeed likely to prevent them from committing electoral offenses again; however, as noted above, no study has proven a correlation between a propensity to commit electoral offenses and the commission of non-electoral offenses. Consequently, predicating convicts' disenfranchisement on incapacitation grounds is over-inclusive. Even limiting disenfranchisement to convicts who are incarcerated for electoral offenses may fail to satisfy the least rights-infringing-means requirement, since the closely-monitored conditions under which incarcerated convicts vote should substantially decrease the likelihood that they will be able to commit electoral offenses.

One could argue that disenfranchisement plays a role in preventing crime, serving to deter both actual and potential lawbreakers from future criminal activity.[59] However, no study has shown a correlation between the disenfranchisement of convicts and a reduction in crime rates.[60] While the threat of disenfranchisement may possibly tilt the balance for individuals who otherwise would be only partially deterred from committing a crime, this may apply to a relatively small and not easily identifiable group of potential offenders. For other potential offenders, the threat of disenfranchisement may appear remote and secondary in light of immediate and visible punitive measures imposed, like incarceration or fines.

Consider next the applicability of the communicative punishment theory. Duff argues that by tying wrongdoing to censure, society expresses disapproval of convicts' behavior.[61] Disenfranchisement could theoretically serve such a condemnatory purpose, considering its non-physical nature. However, to consider a punishment communicative, it must express a continuing concern for the convict as a (recalcitrant) community member. By contrast, expelling the convict from the community fails to recognize that she remains a community member.[62] Duff suggests that criminal law defines public wrongs for which their perpetrators must

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[57] Note, *supra* note 40, at 1316.

[58] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 133 (2006).

[59] Cholbi, *supra* note 55, at 557.

[60] *Id.*

[61] DUFF, *supra* note 56, at 82.

[62] R. A. DUFF, TRIALS AND PUNISHMENTS 255 (1986).

answer to fellow members of the political community whose law it is—if criminal law does not address offenders as members of the polity, then it becomes a matter of mere control, rather than a communicative enterprise.[63] This article submits that the exclusionary nature of disenfranchisement amounts to a partial expulsion of a convicted citizen from her community, either permanently or temporarily; as such, disenfranchisement cannot qualify as a communicative punishment.

Retribution is perhaps the most frequently invoked justification for disenfranchisement.[64] Waldron's version of the lex talionis ("eye for an eye") retributive principle suggests that punishments should possess at least some characteristics of the committed wrongs.[65] However, the difficulty of determining the intention behind, or purpose of, criminal acts makes it difficult to link disenfranchisement fairly and proportionally to most crimes.[66]

According to a retributive penal theory, a punishment should satisfy two primary requirements: proportionality and individuality. The former concerns the gravity of the criminal act vis-à-vis the punishment, whereas the latter appraises the personal circumstances of each offender.[67] A punishment thus ought to be both proportional and individualized. In applying these principles to current disenfranchisement practices, life disenfranchisement seems disproportionate, while the disenfranchisement of all serving prisoners above a certain length of sentence (and, a fortiori, of all serving prisoners) does not provide a sufficiently individualized punishment.

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[63] Regarding visitors, Duff asserts that transients are expected to respect their host society's values (as reflected by its criminal law), even if they do not share them. R.A. Duff, Citizens, Enemies, Outlaws: The Criminal Law and its Addressees 8-10, at the Criminal Law in Times of Emergency International Conference (May 21-22, 2008), *available at* http://law.huji.ac.il/eng/calendar.asp?act=event&event_id=54&cat=776&thepage=iruim.

[64] *See generally* Mark Carter, *Retributive Sentencing and the Charter: The Implications of Sauvé v. Canada (Chief Electoral Officer)*, 10 CAN. CRIM. L. REV. 43, 56-57 (2005).

[65] Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992). For a classic critique of lex talionis, see A. M. Quinton, *On Punishment*, 14 ANALYSIS 133, 135 (1954). For a contemporary critique, see e.g., Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 701 (2005) (arguing that following lex talionis frequently leads to absurd results, because it is unclear how the harm is to be reproduced in cases like fraud, perjury, and blackmail, or how the principle could be applied, for instance, to an indigent criminal who destroys property).

[66] Cholbi, *supra* note 55, at 545-46. It can be argued that every crime can be interpreted as being political in nature, since crimes may cause insecurity, threaten public order, and prevent democratic societies from functioning properly; punishments should thus arguably mirror the political nature of crimes. However, crimes can also just as easily have an opportunistic (as opposed to ideological) basis.

[67] *See*, *e.g.*, Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005).

A faithful application of retributive theory could nevertheless provide disenfranchisement advocates with a conceptual penal basis for temporary disenfranchisement in cases of certain electoral offenses or offenses against democratic processes. Germany adopted a legislative framework of such nature; the offenses that allow (but do not require) a court to temporarily disenfranchise an offender are assumed to be those that will, or likely will, undermine the foundation of the state or constitute tampering with elections.[68] Interestingly, to date, German courts have disenfranchised very few convicts.[69]

## II. Disenfranchisement Policies from a Comparative Perspective: "American Exceptionalism" in Light of an Emerging Transnational Judicial Discourse

### A. *Introduction*

Drawing on judgments rendered by courts across four continents,[70] this article argues that an identifiable global trajectory has emerged towards the expansion of felon suffrage. American jurisprudence lies outside of this global trajectory; a phenomenon described in various other contexts as "American exceptionalism."[71]

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[68] Nora Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753, 760-61 (2001). In many countries where disenfranchisement is practiced, electoral-related offenses such as buying votes, fraud, vote tampering, or electioneering are considered misdemeanors, and are hence non-disenfranchising. Keesha Middlemass, *Rehabilitated But Not Fit to Vote: A Comparative Racial Analysis of Disenfranchisement Laws*, 8 Souls 22, 27-28 (2006).

[69] Demleitner, *supra* note 68, at 762.

[70] See analysis of court judgments in section C *infra*. These judgments assess the legality of disenfranchising legislation. By contrast, some jurisdictions sanction disenfranchisement on an individual basis, as part of judge-based sentencing, resulting in challenges to the reasonableness of a specific sentencing determination. *See, e.g.*, M.D.U. v. Italy, App. No. 58540/00 Eur. Ct. H.R. (2003) (unpublished decision) (dismissing a claim by an Italian prisoner whose sentence for a fiscal offence included disenfranchisement). In jurisdictions where neither general nor individualized disenfranchisement is practiced, legal challenges often concern the practicalities of voting. For instance, in Israel, the Supreme Court sitting as the High Court of Justice ordered the government to establish arrangements enabling prisoners to vote, after none had existed for the country's first thirty-five years. In 1996, a petition demanding that Yigal Amir, the convicted murderer of Prime Minister Yitzhak Rabin, be stripped of his voting rights was summarily rejected. The Court held that absent disenfranchising legislation, general principles of universal suffrage apply. HCJ 337/84 Hokama [Hukma] v. Minister of the Interior, 38(2) PD 826; HCJ 2757/96 Alrai v. Minister of the Interior, 50(2) PD 18.

[71] This is a term coined by Alexis de Tocqueville in 1831. *See* Harold Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1481 n.4 (2003).

Section B analyzes American felon disenfranchisement. It suggests that U.S. jurisprudence demonstrates three unique features. First, the absence of a constitutional right to vote, coupled with implicit constitutional sanction of disenfranchisement, has led the U.S. Supreme Court to effectively block challenges to facially neutral disenfranchising legislation.[72] Second, America suffers from mass incarceration, which due to disenfranchisement legislation, has led to mass disenfranchisement. The U.S. is home to less than five percent of the world's population, yet with the world's highest incarceration rate (756 out of every 100,000 persons), it incarcerates a quarter of the world's prisoners.[73] In comparison, England and Wales incarcerates 153 out of every 100,000 persons.[74] Due to disenfranchisement legislation explored *infra*, the United States currently disenfranchises an estimated 5.3 million otherwise eligible voters.[75] Third, disenfranchisement legislation disproportionately affects marginalized groups in American society, especially African-Americans.[76] Challenges to disenfranchising legislation consequently focus on applying the Voting Rights Act ("VRA"), enacted by Congress in 1965 to tackle racially discriminatory voting restrictions and amended in 1982 to encompass indirect discrimination resulting from such measures.[77]

Section C analyzes recent judgments regarding challenges to disenfranchisement legislation rendered by courts in Canada,[78] South Africa,[79] Australia,[80] and by the European Court of Human Rights.[81] The analysis identifies a shared vision of a democratic paradigm, coupled with a per-

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[72] Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (Marshall, J., dissenting).

[73] *World Prison Population List*, KING'S COLLEGE LONDON: INTERNATIONAL CENTRE FOR PRISON STUDIES, http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

[74] *Id.*

[75] *Democracy Restoration Act of 2009: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2010). The American prison population has grown six-fold in thirty years. MANZA & UGGEN, *supra* note 58, at 71. Ironically, perhaps, Article 20 of the new Iraqi Constitution, adopted by a referendum on Oct. 15, 2005 with U.S. and U.K. support, guarantees voting rights to *all* citizens, with no exception regarding convicts. Article 20, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

[76] See *infra* Part II.B.3.

[77] National Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

[78] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.).

[79] August v. Electoral Commission 1999 (3) SA 1 (CC) (S. Afr.); Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders ("NICRO") 2005 (3) SA 280 (CC) (S. Afr.).

[80] Roach v. Electoral Comm'r, [2007] 233 CLR 162 (Austl).

[81] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40 (2004) (Fourth Section Chamber); Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006) (Grand Chamber); Frodl v. Austria, App. No. 20201/04 (2010) (First Section Chamber).

ception of convicts as rights-holders who are ab initio entitled to vote and whose disenfranchisement thus needs to be independently justified. These courts conduct balancing or proportionality reviews in order to assess the propriety of disenfranchisement legislation, weighing penal justifications against disenfranchisement's adverse effects.[82] The article highlights a vibrant transnational judicial discourse consisting of frequent cross-referencing from which American jurisprudence is noticeably absent. While particular outcomes vary, a clear trajectory emerges toward expanding convicts' suffrage.

### B. *Convicts' Disenfranchisement and "American Exceptionalism"*

#### 1. Voting Eligibility and the Absence of a Constitutional Right to Vote

The drafters of the U.S. Constitution had no universal suffrage models to draw upon when they wrote the Constitution.[83] Despite commencing with "[w]e the People of the United States," the Constitution did not enunciate an explicit right to vote[84] and still does not do so today.[85]

The Constitution mandates that "[t]he times, places and manner of holding elections for Senators and Representatives" shall be determined by the states.[86] Consequently, election laws and disenfranchisement legislation governing the same federal rights and privileges, "vary widely from State to State, making something of a crazy-quilt of disqualifications and restoration procedures."[87]

Vermont and Maine are currently the only American states that enfranchise all convicts; forty-eight states and the District of Columbia have disenfranchisement laws that deprive convicts of the right to vote while they are in prison.[88] In thirty-five states, convicts may not vote while on parole; thirty states disenfranchise felony probationers; and in

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[82] See *infra* Part II.C.

[83] MANZA & UGGEN, *supra* note 58, at 20.

[84] ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 81 (2006). The Australian Constitution lacks an explicit right to vote as well. Interestingly, while Australia was one of the first countries to enfranchise women, the Commonwealth Franchise Act 1902 (Cth) (Australia) provided that "[n]o aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll." The provision remained in force until 1961. Andrew Geddis, *"For We Are Young and Free": Australia's Electoral Law*, 3 ELECTION L.J. 385, 387 (2004).

[85] *See* Bush v. Gore, 531 U.S. 98, 104 (2000). *See generally* Jamin Raskin, *A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004).

[86] U.S. CONST. art. I, § 4, cl. 1.

[87] Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1054 (2002).

[88] Democracy Restoration Act of 2009, H.R. 3335, 111th Cong. § 2(5) (2009).

ten states, a conviction may result in lifetime disenfranchisement.[89] Divergent disenfranchisement policies thus result in the prima facie unequal treatment of American citizens; individuals who commit the same offense may or may not be ineligible to vote in Federal elections depending on the laws of their state.

In 1787, when the U.S. Constitution was enacted, most African-Americans, Native Americans, women and non-propertied white males were not eligible voters.[90] Following the American Civil War, the Fourteenth Amendment was enacted. Section 1 of the Fourteenth Amendment states that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside."[91] It further stipulates that "[n]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws."[92]

Nevertheless, following the Fifteenth Amendment that enfranchised African-Americans,[93] the Supreme Court rejected claims that the Equal Protection Clause sanctions female suffrage, holding that "the amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it."[94]

By the late 1950s, however, legal perceptions of citizenship and voting had profoundly changed. In *Trop v. Dulles*,[95] the Supreme Court held that "citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."[96] In *Reynolds v. Sims*, the Court held that "the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[97]

The movement toward acknowledging the fundamentality of suffrage became clear in *Harper v. Virginia*, where the Court held the Virginia poll tax unconstitutional.[98] Nevertheless, Justice Harlan's dissent, contending that "property qualifications and poll taxes have been a traditional part of our political structure . . . . whether one agrees or not, arguments have

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89 *Id*.

90 Keyssar, supra note 2, at 2.

91 U.S. CONST. amend. XIV, § 1.

92 *Id.*

93 U.S. CONST. amend. XV.

94 Minor v. Happersett, 21 Wall 162, 171, 88 U.S. 162, 171 (1874).

95 Trop v. Dulles, 356 U.S. 86, 86 (1958).

96 *Id.* at 92-93.

97 Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

98 Harper v. Virginia, 383 U.S. 663 (1966).

been and still can be made in favor of them,"[99] was illuminatingly reminiscent of the past rejection of inclusive suffrage.

Since *Reynolds*, voting restrictions have been generally subjected to strict scrutiny review.[100] For reasons discussed *infra*, the fate of convicts' disenfranchisement legislation has differed from that of other voting restrictions.

### 2. Limited Constitutional Challenges to Convicts' Disenfranchisement

Section 2 of the Fourteenth Amendment enunciates that "when the right to vote . . . is denied to any of the male inhabitants of [a] State, being twenty-one years of age and citizens of the United States . . . the basis of representation [of the State] shall be reduced in the proportion."[101] Congress enacted this section to deter Southern states from disenfranchising newly emancipated African-Americans.[102] Crucially, however, the provision stipulates that no reduction of the basis of representation occurs when disenfranchisement follows "participation in rebellion, or other crime."[103]

The California Supreme Court invalidated state legislation disenfranchising convicted conscientious objectors, holding that this offense did not satisfy the "infamous crime" criterion set by the California state constitution for disenfranchisement.[104]

In the subsequent *Ramirez* judgment, the California Supreme Court invalidated legislation disenfranchising ex-convicts.[105] In both cases, the California Supreme Court applied strict scrutiny review, perhaps in light of *Reynolds*. On appeal, the U.S. Supreme Court reversed *Ramirez* and applied rational basis review. The Supreme Court held in *Richardson* that:

> [T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . . [Section 1] could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.[106]

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[99] *Id.* at 684.

[100] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[101] U.S. CONST. amend. XIV, § 2 (1868).

[102] *See* Courtney Artzner, *Check Marks the Spot: Evaluating the Fundamental Right to Vote and Felon Disenfranchisement in the United States and Canada*, 13 SW. J.L. & TRADE AM. 423, 425 (2007).

[103] U.S. CONST. amend. XIV, § 2.

[104] Otsuka v. Hite, 414 P.2d 412, 421 (1966) (referring to CAL. CONST. art. II, § 1).

[105] Ramirez v. Brown, 507 P.2d 1345, 1357 (1973).

[106] Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974).

The Supreme Court noted that Congress did not even discuss the possibility of leaving the qualification out of Section 2.[107] Moreover, at that time, twenty-nine state constitutions included disenfranchising provisions, and Southern states mentioned convicts' disenfranchisement in their statements of readmission to the Union.[108]

Justice Marshall's dissent maintained that Congress enacted Section 2 to provide a remedy for disenfranchised African-Americans prior to the passage of the Fifteenth Amendment, not to exclude convicts from the purview of the Equal Protection Clause.[109] Marshall acknowledged that convicts' disenfranchisement was common when the Fourteenth Amendment was passed, but noted that "[t]he Equal Protection clause is not shackled to the political theory of a particular era."[110]

Consequently, like the California Supreme Court, Marshall applied strict scrutiny review to the legislation; while finding that California's declared objective (protection of the integrity of voting) satisfied the first requirement of the text (a "compelling state interest"), he held that the legislation was not "narrowly tailored," since it was both over and underinclusive.[111]

The majority confined its equality analysis to justifying the non-applicability of the Equal Protection Clause. A democratic paradigm was noticeably absent from the discussion, and the judgment made no reference to convicts' status as rights-holders. Moreover, while references to comparative and international legal sources in the jurisdictions discussed in section C are commonplace, in contemporary U.S. jurisprudence they are considered highly contentious.[112] It is thus unsurprising that neither the majority nor the dissent referred to foreign sources.

The *Richardson* judgment has been criticized in multiple ways. Doubts have been raised regarding the contemporary validity of Section 2 of the Fourteenth Amendment in view of the subsequent Fifteenth Amendment. The Fifteenth Amendment explicitly prohibits the disenfranchisement of African-Americans, whereas the Fourteenth Amendment

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[107] *Id.* at 48-49.

[108] *Id.*

[109] *Id.* at 73-74, 77.

[110] *Id.* at 76-77 (quoting Harper v. Virginia Board of Elections, 383 U.S. 663, 669 (1966)).

[111] *Id.* at 77-80.

[112] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 576 (2005) (citing as persuasive evidence the United Nations Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, despite the fact that the U.S. has not ratified it). Justice Scalia dissented, contending that "[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position." *Id.* at 622.

implicitly tolerates it.[113] Scholars have suggested that based on a harmonized approach to constitutional interpretation, according to which earlier constitutional provisions should be read in light of later stipulations, the Fifteenth Amendment implicitly repealed the relevant part of Section 2 of the Fourteenth Amendment.[114]

The applicability of Section 2 of the Fourteenth Amendment to *ex*-convicts is particularly problematic.[115] The Thirteenth Amendment bars "slavery [and] involuntary servitude . . . except as a punishment for crime whereof the party shall have been duly convicted,"[116] whereas the Fifteenth Amendment proscribes disenfranchisement on account of an individual's "previous condition of servitude."[117] Incarceration may be considered a form of "servitude," and consequently, the disenfranchisement of *ex*-convicts who are no longer in their "previous condition of servitude" could be incompatible with the Fifteenth Amendment.

The dissent in *Richardson* implies that even if the disenfranchisement of *ex*-felons is constitutionally permissible, such legislation should be subject to strict scrutiny, since ex-felons could be considered a "discrete and insular minority"[118] who are deprived of the right to vote (which as noted above, many regard as a fundamental right[119]).

Further, *Richardson*'s holding that ex-convicts do not have an inalienable right to vote may conflict with previous Supreme Court judgments. In *Afroyim*, the Court maintained that citizenship is an inalienable right that cannot be involuntarily taken away.[120] In *Reynolds*, the Court opined that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[121] If the right to vote is "a central component, if not the central component, of democratic citizenship,"[122] then to the extent that qualitatively diminishing citizenship is tantamount to taking part of one's citizenship away, *Richardson*'s holding clashes with those of *Afroyim* and *Reynolds*. In spite of these critiques, *Richardson* remains binding precedent. The Fifth Circuit rejected a challenge to Texas state

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[113] U.S. CONST. amend. XV, § 1. The Fourteenth Amendment assigns states a representation penalty for disenfranchising African-Americans, but does not explicitly prohibit it.

[114] *See generally* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004).

[115] Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1131 (2002).

[116] U.S. CONST. amend. XIII.

[117] U.S. CONST. amend. XV.

[118] *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[119] HULL, *supra* note 84, at 104.

[120] Afroyim v. Rusk, 387 U.S. 253 (1967).

[121] Reynolds v. Sims, 377 U.S. 533, 567 (1964).

[122] Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197, 1217 (1997).

legislation that disenfranchised both felons and ex-felons.[123] The *Shepherd* court held that "[a] state . . . has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation," and that while it "might not rise to the level of a compelling state interest," such an interest "is forceful enough to constitute a legitimate state interest."[124]

The rational basis threshold set by the Supreme Court in *Richardson* thus seems to have effectively blocked further constitutional challenges to disenfranchisement *as such.*

3. Historical and Social Contexts and the Voting Rights Act

Following the passage of the Fifteenth Amendment, scholars have argued that American states "tailored" their criminal disenfranchisement legislation to cover crimes they considered African-Americans more likely to commit[125] and excluded crimes they thought both races were equally likely to commit.[126] For instance, since African-Americans were considered more likely to commit burglary, theft and arson, Mississippi amended its state constitution in 1890 to disenfranchise individuals convicted of these offenses, while offenses considered likely to be committed by both races (like robbery or murder) did not result in disenfranchisement.[127] The Mississippi Supreme Court, upholding the amendment, held that "[r]estrained by the [U.S.] Constitution from discriminating against the Negro race, the [Mississippi] convention discriminated against its characteristics and the offenses to which its weaker members were prone."[128] This legislation constituted part of a "white backlash" against

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[123] Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978). *Cf.* McLaughlin v. City of Canton, 947 F. Supp. 954, 974-75 (S.D. Miss. 1995) (holding that strict scrutiny review should be applied to legislation disenfranchising individuals convicted of *misdemeanors*).

[124] Shepherd, 575 F.2d at 1115.

[125] Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOCIOLOGY 559 (2003). Manza and Uggen note that the number of offenses defined as felonies not only significantly increased, but also presently includes offenses that were previously considered to be of a minor nature. MANZA & UGGEN, *supra* note 58, at 8. Between 1865 and 1900, nineteen states adopted or amended disenfranchising legislation. *Id.* at 55.

[126] Andrew Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993). *But cf.* Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Bullet* and *the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U. J. GENDER SOC. POL'Y & L. 1, 7-8 (2006) (claiming that criminal disenfranchisement provisions were generally enacted for racially-neutral reasons).

[127] Jeffrey Reiman, *Liberal and Republican Arguments Against the Disenfranchisement of Felons*, 24 CRIM. JUST. ETHICS 3, 5 (2005).

[128] Ratliff v. Beale, 74 Miss. 247, 20 So. 865, 868 (Miss. 1896).

black suffrage, manifested by voting restrictions designed to disenfranchise African-Americans without violating the Fifteenth Amendment.[129]

A significant rise in African-American incarceration and a steep decline in registered voters ensued. For example, in Alabama, the percentage of African-Americans among the prison population rose from two percent in 1850 to seventy-four percent by 1870,[130] while in Louisiana, forty-four percent of registered voters after the Civil War were African-Americans, but only fewer than one percent were in 1920.[131] Crutchfield suggests that economic disincentives to incarcerate African-Americans before the Civil War—such as the deprivation of labor from slave owners—ceased to exist, leading to higher incarceration rates.[132]

In 1985, the U.S. Supreme Court invalidated a 1901 amendment to Alabama's state constitution that disenfranchised individuals convicted of "all crimes of moral turpitude."[133] Basing its judgment on proceedings of the Alabama Constitutional Convention that made explicit reference to "the menace of Negro domination,"[134] the Court held that "[the law's] original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."[135] Distinguishing *Richardson*, the Court maintained that it was "confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 [the Alabama amendment] which otherwise violates § 1 of the Fourteenth Amendment."[136]

*Hunter* thus made challenges to invidious disenfranchisement provisions possible. However, although facially-neutral disenfranchisement provisions fall outside *Hunter*'s purview,[137] the provisions may neverthe-

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[129] Shapiro, *supra* note 126, at 537-38.

[130] MANZA & UGGEN, *supra* note 58, at 59-60.

[131] Carl Frazier, Note, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 484 (2006).

[132] Robert Crutchfield, *Abandon Felon Disenfranchisement Policy*, 6 CRIMINOLOGY & PUB. POL'Y 707, 708 (2007).

[133] Hunter v. Underwood, 471 U.S. 222 (1985); *see also* ALA. CONST. art. VIII, § 177 (1901), *repealed by* ALA. CONST. amend. 579.

[134] Behrens et al., *supra* note 125, at 598; *see* John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. POL'Y HIST. 282, 295-98 (2007).

[135] Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[136] *Id.*

[137] Recently, the U.S. Supreme Court held that a state's interest in preventing persons who "were not eligible to vote because they had been convicted of felonies" from voting is a "neutral and nondiscriminatory reason" for enacting voter identification legislation. Crawford v. Marion Cnty. Election Bd., 533 U.S. 181, 196-97 (2008).

less disproportionately affect certain social groups. For instance, African-Americans make up only twelve percent of the U.S. population, but disproportionately comprise thirty-six percent of its disenfranchised convicts.[138] The Sentencing Project suggests that this data cannot be explained solely by divergent crime rates since, for example, African-Americans make up thirteen percent of drug users but fifty-six percent of drug-related felons.[139] Historically, states with greater African-American prison populations have been more likely to disenfranchise convicts.[140]

In view of the above, after enacting the VRA in 1965 to tackle invidious voting restrictions,[141] Congress amended the VRA in 1982 and expanded its scope to encompass facially-neutral voting restrictions with disproportionate racial effects. The U.S. Supreme Court held that the purpose of the amendment was to address "a certain electoral law, practice, or structure [that] interacts with social and historical conditions to cause an inequality in the [electoral] opportunities enjoyed by black and white voters."[142]

Following the VRA amendment, the U.S. District Court for the Middle District of Tennessee rejected a claim that African-Americans are disproportionately represented among state felons due to historical discrimination and debilitating socioeconomic inequalities and that consequently, the state's disenfranchisement legislation should be invalidated because the legislation disproportionately affects them.[143] The Court noted that disenfranchisement in this case results not from an "immutable characteristic," but rather by "the conscious decision [of felons] to commit an act for which they assume the risks of detection and punishment."[144]

Recent judgments by federal courts exhibit contrasting views regarding the applicability of the VRA to disenfranchisement provisions. The Sec-

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138 JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS 1 (1998).

139 Ryan King & Marc Mauer, THE SENTENCING PROJECT, *Distorted Priorities: Drug Offenders in State Prisons* 11 (2002), *available at* http://sentencingproject.org/Admin/Documents/publications/dp_distortedpriorities.pdf. Drug offenses account for a third of all U.S. felony convictions. MANZA & UGGEN, *supra* note 58, at 70.

140 MANZA & UGGEN, *supra* note 58, at 67. Manza and Uggen note that more than one in seven African-American men is currently denied the right to vote, and that this figure rises to more than one in four in states like Florida. *Id.* at 9-10. According to a survey, eighty percent of Americans generally support the re-enfranchisement of ex-felons, sixty percent support enfranchising convicts on parole, and thirty-one percent support full re-enfranchisement. Jeff Manza, Clem Brookers & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280-83 (2004).

141 National Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

142 Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

143 Wesley v. Collins, 605 F. Supp. 802, 814 (M.D. Tenn. 1985).

144 *Id.* at 813.

ond Circuit affirmed the dismissal of a VRA challenge.[145] Then-Circuit Judge Sotomayor dissented, maintaining that "[s]ection 2 of the [VRA] by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage."[146] The Eleventh Circuit has also rejected a VRA-based challenge. Following *Richardson* and *Hunter*, it determined that the impugned legislation was not invidious.[147] In comparison, the Ninth Circuit held that "[w]hen felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress."[148] Finally, in a referendum held in 2000, Massachusetts reinstated the disenfranchisement of incarcerated felons.[149] The First Circuit dismissed a VRA-based challenge to the state's legislation.[150] On October 18, 2010, the Supreme Court denied a petition for grant of certiorari regarding the applicability of Section 2 of the VRA to disenfranchisement.[151]

Invoking the VRA to tackle situations when disenfranchisement disproportionately affects racial minorities has encountered considerable difficulties in court. Following the denial of certiorari in *Simmons*, there remains ambiguity regarding whether claimants may rely on the VRA. Absent a constitutional amendment or federal legislation, direct challenges to American disenfranchisement legislation appear unlikely to succeed.

By contrast, the non-American judgments, discussed *infra,* scrutinize the legality of disenfranchisement legislation as such. Consequently, their analysis does not focus on the disproportionate effects on minorities that may ensue from disenfranchisement legislation. For instance, the Canadian Supreme Court heard a challenge to legislation disenfranchising convicts sentenced to prison terms of two or more years.[152] Claimants argued that the legislation violated the right to vote under the Canadian Charter of Rights and Freedoms[153] as well as the right to equality,[154] because Aboriginal Canadians are overrepresented among convicts as a result of systemic discrimination in the criminal justice system.[155] The Court acknowledged the claim that the legislation has had a "dispropor-

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145 Baker v. Pataki, 449 F.3d 305, 329 (2d Cir. 2006).

146 *Id.* at 368.

147 Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005).

148 Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).

149 *See* 2001 Mass. Acts 375.

150 Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009).

151 *Id.* Notably, the Acting Federal Solicitor General filed *amicus curiae* brief (at the Court's request), submitting that the petition should be denied.

152 *See* Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.).

153 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11 (U.K.).

154 *Id*.

155 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 60 (Can.).

tionate impact on Canada's already disadvantaged Aboriginal population."[156] Nonetheless, since a violation of the right to vote was sufficient to invalidate the legislation, the Court did not engage fully with the legal ramifications of the inequality claim.[157]

### C. *Is There a Transnational Judicial Discourse on Convicts' Suffrage?*

#### 1. The Notion of a Transnational Judicial Discourse

The propriety of convicts' disenfranchisement has recently become the subject of a robust transnational judicial discourse. The discourse is premised on a shared democratic paradigm and on a notion of convicts as rights-holders whose disenfranchisement is considered a prima facie infringement of their right to vote. Courts in non-American jurisdictions assess disenfranchisement legislation by applying balancing or proportionality review, which arguably sets a higher threshold for reviewing legislation than the American strict scrutiny test and, a fortiori, is more searching than the *Richardson* Court's rational basis standard.

The discourse on convicts' disenfranchisement forms part of an increasingly prevalent phenomenon of formal and informal contacts between judiciaries in human rights adjudication.[158] McCrudden presents two explanations for the transnational discourse phenomenon. The first explanation, which he rejects, is the attraction of "discovering already laid down meanings" in the form of "new natural law."[159] The second explanation is that judges believe they participate in "a common enterprise."[160] Carozza maintains that judges across jurisdictions are increasingly borrowing from, responding to, or otherwise interacting substantially with external legal sources.[161] He argues that, unlike with other areas of law, the human rights transnational discourse is not merely perfunctory. Exploring references to dignity in death penalty adjudication, he points to a "tendency of courts . . . to consistently place their appeal to foreign sources on the level of the shared premise of the funda-

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156 *Id.*

157 *Id*. paras. 60-63.

158 *See* Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J.L. STUD. 499, 510-11 (2000).

159 *Id.* at 527-29.

160 *Id.* McCrudden also rejects a (cynical) explanation that judges are merely results-driven.

161 Paolo Carozza, "*My Friend is a Stranger*"*: The Death Penalty and the Global* Ius Commune *of Human Rights*, 81 TEX. L. REV. 1031, 1045 (2003). Domestic law normally does not mention recourse to foreign law. Exceptionally, the South African Constitution explicitly *allows* judges to consider foreign law. In other jurisdictions, any such reference is judge-initiated. McCrudden, *supra* note 158, at 527.

mental value of human dignity . . . [d]espite differences in positive law, in historic and political context, in religious and cultural heritage."[162]

McCrudden interprets Carozza's argument as suggesting that judges search for a universal meaning of dignity that is not simply *found,* as "natural lawyers" seem to suggest, but is rather *constructed* by the discourse.[163] McCrudden, however, remains unconvinced that comparativism actually produces such common meaning. Rather, he suggests that comparativism aims to establish a "recognizably workable system of judicial interpretation and application of human rights," which does not guarantee uniform interpretation.[164] For instance, despite the transnational use of the term "dignity," no universal interpretation or even particularly coherent national interpretations of the term have emerged.[165]

As noted above, a debate rages in U.S. jurisprudence regarding whether courts should make references to foreign legal sources at all. Justice Scalia avidly criticized what he regarded as selective recourse to comparative sources, suggesting that the Supreme Court's method in *Roper* was to "look over the heads of the crowd and pick out its friends."[166] The significant observation for this article's purpose is that the transnational discourse on convicts' disenfranchisement is replete with references to comparative sources, while American participation in this "common enterprise" is noticeably absent.

### 2. Convicts' Disenfranchisement: The Transnational Discourse

This section offers comparative analysis of leading non-American judgments that form part of a transnational discourse on the legality of convicts' disenfranchisement. The democratic paradigm plays a significantly greater part in these judgments than in parallel American disenfranchisement jurisprudence, as does the notion of convicts as rights-holders; the judgments apply balancing or proportionality review to scrutinize respective disenfranchisement legislation and make frequent references to comparative sources.[167]

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[162] Carozza, *supra* note 161, at 1082.

[163] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 696 (2008).

[164] McCrudden, *supra* note 163, at 713.

[165] *Id.* at 724.

[166] Roper v. Simmons, 543 U.S. 551, 617 (2005). McCrudden questions whether American reluctance to refer to foreign law and American judges' common usage of the term *civil rights* instead of *human rights*, indicate that they do not feel part of the "common enterprise." McCrudden, *supra* note 158, at 529-30.

[167] In comparison, references to international sources are not as frequent. This phenomenon is due, perhaps, to the inconclusive position of the human rights treaty regime. *See* Part III *infra*.

The claimants in the 1998 *August* judgment,[168] rendered by the South African Constitutional Court, challenged the South African government's policy which, absent disenfranchisement legislation, effectively denied prisoners access to the ballot by refusing to make arrangements in prisons for registration and voting. The Court ordered the government to set in place proper arrangements, having held that current government policy created a "system . . . effectively disenfranchis[ing] all prisoners . . . . The applicants have accordingly established a threatened breach of section 19 of the Constitution."[169]

In comparison, the Canadian Supreme Court offered a substantive and thorough analysis of disenfranchisement's effects in its 2002 *Sauvé* judgment.[170] Consequently, when the South African Court rendered its *NICRO* judgment in 2004, invalidating South Africa's post-*August* blanket disenfranchising legislation, it made frequent references to *Sauvé*.[171]

The respective 2004 and 2005 judgments of the Fourth Section Chamber and Grand Chamber of the European Court of Human Rights in *Hirst* followed suit, holding the U.K.'s blanket disenfranchisement legislation to be incompatible with the European Convention on Human Rights ("ECHR").[172] In the subsequent *Frodl* judgment, the First Section Chamber of the European Court of Human Rights held Austria's disenfranchisement legislation to be incompatible with the ECHR, despite being less stringent than its British counterpart.[173] When the Australian High Court rendered its 2007 judgment in *Roach* striking down Australia's blanket disenfranchisement legislation, both the majority and dissent cited comparative sources in their arguments.[174]

### a. *The Democratic Paradigm and the Rejection of Regulatory Justifications for Convicts' Disenfranchisement*

The South African Constitutional Court's judgment in *August* rested on the Constitution's stipulation that "[t]he Republic . . . is one, sovereign, democratic state founded on . . . [u]niversal adult suffrage," and that "[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution."[175] The Court held

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168 August v. Electoral Commission, 1999 (3) SA 1 (CC) at 37-38 para. 42 (S. Afr.).

169 *Id.* at 27, para. 22.

170 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, paras. 20-62 (Can.).

171 *See* Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders, 2005 (3) SA 280 (CC) at 37-38 para. 42 (S. Afr.).

172 Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40 (2004) (Fourth Section Chamber); Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006) (Grand Chamber).

173 Frodl v. Austria, App. No. 20201/04 (Apr. 8, 2010) (First Section Chamber).

174 Roach v. Electoral Comm'r, [2007] 233 CLR 162 (Austl).

175 S. AFR. CONST., 1996, § 1, 19.

that "universal adult suffrage is one of the fundamental values of the constitutional order,"[176] and that "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, [the vote] says that everybody counts."[177] In *NICRO,* invalidating subsequent disenfranchising legislation,[178] the Court referred to its previous analysis in *August*[179] as well as to the enunciation of equal citizenship of all South Africans in Section 3 of the Constitution.[180]

In *Sauvé* (no. 1), the Canadian Supreme Court unanimously invalidated blanket disenfranchisement legislation.[181] The judgment followed from the Canadian Charter's stipulation that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[182] Rejecting a "subversive voting" argument, the Court held that "[i]t is fair to assume that we abandoned the notion that the electorate should be restricted to a 'decent and responsible citizenry' . . . in favour of a pluralistic electorate which could well include domestic enemies of the state."[183]

Subsequently, in *Sauvé* (no. 2), the Supreme Court invalidated (by 5 to 4) the amended provision mentioned in section B *supra* that disenfranchised all persons "imprisoned in a correctional institution serving a sentence of two years or more."[184] The Court held that "[t]he right of every citizen to vote . . . lies at the heart of Canadian democracy,"[185] and observed that:

> [The] [u]niversal franchise has become . . . an essential part of democracy [and that] the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote . . . . 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

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176 August v. Electoral Commission, 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).

177 *Id.*

178 Electoral Laws Amendment Act of 2003 § 24B(2) (S. Afr.).

179 *See* Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders 2005 (3) SA 280 (CC) at 13 para. 28 (S. Afr.).

180 *Id.* para. 24. Like the Canadian Supreme Court, the South African Constitutional Court deemed it unnecessary to determine whether its legislation breaches § 9 of the South African Constitution (equality), in addition to breaching § 19 (the right to vote). The *NICRO* decision was reached by a 9 to 2 majority.

181 Sauvé v. Canada (Att'y Gen.), [1992] 89 D.L.R. 644 (Can. Ont. C.A.). The impugned legislation was the Canada Elections Act, R.S.C. 1985 c. E-2 § 51(e).

182 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11 (U.K.).

183 Sauvé v. Canada (Att'y Gen.), [1992] 89 D.L.R. 644, 650-51 (Can. Ont. C.A.).

184 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.). The legislation in question is the Canada Elections Act, § 23.

185 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 1 (Can.).

> to disenfranchise the very citizens from whom the government's power flows.[186]

In April 2001, the High Court of England and Wales dismissed[187] claims that Section 3 of the Representation of the People Act ("RPA")[188] is incompatible with Article 3 of the First Additional Protocol to the ECHR,[189] which the Human Rights Act incorporated into domestic legislation. Article 3 provides that "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[190] Section 3 of the RPA holds that "[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election."[191]

In June 2001, Lord Brown refused the claimants' request for permission to appeal after oral argument.[192] John Hirst, one of the claimants, appealed to the European Court of Human Rights. In 2004, the Court's Fourth Section Chamber unanimously held that Section 3 of the RPA violates Hirst's right to vote, effectively reversing a judgment rendered in 1966 by the European Commission on Human Rights.[193] The Chamber maintained that "the right to vote . . . [is] the indispensable foundation of a democratic system," and "any devaluation or weakening of that right threatens to undermine that [democratic] system."[194] The Grand Chamber affirmed (by 12 to 5), holding that "the right to vote is not a privilege . . . . [T]he presumption in a democratic State must be in favour of inclusion . . . . Any departure from the principle of universal suffrage risks

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[186] *Id.* paras. 31-33.

[187] R. v. Sec'y of State for the Home Department, [2001] EWHC (Admin) 239 (Eng.).

[188] Section 3 of the Representation of the People Act 1983 echoes § 2 of the Forfeiture Act. *See* Representation of the People Act, 1983, c. 2, § 3 (Eng.).

[189] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 213 U.N.T.S. 221.

[190] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 189, at 264.

[191] Representation of the People Act, 1983, c. 2, § 3 (Eng.).

[192] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40, para. 16 (2004) (Fourth Section Chamber).

[193] X v. Federal Republic of Germany, App. No. 2728/66 25 Eur. Comm'n H.R. Dec. & Rep. 38 (1966).

[194] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40, para. 41 (2004) (Fourth Section Chamber). Like the Canadian and South African decisions, the Chamber held that "no separate issue" arose regarding non-discrimination under Article 14 of the ECHR. *Id.* para. 54.

undermining the democratic validity of the legislature thus elected and the laws it promulgates."[195]

The First Section Chamber used the same language in its 2010 *Frodl* judgment, involving an Austrian prisoner convicted of murder and sentenced to life imprisonment. The Court held that "exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 . . . ."[196]

In *Roach*, the Australian High Court invalidated (by 4 to 2) blanket disenfranchisement legislation.[197] The impugned legislation had replaced disenfranchisement legislation which was applicable only in cases of sentences of three or more years in prison.[198] The Australian Constitution, like its American counterpart, lacks an explicit right to vote. Nevertheless, the Australian High Court adopted a dynamic interpretation,[199] ruling that democracy in contemporary Australia is premised on universal suffrage,[200] and that "the definition of . . . [an] excluded class or group [from suffrage] would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice."[201]

b. *"Residual Liberty" and Convicts as Rights-Holders*

In *August*, the South African Constitutional Court held that convicts are entitled to all of their personal rights and dignity when those rights are not temporarily taken away by law or are not otherwise inconsistent with circumstances in which the convicts have been placed.[202] Consequently, disenfranchisement requires an independent justification more compelling than the mere fact of conviction. The court has thus unequivocally accepted the premise underlying much of the contemporary "residual liberty" jurisprudence described in Part I *supra*.

In *Sauvé* (no. 2), the Canadian Supreme Court maintained that "the right . . . to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with

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195 Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, paras. 59, 62 (2006) (Grand Chamber).

196 Frodl v. Austria, App. No. 20201/04, para. 67 (Apr. 8, 2010) (First Section Chamber).

197 Roach v. Electoral Comm'r, [2007] 233 CLR 162 (Austl).

198 *Commonwealth Electoral Act 1918* (Cth) §§ 93, 208, 221 (Austl.).

199 AUSTRALIAN CONST. § 7 (providing that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State"); *id.* at § 24 (stating that "[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth").

200 Case Comment, *Australia: Denying Vote to Citizens Serving Custodial Sentences Unconstitutional, Inconsistent with Representative Government*, 2008 PUB. P.L. 383, 383 (2008).

201 Roach v. Electoral Comm'r, [2007] 233 CLR 162, para. 8 (Austl).

202 August v. Electoral Commission, 1999 (3) SA 1 (CC) at 23 para. 19 (S. Afr.).

rights and responsibilities."[203] The dissent accepted that convicts should be regarded as rights-holders; however, it argued that by disenfranchising convicts, society shows them respect, because it treats them as autonomous individuals who pay a price for the choices they have made.[204]

In *Hirst* (no. 2), the Chamber held that "the fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention."[205] The Grand Chamber reiterated that "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty."[206] It repeated the same language in *Frodl*.[207]

In *Roach*, Chief Justice Gleeson held that "there is nothing inherently inconsistent between being in custody and voting."[208] The other three majority judges maintained that "[p]risoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration."[209]

### c. *Balancing or Proportionality Review*

In *August*, the South African Constitutional Court referred to a U.S. Supreme Court judgment to maintain that "Parliament cannot by its silence deprive any prisoner of the right to vote."[210] Nonetheless, based on the general limitation clause of the South African Constitution,[211] the Constitutional Court noted that its judgment "should not be read . . . as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners."[212]

In *NICRO,* the South African Court assessed the constitutionality of the post-*August* legislation. It emphasized that legitimate legislative objectives are required in order to justify infringement of rights.[213] The government presented two such objectives. The first objective was that making a provision for convicted prisoners to vote would send an incor-

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[203] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 47 (Can.).

[204] *Id.* para. 75.

[205] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40, para. 44 (2004) (Fourth Section Chamber).

[206] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 69 (2006) (Grand Chamber).

[207] Frodl v. Austria, App. No. 20201/04, para. 25 (Apr. 8, 2010) (First Section Chamber).

[208] Roach v. Electoral Comm'r, [2007] 233 CLR 162, para. 11 (Austl).

[209] *Id.* para. 85.

[210] August v. Electoral Commission, 1999 (3) SA 1 (CC) at 28 para. 33 (S. Afr.).

[211] S. AFR. CONST., 1996 § 7 (providing that "[t]he rights in the Bill of Rights are subject to the limitations . . . contained or referred to . . . in Section 36").

[212] August v. Electoral Commission, 1999 (3) SA 1 (CC) at 16 para. 31 (S. Afr.).

[213] *See* Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders, 2005 (3) SA 280 (CC) at 296 para. 23 (S. Afr.).

rect message to the public that the government is "soft on crime."[214] Rejecting this justification, the Court held that "[i]t could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception . . . ."[215] The second objective presented was the government's desire to refrain from investing "scarce resources."[216] The Court noted that "[a]rrangements for registering voters were made at all prisons to accommodate unsentenced prisoners and those serving sentences because they had not paid the fines imposed on them."[217]

After rejecting both objectives, the majority deemed it unnecessary to conduct a balancing or proportionality analysis.[218] Contrarily, the dissenting judges accepted the first objective. Justice Madala asserted that objectives must be treated "holistically," and that in a country "plagued by the scourge of crime," disenfranchisement is a legitimate measure.[219] Justice Ngcobo posited that denouncing crime is a legitimate policy objective, and that disenfranchisement forms part of necessary societal efforts to fight crime and emphasize the duties and responsibilities of citizens.[220]

In *Sauvé* (no. 2), the Canadian government presented two possible legislative objectives: promotion of civic responsibility and respect for the rule of law, and enhancement of general purposes of criminal sanctions.[221] The Canadian Supreme Court found both objectives to be too symbolic and abstract.[222] Linking the objectives to the communicative theory of punishment, it held that the main message which disenfranchisement sends is that "democratic values are less important than punitive measures ostensibly designed to promote order."[223]

Section 1 of the Canadian Charter enunciates that "rights and freedoms . . . [are] subject only to such reasonable limits prescribed by law as

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[214] *Id.* para. 46.

[215] *Id.* para. 56.

[216] *Id.* para. 45.

[217] *Id.* para. 49.

[218] *Id.* para. 51.

[219] *Id.* paras. 113, 117.

[220] Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders, 2005 (3) SA 280 (CC) at 342-45 paras. 140-46 (S. Afr.).

[221] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 21 (Can.). In the first *Sauvé* case, the government put forward an additional "republican" justification, that disenfranchisement promotes a "decent and responsible electorate," but dropped it in the appeal process. Debra Parkes, *Ballot Boxes Behind Bars*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 81-83 (2003).

[222] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 46 (Can.).

[223] *Id*. para. 40.

can be demonstrably justified in a free and democratic society."[224] The Canadian Supreme Court, unlike its South African counterpart, conducted a proportionality review emanating from the above provision, despite the fact that Section 1 requires such analysis only when adequate legislative objectives are presented.

In its seminal *Oakes* judgment, the Canadian Supreme Court maintained that in order to uphold rights-infringing legislation, three criteria must be met.[225] The first criterion is a rational connection between the proposed measure and the pursued objective. In *Sauvé* (no. 2), the Court held that because the provision "imposes *blanket* punishment on all penitentiary inmates regardless of the particular crime they committed, the harm they caused, or the normative character of their conduct," it is not "individually tailored to the particular offender's act, . . . [and thus] does not . . . meet the requirements of a denunciatory, retributive punishment, . . . [and] is *not* rationally connected to the goal of imposing *legitimate punishment*."[226]

While a determination that a measure fails to satisfy the rational connection criterion is sufficient to strike down legislation, the Court proceeded to the second proportionality test, *minimal impairment*. In order to satisfy this test, if several measures could plausibly achieve the state's legitimate objectives, the state is required to choose the measure that is the least rights-infringing.[227] The Court rejected the claim that by disenfranchising only those serving a sentence of two or more years, the legislation at issue satisfies the minimal impairment test; it held that "even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*."[228]

Finally, the Court applied the third ("narrow") proportionality test, a cost-benefit analysis (often referred to as proportionality *stricto sensu*); the Court found that the legislation's benefits fail to surpass the detrimental effects of the right to vote's infringement.[229]

Contrarily, the dissent *accepted* the legislative objectives, praising the fact that the provision restricted disenfranchisement to those incarcerated for over two years.[230] Justice Gonthier refused to reject the government's arguments because of their symbolic or abstract character,[231] suggesting

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[224] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11 (U.K.).

[225] R. v. Oakes, [1986] 1 S.C.R. 103, paras. 69-70 (Can.).

[226] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 51 (Can.) (emphasis added).

[227] *Id.* para. 55.

[228] *Id.*

[229] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 60 (Can.).

[230] *See id.* paras. 69-71.

[231] *Id.* para. 99.

that deference should be given to legislative policy choices based on reasonable social or political philosophy.[232]

In *Hirst* (no. 2), the U.K. presented two legislative aims: enhancing civic responsibility and increasing respect for the rule of law. The Fourth Section Chamber held that "there is no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or 'un-citizen-like' but whose crime is not met by such a consequence."[233] Nonetheless, the Chamber refrained from determining whether the legislative aims were legitimate.[234] Addressing the "margin of appreciation" which the European Court of Human Rights frequently grants domestic authorities, the Chamber maintained that the U.K. Parliament did not appear to have sufficiently debated and weighed the competing interests.[235] Moreover, the Chamber stressed that it "cannot accept . . . that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation."[236]

Unlike other treaty provisions, Article 3 of the ECHR does not include an internal limitation clause.[237] Hence, it could have been interpreted as mandating that the right to vote ought not to be infringed. Instead, the Chamber decided to use a proportionality review, which the legislation subsequently failed to pass.

The Grand Chamber held that Article 3 does not include a "closed list" of legitimate aims, and that the aims which the government presented are

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[232] *Id.* para. 67.

[233] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40, paras. 46-47 (2004) (Fourth Section Chamber).

[234] *Id.* para. 47.

[235] *Id.* para. 51. The "margin of appreciation" doctrine was famously presented in Handyside v. U.K., 24 Eur. Ct. H. R. (ser. A) para. 48 (1976), where the Court maintained that since "requirements of morals vary from time to time and from place to place . . . . State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements." Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843-45 (1999) (arguing that by allowing a margin of appreciation, courts are recognizing the validity of cultural relativity contentions). *Cf.* Aaron Ostrovsky, *What's So Funny About Peace, Love and Understanding?: How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 HANSE L. REV. 47, 58 (2005) (suggesting that the margin of appreciation doctrine strikes a balance between cultural diversity and the protection of core rights).

[236] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40, para. 51(2004) (Fourth Section Chamber).

[237] *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8-11, Nov. 4, 1950, E.T.S. No. 5.

not "untenable or *per se* incompatible."[238] Following the Chamber's proportionality review, the Grand Chamber held, without discussion, that "the rights bestowed by Article 3 . . . are not absolute," and that Article 3 does not preclude restrictions "on an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations."[239] It stressed that restrictions must further a legitimate aim, and the means used should be proportionate to that aim in order to maintain the integrity of the electoral procedure.[240]

The U.K. submitted that the impugned legislation fulfilled the proportionality requirement because only incarcerated convicts are disenfranchised, excluding pre-conviction detainees, those imprisoned for contempt of court, and those imprisoned for failing to pay fines.[241] The Grand Chamber rejected this reasoning, holding that Section 3 of the RPA is a "blunt instrument," indiscriminate and disproportionate to the aims pursued because it sanctions disenfranchisement irrespective of the length of sentence or the nature or gravity of the offense.[242] The Court noted that states-parties adopt "different ways of addressing the issue [of disenfranchisement],"[243] and that it was up to the U.K. Parliament to choose the means for securing the right to vote.[244] It thus accepted, in principle, the British position that it may enjoy a wide margin of appreciation.[245] In spite of this, the Court rejected the claim that the amendment

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[238] Hirst (No. 2) v. U.K., 42 Eur. H.R. Rep. 41, para. 74-75 (2006) (Grand Chamber).

[239] *Id.* paras. 60, 71.

[240] *Id.* para. 62.

[241] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 82 (2006) (Grand Chamber); Further Observations on Behalf of the Government of the United Kingdom § 28-32 (Jan. 20, 2005) [hereinafter Further Observations].

[242] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 82 (2006) (Grand Chamber).

[243] The Grand Chamber quoted a U.K. government survey, which suggested that 18 member-states of the Council of Europe enfranchise all convicts, in 12 member-states parties some convicts are disenfranchised, and in 13 other member-states, all incarcerated individuals are disenfranchised. *Id.* para. 33. According to a report issued on Jan. 27, 2009 by the U.K. Joint Committee on Human Rights, since *Hirst* (No. 2) was decided, Ireland and Cyprus have enfranchised all their convicts.

In Hong Kong, where under British rule prisoners were disenfranchised, the High Court ordered the government to make arrangements to enable all CONVICTS to VOTE. Chan Kin Sum v. Secretary for Justice & Electoral Affairs Commission [2008] H.C. Special Administrative Region (Court of First Instance), at para. 202 (H.C.), *available at* http://www.cmab.gov.hk/doc/HCAL000079_2008.pdf (last visited Mar. 22, 2011).

[244] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 80 (2006) (Grand Chamber).

[245] Further Observations, *supra* note 241, § 23-24 (referring to Mathieu-Mohin & Clerfayt v. Belgium, 113 Eur. Ct. H.R. (ser. A) 4, para. 54 (1987)).

of the RPA in 2000, which enfranchised individuals on remand, was an indication that the U.K. Parliament gave the issue due consideration.[246]

In their joint dissenting opinion, Justices Wildhaber, Costa, Lorenzen, Kovler and Jebens maintained that states-parties should be given a wide margin of appreciation and be permitted to adopt diverging voting eligibility criteria.[247] Unlike the majority, the dissent did not engage in proportionality review, opting instead to defer to the U.K. legislature. The justices posited that their "own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little," and that they "are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent."[248]

In *Frodl*, the chamber followed the Grand Chamber's *Hirst* (no. 2) judgment, applying an even more searching review. The Austrian legislation under scrutiny, Section 22 of the National Assembly Election Act, stated that "anyone who has been convicted by a domestic court of one or more criminal offenses committed with intent and sentenced with final effect to a term of imprisonment of more than one year shall forfeit the right to vote."[249] Section 44(2) of the 1996 Austrian Criminal Law Amendment Act permitted judges to suspend (some or all of) the legal consequences of the conviction, including disenfranchisement.[250] The Austrian Constitutional Court upheld the legislation both before *and* after *Hirst* (no. 2).[251] Attempting to distinguish *Hirst* (no. 2), the Austrian Court relied on three distinguishing characters of state legislation compared to the impugned British legislation: the one-year imprisonment threshold; the intent requirement; and the provision for judicial discretion. The chamber interpreted *Hirst No. 2* as ruling out automatic and blanket disenfranchisement, as well as requiring that disenfranchisement be judicially-sanctioned.[252] The chamber maintained that a disenfranchising judgment must take into account particular individual circumstances, establishing a link between the offense committed and issues relating to elections and democratic institutions.[253] Thus, even for convicted prisoners, disenfranchisement should be considered an exception.[254] The cham-

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[246] *Id.* § 10.

[247] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 5 (2006) (Grand Chamber).

[248] *Id.* paras. 8-9.

[249] Frodl v. Austria, App. No. 20201/04, para. 14 (Apr. 8, 2010) (First Section Chamber).

[250] *Id.*

[251] *Id.* para. 15.

[252] *Id.* para. 34.

[253] *Id.*

[254] *Id.* para. 35.

ber subsequently held that no such link existed under the provisions of the Austrian law which led to the applicant's disenfranchisement.[255]

In *Roach*, the Australian Court held that limits on the right to vote have to be "reasonably appropriate."[256] Three of the four judges in the majority suggested that "there is little difference between [reasonably appropriate] . . . and 'proportionality.'"[257] The fourth majority judge, Chief Justice Gleeson, posited that proportionality is a different legal standard from "reasonably appropriate," the latter being *less* searching.[258] Invalidating the impugned legislation, the majority maintained that they would have *upheld* the previous legislation disenfranchising individuals serving sentences of three or more years because it operated "to deny the exercise of the franchise during one normal electoral cycle . . . [not] without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process."[259]

d. *References to Foreign Sources*

In *August,* the South African Court referred to Canadian and American judgments to support the claim that convicts remain rights-holders.[260] In *NICRO*, it relied on the majority's reasoning in *Sauvé* (no. 2),[261] *inter alia,* to argue that appeasing public opinion is not a justifiable aim. While the South African government argued that *Sauvé* (no. 2) should not be relied on because it was narrowly decided, the South African Court held that the legislation in *Sauvé* (no. 2) affected convicts serving sentences of two or more years, whereas previous legislation disenfranchising all serving prisoners was *unanimously* invalidated.[262] In his dissent, Justice Madala referenced the laws of the U.S., Australia, New Zealand, Europe and the U.K. to demonstrate that democracies practice disenfranchisement.[263]

The majority in *Sauvé* (no. 2) referred to the holding in *August* that voting is a "badge of dignity."[264] Like Justice Madala in *NICRO*, Justice Gonthier, in his dissenting opinion, referred extensively to global prac-

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255 *Id.*

256 Roach v. Electoral Comm'r, [2007] 233 CLR 162 ¶ 85 (Austl).

257 *Id.*

258 *See id*. ¶¶ 16-17.

259 *Id.* ¶ 98.

260 August v. Electoral Commission 1999 (3) SA 1 (CC) at 20-21 n.18 paras. 21-22 (S. Afr.).

261 Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders (NICRO) 2005 (3) SA 280 (CC) at 309-11 paras. 61-63 (S. Afr.).

262 *Id.* para. 66.

263 *Id.* paras. 118-22.

264 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 35 (Can.).

tices in order to support the claim that disenfranchisement legislation is reasonable.[265]

In *Hirst* (no. 2), the Chamber referred to external sources in two contexts. First, in separate sections titled "Relevant International Materials," and "The Law," it quoted provisions of the ICCPR, the European Prison Rules,[266] the Code of Good Practice in Electoral Matters,[267] and parts of the majority and dissenting opinions in *Sauvé* (no. 2), without discussion.[268] Second, in its later scrutiny of legislative aims, the Court described the majority judgment in *Sauvé* (no. 2) as a "detailed and helpful examination of the purposes pursued by prisoners disenfranchisement," and noted that "[t]aking due account of the difference in text and structure of the Canadian Charter, the . . . substance of the reasoning may be regarded as apposite in the present case."[269]

Like the South African government in *NICRO*, the British government in *Hirst* (no. 2) *unsuccessfully* contended that *Sauvé* (no. 2) should not have featured prominently in the Chamber's judgment, because it was narrowly decided and concerned unique provisions of the Canadian Charter.[270]

In *Roach,* Chief Justice Gleeson distinguished *Sauvé* (no. 2) and *Hirst* (no. 2), arguing that these judgments used different legal standards in their respective analyses than those required by the Australian Constitution.[271] Wary of "uncritical translation of the concept of proportionality" leading to "application in this country of a constitutionally inappropriate standard of judicial review,"[272] he suggested that "[t]he difference between the majority and minority opinions in both *Sauvé* and *Hirst* turned largely upon the margin of appreciation . . . courts thought proper to allow the legislature."[273] Although the court invalidated the impugned legislation, Chief Justice Gleeson referred to the dissent in *Sauvé* (no. 2) to support his argument that disenfranchising some convicts is justified,

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[265] *Id.* paras. 124-32.

[266] Eur. Consult. Ass., *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules*, *available at* https://wcd.coe.int/ViewDoc.jsp?id=955747 (last visited Feb. 6, 2011).

[267] Eur. Comm'n for Democracy Through Law, *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, European Commission for Democracy Through Law (Venice Commission) 51st and 52nd Sess., Opinion No. 190/2002, http://www.venice.coe.int/docs/2002/CDL-AD%282002%29023rev-e.pdf.

[268] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, paras. 24-27 (2006) (Grand Chamber).

[269] *Id.* para. 43.

[270] Further Observations, *supra* note 241, §§ 18-19.

[271] Roach v. Electoral Comm'r, [2007] 233 CLR 162 ¶¶ 13-17 (Austl).

[272] *Id.* ¶ 17.

[273] *Id.*

because they "suffered a temporary suspension of their connection with the community."[274]

In his dissent, Justice Hayne flatly rejected *any* reference to non-Australian sources, instead supporting the application of "generally accepted Australian standards."[275] He suggested that "there is no similarity" between the Australian and foreign cases except "in the statement of the problem as an issue about the validity of legislative provisions excluding prisoners from voting."[276] Justice Heydon, also dissenting, presented an "originalist" position, maintaining that "[t]hese instruments [foreign and international law] did not influence the framers of the Constitution for they all postdate it."[277]

### 3. Legal Challenges to Convicts' Disenfranchisement: The Aftermath

The *NICRO* and *Sauvé* (no. 2) judgments arguably left room for the South African and Canadian legislatures to adopt *proportionate* disenfranchisement legislation. Nevertheless, to date, both legislatures have refrained from doing so, leading to full enfranchisement in both countries. In comparison, the *Roach* judgment has led to the reinstatement of former Australian legislation disenfranchising prisoners serving sentences of three or more years.

Comparatively, more than five years after *Hirst* (no. 2), the U.K. is still struggling with its ramifications. In 2006, the (then) Labour government issued a "Green Paper" for public consultation.[278] The consultation was conducted in two phases and closed on September 29, 2009.

The First Phase consultation paper was prefaced by a forward written by the (then) Lord Chancellor, Lord Falconer. Despite determination to the contrary in *Hirst* (no. 2),[279] Lord Falconer postulated that in the U.K., the right to vote is considered by many to be a privilege as well as an entitlement and that the government's position remained that disenfranchisement "reflected in the current law, is a proper and proportionate punishment."[280] Remarkably, one of the options that the government

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[274] *Id.* ¶¶ 18-19.

[275] *See id.* ¶¶ 163-64.

[276] *Id.* ¶ 166.

[277] *Id.* ¶ 181.

[278] MINISTRY OF JUSTICE, VOTING RIGHTS OF CONVICTED PRISONERS DETAINED WITHIN THE UNITED KINGDOM, CP 29/06 FIRST PHASE CONSULTATION (Dec. 2006), CP 6/09 SECOND PHASE CONSULTATION (Apr. 2009) (U.K.), *available at* http://www.justice.gov.uk/consultations/prisoners-voting-rights.htm.

[279] Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 69 (2006) (Grand Chamber).

[280] Lords Hansard Text for 15 Dec. 2008, column 637, *available at* http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81215-0001.htm (last visited Mar. 23, 2011).

included in the First Phase consultation paper was retaining the status quo.[281]

The Second Phase consultation paper, however, precluded from consideration both blanket disenfranchisement and full enfranchisement.[282]

The government ultimately failed to introduce enfranchising legislation prior to the general elections on May 9, 2010. Consequently, all serving prisoners were barred from voting in those elections.

The Committee of Ministers of the Council of Europe repeatedly reprimanded the U.K. for its failure to implement *Hirst* (no. 2).[283] The European Parliament's Committee on Legal Affairs and Human Rights also used particularly strong language in its seventh report on the implementation of judgments of the European Court of Human Rights; it submitted that the U.K. "must put to an end the practice of delaying full implementation of Strasbourg Court judgments with respect to politically sensitive issues, such as prisoners' voting rights."[284]

On November 23, 2010, the European Court of Human Rights unanimously ordered the U.K. government to "bring forward, within six months of the date upon which the present judgment becomes final, legis-

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[281] MINISTRY OF JUSTICE, VOTING RIGHTS OF CONVICTED PRISONERS DETAINED WITHIN THE UNITED KINGDOM, CP 29/06 FIRST PHASE CONSULTATION (Dec. 2006) paras. 57-58, *available at* http://www.justice.gov.uk/consultations/prisoners-voting-rights.htm (last visited Mar. 21, 2011).

[282] MINISTRY OF JUSTICE, VOTING RIGHTS OF CONVICTED PRISONERS DETAINED WITHIN THE UNITED KINGDOM, CP 6/09 SECOND PHASE CONSULTATION (Apr. 2009) at 23-24, *available at* http://www.justice.gov.uk/consultations/prisoners-voting-rights.htm (last visited Mar. 21, 2011).

In this paper, the U.K. government posited that prisoners sentenced to four years in prison or longer will not be enfranchised under any circumstances; neither will those convicted of electoral offenses, regardless of the length of their prison sentence. *Id.* at 22. As part of the consultation, the government offered four options for consideration, entailing *enfranchisement*, respectively, of prisoners serving sentences of less than four, two or one year, with an intermediate position suggesting the exercise of judicial discretion regarding those sentenced to between two and four years. The government announced its inclination to adopt the *lowest* threshold. Notably, *no* respondent to the First Phase Consultation suggested setting *a* threshold for disenfranchisement. Instead, the respondents recommended either to fully enfranchise convicts or to retain the *blanket* prohibition. *Id.* at 15.

Interestingly, the claim that prisoners will not have access to sufficient campaign material to be able to make an informed choice was refuted in the paper, drawing a comparison with U.K. soldiers serving overseas. *Id.* at 34.

[283] *See, e.g.*, summary of meetings held between March 2-4, 2010 and on September 15, 2010, https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282010%291078&Language=lanEnglish&Ver=immediat&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D3 (last visited Jan. 5, 2011).

[284] Section A.7.10 of the 7th report, AS/Jur (2010) 36, Nov. 17, 2010.

lative proposals intended to amend the 1983 Act . . . in a manner which is Convention-compliant."[285]

On December 17, 2010, the Cabinet office published "the government approach to prisoner voting rights," according to which "all offenders sentenced to *four years or more* will automatically be barred from registering to vote. Prisoners sentenced to less than four years will retain the right to vote, unless the sentencing judge removes it."[286] Interestingly, in its announcement, the government indicated its intention to set the *highest* of the thresholds that were proposed in its consultation paper, despite the inclination to the contrary that was expressed in the second phase consultation paper.

The announcement stirred controversy and led to a special backbench parliamentary debate on February 10, 2011. The crossbench motion, which passed by a majority of 234 to 22, expressed strong disapproval both of the content of the judgment in *Hirst* (no. 2), and of the fact that

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[285] Greens and M.T. v. The United Kingdom (Application Nos. 60041/08 & 60054/08), at para. 6(a).

[286] According to the proposal, voting will be done either by post or proxy. Prisoners will not be registered at the prison, but at their former address or an area to which they have a local connection, http://www.cabinetoffice.gov.uk/news/government-approach-prisoner-voting-rights (last visited Jan. 5, 2011) (emphasis added).

Following *Hirst* (no. 2), U.K. courts adopted divergent approaches regarding the judgment's implications. In *Smith v. Scott*, [2007] C.S.I.H (Scot.), the Registration Appeal Court of Scotland refused to "read down" Section 3(1) of the RPA as providing for full or partial enfranchisement and found its language to clearly mandate blanket disenfranchisement, in contravention of the judgment in *Hirst* (no. 2). It thus issued a declaration of incompatibility under Section 4 of the Human Rights Act. *Id.* para. 26. Smith was heard shortly before the 2007 elections for the Scottish parliament. The Court criticized the U.K. government's "sluggish" reaction to *Hirst* (no. 2) and maintained that the consultation timetable failed to take into account the date of the abovementioned elections. *Id.* para. 41.

By contrast, in *Chester v. Secretary of State for Justice*, [2010] EWCA Civ 1439, the Court of Appeals of England and Wales dismissed a prisoner's claim that prisoners' voting should be sanctioned in light of the judgments in *Frodl* and *Hirst* (No. 2). In its December 17, 2010 decision, the court held that the nature and scope of the measures amending or replacing Section 3(1) of the RPA are "likely to be acutely controversial. The controversy will not be about the law, but about the wisdom or unwisdom of social policy. There are deep philosophical differences of view between reasonable people upon the question of prisoners' suffrage." *Id.* at para. 32. Briefly outlining some arguments for and against convicts' suffrage, the court maintained that the choices for government in amending or replacing Section 3(1) of the RPA "are delicate and difficult, and are by no means to be concluded, as it were cut and dried, by the law. It is a political responsibility, and that is where it should remain." *Id.* at paras. 33-34.

the ruling was made by a supranational court.[287] On March 1, the U.K. Deputy Prime Minister noted in a written response to a question at the House of Commons regarding prisoner voting, that "[t]he [UK] Government have requested that the [Chamber] judgment in the 'Greens and MT' case be referred to the Grand Chamber" in light of the recent debate in Parliament. To date, the Grand Chamber has not made a decision regarding the U.K.'s request.[288] Moreover, even if the U.K. Parliament were to pass the initially proposed enfranchising legislation, any sentencing threshold seems prima facie incompatible with the *Frodl* judgment.

### D. *Concluding Remarks*

The comparative analysis *supra* demonstrates that a (non-American) transnational judicial discourse on convicts' disenfranchisement is currently taking place.

The judgments base their analyses on a common democratic paradigm, adopt a "residual liberty" approach to convicts' rights, and share similar understandings of the penal nature of disenfranchisement, as well as of the relevance of the goals of punishment.

The dissents in *Sauvé* (no. 2), *NICRO,* and *Roach* generally accepted the normative framework set by their respective majority opinions; the dissents diverged at the cost-benefit analysis stage. The dissent in *Hirst* (no. 2) should be understood as part of an ongoing discourse regarding the extent to which the European Court of Human Rights, being a supranational court, should review legislation, rather than as a challenge to the majority's reasoning. The *August* judgment was unanimous.

The conflicting approach of American jurisprudence may be explained by the absence of a constitutional right to vote, by an implicit constitutional sanction of convicts' disenfranchisement, as well as by a general reluctance to partake in transnational discourse. Consequently, there is a growing disparity between American disenfranchisement practices and the global trajectory towards expanding convicts' suffrage.

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[287] The motion read, "[T]hat this House notes the ruling of the European Court of Human Rights in Hirst v. the United Kingdom in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand." House of Commons, Hansard Debates, col. 493 (Feb. 10, 2011), *available at* http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0001.htm#11021059000001 (last visited Mar. 23, 2011).

[288] House of Commons, Hansard Written Answers, col. 428 (Mar. 1, 2011), *available at* http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110301/text/110301w0005.htm (last visited Mar. 23, 2011).

## III. Disenfranchisement Under the Human Rights Treaty Regime

### A. *Introduction*

This part of the article assesses the human rights treaty regime[289] based on interpretations of Article 25 of the ICCPR, which is arguably the leading international treaty provision with regard to the right to vote.[290] The ICCPR enunciates that "every citizen" has the right and opportunity to vote in elections "without unreasonable restrictions."[291] The article then proposes a new optional protocol that would clarify the interpretive ambiguity resulting from the latter phrase.

The following supplementary means of interpretation are used in section B to interpret the phrase "unreasonable restrictions":[292] the *Travaux Préparatoires* (preparatory work of the Treaty), the views expressed by the Human Rights Committee, State-parties' reservations to Article 25, dynamic treaty interpretation (premised on an increasingly accepted[293] "emerging right to democratic governance,"[294] which permeates seminal international documents, including the Universal Declaration of Human Rights),[295] and harmonized treaty interpretation (the assessment of Article 25 in light of other treaty provisions). The analysis concludes that the disenfranchisement of convicts as such is *not* proscribed by Article 25. However, based on a balancing or proportionality review, disenfranchisement of ex-convicts and *blanket* disenfranchisement of convicts may be incompatible with treaty obligations.

Section C presents this article's proposal for adopting a new optional protocol to the ICCPR, which would fully proscribe disenfranchisement. Contemporary disenfranchisement discourse has generally adopted the normative framework that was presented in the Introduction, according to which it is no longer possible to base convicts' disenfranchisement on notions of "civil death" or forfeiture of rights. Judgments in non-American jurisdictions, as well as interpretations of Article 25 of the ICCPR, generally reject regulatory justifications for disenfranchisement; liberal-oriented contentions are considered to be incompatible with political

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289 This article discusses disenfranchisement in *treaty* law. For the possible emergence of *customary* international law proscribing disenfranchisement of *ex*-convicts, see Hull, *supra* note 84, at 118, 122-24.

290 The ICCPR currently has 164 States parties. ICCPR, *supra* note 21.

291 *Id.* art. 25(b).

292 Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

293 Christine Cerna, *Universal Democracy: An International Legal Right or a Pipe Dream of the West?* 27 N.Y.U. J. Int'l L. & Pol. 289, 295 (1995).

294 Thomas Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46 (1992).

295 Universal Declaration of Human Rights, G.A. Res. 217A217 (III) A (III), U.N. Doc. A/RES/217(III)810 (Dec. 10, 1948) [hereinafter UDHR].

equality and institutional neutrality, while republican arguments have lost their appeal in an age of nearly universal suffrage. It is thus increasingly acknowledged that disenfranchisement should be considered a penal measure, and that its imposition necessitates penal justifications.[296] The comparative and the international analyses both demonstrate that while disenfranchisement is considered a suspect practice, it is typically analyzed under balancing or proportionality review, rather than proscribed.

This article contends that there are certain punishments which the state ought not to impose, even if they presumably satisfy one or more penal goals, because of their normatively flawed nature and their adverse effects on convicts. For instance, despite the direct link between stealing televisions and cutting off thieves' hands, most modern criminal justice systems proscribe physical mutilation. Similarly, even if it can be shown that the infliction of torture as a punishment is effective, torture is prohibited in widely ratified international treaties.[297]

It is asserted that by denying convicts their previously held fundamental right to vote, disenfranchisement denies them a defining element of their political and societal identity, makes them politically unequal, and degrades them to a lower social status. Moreover, because voting advances both individual interests and interests of the social groups to which these individuals belong, disenfranchisement harms both convicts and marginalized groups that are over-represented among the disenfranchised. Consequently, disenfranchisement may exacerbate feelings of alienation and distrust of institutions among convicts who belong to such groups. Disenfranchisement may also skew political processes both by under-representing views of convicts on general issues,[298] and by excluding convicts—a group that has particular stakes in penal policies from the political process. Because others are unlikely to advance their interests, incarcerated convicts are a particularly unpopular "discrete and insular"[299] minority for whom voting is significant. Finally, disenfranchisement seems like a paradigmatic case of the "ins" excluding the "outs"

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[296] Gen. Assembly, Human Rights Comm., Report of the Human Rights Committee, para. 75(10), U.N. Doc. A/57/40 (Vol. I), 2002.

[297] ICCPR, *supra* note 21, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, art. 2(2), Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 ("No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

[298] *See, e.g.*, MANZA & UGGEN, *supra* note 58. They argue that disenfranchisement policies have possibly affected the outcome of important American election campaigns, including the 2000 presidential elections, due to the effects of disenfranchisement in Florida. *Id.* at 192.

[299] United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

from the political game.[300] It was noted in Part II that disenfranchisement was purportedly used in the U.S. to reduce the political influence of African-Americans.

As a legal construct,[301] voting eligibility constitutes the *essence* of the right to vote, and questions related to eligibility should thus be assessed differently than those relating to voting regulation. That is, while a balancing or proportionality review may be helpful for adjudicating claims regarding voting *regulation*, it does not suit questions of voting *eligibility*. Non-invidious regulatory requirements may limit accessibility of voters to the polls, whereas disenfranchisement intentionally abrogates convicts' right to vote. It is thus argued that the plausibility of certain voting regulations, such as prior registration, may be balanced against the inconveniences they cause; by contrast, disenfranchisement should be proscribed outright.

The analysis *infra* demonstrates that Article 25 of the ICCPR cannot be interpreted to *require* outright proscription of disenfranchisement. This article therefore proposes that instead of subverting acceptable interpretations Article 25 or attempting to amend it, a virtually impossible task,[302] a new optional protocol to the ICCPR proscribing disenfranchisement should be drafted. Such a protocol will set a higher threshold for the global disenfranchisement discourse.[303]

The inclination to defer to decisions which are made by elected domestic legislatures seems ill-suited when these decisions concern disenfranchisement. In such matters, the incentive for majorities to make decisions which cast parts of the citizenry out of future decision-making is evident. Judicial scrutiny of disenfranchisement legislation thus seems particularly appropriate.

Efforts to enhance an international standardization of rights frequently raise cultural relativity critiques.[304] Nevertheless, the facilitative nature of the right to vote (sometimes referred to as "the right of rights")[305] arguably makes it less vulnerable to such concerns.

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[300] JOHN ELY, DEMOCRACY AND DISTRUST 120 (1980).

[301] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 122, 334 (2002).

[302] *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 640 (1st ed., Engel 1993).

[303] ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 159 (2007) suggest that certain matters, including human rights, may be unsuitable for consensus-based negotiating processes, since they don't readily lend themselves to package-deal approaches.

[304] *See, e.g.*, Makau Mutua, *Standards Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q. 547 (2007); Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167 (Rebecca J. Cook ed., 1994).

[305] JEREMY WALDRON, LAW AND DISAGREEMENT 232, 282 (1999).

States remain the primary guarantors of rights to those under their jurisdiction, such as the right to vote, which requires institutional apparatus for its implementation. International standardization in the human rights field is flourishing,[306] even though international treaties admittedly have limited effect—normally binding only signatories.[307] In "dualist" systems, treaties are not directly applicable in domestic law,[308] and moreover, treaties rarely include effective enforcement mechanisms.[309] Nonetheless, unambiguous treaty stipulations may improve treaty compliance[310] as well as provide clarity and certainty.[311] In addition, the expressive nature of the proposed protocol[312] may signal internationally-

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[306] List of U.N. Human Rights Treaties, U.N.T.C. DATABASES, *available at* http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (last visited Feb. 13, 2011).

[307] MENNO KAMMINGA & MARTIN SCHEININ, THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 63, 65 (2009). The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, however, may be an exception.

[308] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564 n.34 (1984).

[309] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979) famously noted that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Henkin suggests that since a country's violations of the rights of its inhabitants do not ordinarily infringe the national interests of other parties to the agreement, "they have no compelling interest to scrutinize the violating behavior and call it to account." *Id*. at 232.

[310] BOYLE & CHINKIN, *supra* note 303. *Cf.* Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights and Conditional Consent,* 149 U. PA. L. REV. 399, 460 (2000) (contending that the central problem for international human rights law has not been selective consent to treaty terms, but rather, failure by nations to adhere to treaties to which they have consented); *see also* Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1938, 2005, 2016 (2002) (arguing that treaty ratification is not infrequently associated with *worse* human rights record, though for fully democratic nations it is associated with better human rights practices). Hathaway suggests that due to the dual character of treaties, countries can reap the (expressive) benefits of treaty ratification, such as communicating a commitment to human rights without having to actually follow the treaty standards. Hathaway accepts that treaties may have positive effects on ratifying countries, but argues that the process may take decades to achieve tangible results. Rejecting "shallow" treaty ratifications, she proposes conditioning treaty membership on undertaking assessable commitments. *Id.* at 2021, 2024.

[311] Kenneth Abbott et al., *The Concept of Legitimization*, 54 INT'L ORG. 401, 414 (2000) suggest that in treaties, precise rules specify clearly and unambiguously what is expected of countries, both in terms of their intended objectives and the means of achieving it in particular sets of circumstances.

[312] Alex Geisinger & Michael Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007) suggest that the ratification of treaties can influence domestic norms, which in turn can affect both citizens' behavior and domestic policy.

desired behavior,[313] carrying persuasion and acculturation effects.[314] Internationally recognized human rights are of a recent vintage, advanced primarily by treaty law rather than custom, reflecting a steady drift toward enhanced protection.[315] The time is ripe for the international community to take a step forward towards recognizing the importance of expanding convicts' suffrage.

## B. *Deconstructing "Unreasonable Restrictions"*

### 1. Article 25 of the ICCPR and the Principles of Treaty Interpretation

The ICCPR enunciates that the rights and freedoms under the treaty are generally guaranteed to *all individuals* present in the territory of a state party and subject to its jurisdiction.[316] Exceptionally, Article 25 guarantees only to *citizens* the right "to vote . . . [at] elections which shall be by universal and equal suffrage."[317] The provision prohibits "unreasonable restrictions" of the right to vote—and thereby tolerates *reasonable* restrictions. The preamble makes reference to Article 2's generally applicable prohibition on distinctions made on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[318]

State parties to treaties are bound by them,[319] and must perform their obligations in good faith (*pacta sunt servanda*).[320] States may not invoke internal law to justify a failure to perform a treaty obligation.[321] In federated countries, the federal government is responsible for ensuring treaty compliance, even if political sub-divisions are responsible for the treaty's

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They assert that Hathaway's account, *supra* note 310, is applicable only where a country can act in derogation of a treaty without serious consequences to its reputation.

[313] David Moore, *A Signaling Theory of Human Rights Compliance*, 97 Nw. U. L. Rev. 879, 894 posits that by complying with human rights treaties, countries send a particularly powerful sign to the international community due to domestic costs incurred by ratification.

[314] Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54(3) Duke L.J. 621, 630 (2004) suggest that in the international community, social influence is characterized by three phenomena: coercion, persuasion and acculturation.

[315] Louis Henkin, *Human Rights and State Sovereignty*, 25 Ga. J. Int'l & Comp. L. 31, 36 (1996).

[316] ICCPR, *supra* note 21, art. 2(1).

[317] *Id.* at art. 25(b). These rights *may* be granted to non-citizens as well.

[318] *Id.* at art. 2(1).

[319] Vienna Convention, *supra* note 292, at art. 14.

[320] *Id.* at art. 26.

[321] *Id.* at art. 27.

implementation, as is arguably the case regarding voting eligibility in the U.S.[322]

Article 31 of the Vienna Convention stipulates that in interpreting treaty provisions, the ordinary meaning should be sought in light of the treaty's object and purpose.[323] Article 32 permits the use of supplementary means of interpretation, including the *Travaux Préparatoires*, in case of ambiguity, obscurity, or an interpretive result which is manifestly absurd or unreasonable.[324] The ambiguous nature of "unreasonable restrictions" in Article 25 merits recourse to supplementary means of interpretation.

2. *Travaux Préparatoires*

The British House of Lords, in the course of interpreting an aviation treaty, held that "an agreed conference minute [sic] of the understanding on the basis of which the draft or an article of the [Warsaw] Convention was accepted may well be of great value."[325]

While drafting Article 25, the question whether political rights should be formulated as individual rights (as in Section 3 of the Canadian Charter) or state-party obligations (as in Article 3 of the First Additional Protocol to the ECHR) was vigorously debated.[326] Eventually, a joint Yugoslav-French proposal was adopted, guaranteeing citizens the right and opportunity to take part in conduct of public affairs.[327] The phrase "universal and equal suffrage" in subsection two of Article 25 was used due to its fundamental nature, though some delegates considered it redundant in light of Article 25's guarantee of rights to *every* citizen.[328] The phrase "unreasonable restrictions" was *absent* from the original

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[322] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 207(b) (1986) ("A State is responsible for any violation of its obligations under international law resulting from action or inaction by . . . authorities of any political subdivision of the State.").

[323] Vienna Convention, *supra* note 292, at art. 31.

[324] Gardiner notes that it is difficult to detect a distinctive and comprehensive approach to treaty interpretation among countries which are not parties to the Vienna Convention. RICHARD K. GARDINER, TREATY INTERPRETATION 133 (2008). As early as 1971, the U.S. State Department maintained that "although not yet in force, the Vienna Convention is already generally recognized as the authoritative guide to current treaty law and practice." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE VIENNA CONVENTION ON THE LAW OF TREATIES SIGNED FOR THE UNITED STATES ON APRIL 24, 1970, Exec. Doc. L. 92nd Cong. 1st Sess. 1 (1971).

[325] Fothergill v. Monarch Airlines, [1981] A.C. 251, 295 (U.K.).

[326] *See* MARC J. BOSSUYT, GUIDE TO THE "*TRAVAUX PRÉPARATOIRES*" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 473 (1987).

[327] NOWAK, *supra* note 302, at 439 (referring to E/CN.4/L.224/Rev 1m Rev. 4 (1953)).

[328] *Id*.

draft. It was included in the Yugoslav-French draft[329] after rejection of a Soviet proposal[330] to add to Article 2's list of prohibited distinctions an Article 25-specific list of prohibited grounds, including property and education. An age qualification and the exclusion of mentally impaired persons were considered "reasonable restrictions,"[331] but convicts' disenfranchisement was not mentioned.[332] However, at least one authority has contended that the absence from the preparatory work of reference to an issue is not dispositive.[333]

3. The View of the Human Rights Committee

The Human Rights Committee ("HRC"), established pursuant to Article 28 of the ICCPR, is comprised of eighteen independent experts and charged with three main functions: issuing general comments, examining country reports, and assessing individual complaints involving state parties which have ratified the additional protocol. General Comments represent the HRC's views on issues arising of treaty provisions.[334] Nowak suggests that these comments should be considered highly in treaty interpretation, despite their non-binding nature, since they are adopted by consensus.[335]

The general comment regarding Article 25 posits that the right to vote "lies at the core of democratic government, based on the consent of the people," and suggests that it is related to the rights of peoples to self-determination under Article 1(1).[336] However, the HRC notes that the right to vote under the ICCPR is not absolute. Limitations are acceptable, as long as no distinction is made on grounds prohibited in Article 2(1), no unreasonable restrictions are imposed, and rights "are not suspended or excluded, except on grounds which are established by law and which are objective and reasonable."[337]

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329 U.N. ECOSOC Summary Record, 9th Sess., 363d mtg. at 12-13, U.N. DOC. E/CN.4/SR.363 (Sept. 28, 1953).

330 *Id*.

331 *Id.*

332 *Id.* at 14; *see also* Annotation by the Secretary-General of the Draft International Covenants on Human Rights, U.N. GAOR, 10th Sess. Supp. No. 19, U.N. Doc. A/2929 (1955).

333 GARDINER, *supra* note 324, at 336.

334 Philipp Alston, *The Historical Origins of the Concept of General Comments*, *in* THE INTERNATIONAL LEGAL SYSTEM: IN QUEST OF EQUALITY AND UNIVERSALITY 763, 763-64 (Laurence Boisson de-Chazournes & Vera Gowland-Debbas eds., 2001).

335 Nowak, *supra* note 302, at XXIV.

336 General Comment No. 25 (57) on the Right to Take Part in the Conduct of Public Affairs, Voting Rights and the Right of Equal Access to Public Service, adopted at the 57th Sess. (Aug. 27, 1996) at paras. 1-2, *available at* http://www2.ohchr.org/english/bodies/hrc/comments.htm.

337 *Id.* para. 4.

It is noted that an established mental incapacity and an age qualification are reasonable restrictions, while it is unreasonable to restrict the right to vote on grounds of physical disability or to impose literacy, educational, or property requirements.[338] Regarding convicts' disenfranchisement, the comment posits that the period of suspension of their right to vote "should be proportionate to the offence and the sentence."[339] In a 1984 opinion, the HRC maintained that deprivation of all political rights for fifteen years could only be justified in exceptional circumstances.[340]

On later occasions, the committee expressed concern regarding blanket disenfranchisement. It generally seemed to view disenfranchisement policies unfavorably. In its 1993 observations regarding Luxembourg, it noted that "the practice of including a suspension of voting rights as part of sentencing raises a number of problems under . . . the Covenant," and recommended that "the State party should consider abolishing the deprivation of the right to vote as part of legitimate punishment."[341] In its 2003 observations, the committee "remained concerned" that "for a large number of offences, the systematic deprivation of the right to vote is an additional penalty in criminal cases."[342] In its 2006 observations on American practices, the committee noted that "general deprivation of the right [to] vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not [sic] meet the requirements of Articles 25 [and] 26 . . . nor [does it] serve[ ] the rehabilitation goals of Article 10(3)."[343]

Interestingly, in 2002, the HRC made a stronger general statement (as opposed to its usual state-specific comments), holding that "the Committee fails to discern the justification for . . . [disenfranchisement] in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation, contrary to Article 10 paragraph 3 in conjunction with Article 25 of the Covenant."[344]

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[338] *Id*. paras. 4, 10.

[339] *Id*. para. 14.

[340] *See* Human Rights Committee, Selected Decisions under the Optional Protocol, Pietraroia v. Uruguay, No. 44/1979, U.N. DOC. CCPR/C/OP/1, at 76, para. 16 (1984).

[341] Report of the Human Rights Committee, U.N. GAOR, 48th Sess., Supp. No. 40, U.N. DOC A/48/40 (Oct. 7, 1993) at para. 133, 145.

[342] Report of the Human Rights Committee, U.N. GAOR, 58th Sess., Supp. No. 40, U.N. DOC A/58/40 (2002-2003) at para. 80(8) [hereinafter Report of the Human Rights Committee].

[343] Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, 87th Sess., U.N. DOC. CCPR/C/USA/CO/3/Rev 1 (July 10-28, 2006), at para. 35.

[344] Gen. Assembly, Human Rights Comm., Report of the Human Rights Committee, para. 75(10), U.N. DOC. A/57/40 (Vol. I), 2002. Article 10 is analyzed *infra*.

The U.K. submitted in *Hirst* (no. 2) that its disenfranchisement legislation is compatible with Article 25.[345] The HRC, in its 2008 observations, expressed concern regarding retention of blanket disenfranchisement legislation, in contravention of *Hirst* (no. 2), and concluded that "the Committee is of the view that general deprivation of the right to vote for convicted prisoners may not meet the requirements of Article 10, paragraph 3, read in conjunction with Article 25 of the Covenant."[346]

4. Reservations to Article 25

Reservation to a treaty is "a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State."[347] States-parties cannot enter reservations which are incompatible with the object and purpose of the treaty.[348] The HRC deemed it desirable that state-parties accept the full range of obligations under the ICCPR,[349] noting that domestic laws may have to be altered to facilitate treaty compliance,[350] and that the HRC is competent to determine the compatibility of reservations with the ICCPR's object and purpose.[351]

When the United States ratified the ICCPR in 1992,[352] it entered more Reservations, Understandings, and Declarations ("RUDs") than any other state.[353] There are general doubts as to the compatibility of some

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345 Further Observations, *supra* note 241, § 13.

346 Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, 93d Sess., U.N. DOC. CCPR/C/GBR/CO/6 (July 7-25, 2008), at para. 28 [hereinafter Consideration of Reports].

347 Vienna Convention, *supra* note 292, at art. 2(d).

348 *Id*. art. 19(3).

349 Human Rights Committee, General Comment 24, para. 4 (Fifty-Second Session, 1994), Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto or in Relation to Declarations under Article 41 of the Covenant, U.N. DOC. HRI/GEN/1/Rev.9 (Vol. I) at 212.

350 *Id*. para. 12.

351 *Id*. paras. 17-18. In separate observations on General Comment 24, the U.S., U.K., and France have challenged the HRC's competence in determining compatibility of reservations with the ICCPR. *See* Human Rights Committee, *Observations by the United Kingdom on General Comment 24*, 3 INT'L HUM. RTS. REP. 261, 265 (1996); Human Rights Committee, *Observations by France on General Comment 24*, 4 INT'L HUM. RTS. REP. 6 (1997).

352 ICCPR, *supra* note 21.

353 LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, CRITICAL ASSESSMENT OF THE UNITED STATES COMMITMENT TO CIVIL AND POLITICAL RIGHTS 62 (July 2006), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/lccrul.pdf (last visited Feb. 13, 2011).

RUDs with the object and purpose of the treaty.[354] Yet, none of the American RUDs addressed Article 25 in general or convicts' disenfranchisement in particular.[355] In fact, only three reservations were entered regarding Article 25: by Kuwait, regarding restrictions on women's right to vote and stand for elections; by Switzerland, regarding elections held by means other than secret ballot; and by the U.K., regarding (former) voting in Hong Kong (since Hong Kong is no longer under British rule, this reservation is no longer relevant).[356] Considering that many states-parties disenfranchised convicts at the time of their ICCPR ratification, it can be assumed that they viewed disenfranchisement of convicts as being treaty-compatible.

### 5. The "Right to Democratic Governance" and Dynamic Treaty Interpretation

The UN Charter requires all members to promote "universal respect for, and observance of, human rights and fundamental freedoms."[357] In accordance with Article 68, the Economic and Social Council established the Commission on Human Rights which was replaced by the Human Rights Council in 2006.[358]

Article 21 of the UDHR (which the UN General Assembly unanimously adopted in 1948) proclaims that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives."[359] It enunciates that "[t]he will of the people shall be the basis of the authority of government," which "shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage."[360] Article 21 may be considered the "democratic credo," without which, none of the other rights and freedoms have real substance, as they depend on the basic right of citizens to be the sole determining factor,

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354 William Schabas, *Invalid Reservations to the ICCPR: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 278 (1995).

355 *See, e.g.*, U.S. v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002). In *Duarte-Acero*, the United States Supreme Court held that "[t]he ICCPR does not create judicially-enforceable rights," declaring that "the provisions of Articles 1 through 27 of the Covenant are not self-executing." *Id.* at 1283. Nonetheless, in its first report on the ICCPR, the U.S. posited that the "fundamental rights" in the ICCPR "are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases." Human Rights Committee, *Consideration of Reports Submitted by State Parties*, U.N. DOC. CCPR/C/81/Add.4 (Aug. 24, 1994), para. 8.

356 ICCPR, *supra* note 21.

357 U.N. Charter, art. 55(c).

358 G.A. Res. 60/251, ¶ 1, U.N. DOC. A/RES/60/251 (Mar. 15, 2006).

359 UDHR, *supra* note 295, art. 21.

360 *Id.*

either directly or through their elected representatives, in shaping the destiny of their country.[361]

In 1993, the World Conference on Human Rights unanimously adopted the Vienna Declaration, which reaffirmed the UDHR, and proclaimed that "[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing."[362]

In 1999, the Commission on Human Rights adopted a resolution entitled "Promotion of the Right to Democracy." The resolution noted "the large body of international law and instruments . . . which confirm the right to full participation and other fundamental democratic rights and freedoms inherent in any democratic society." and affirmed that "democracy fosters the full realization or all human rights."[363] The Commission's subsequent 2004 resolution entitled "Strengthening of Popular Participation" stressed that "the will of the people shall be the basis of the authority of government . . . expressed in periodic and genuine elections, which shall be by universal and equal suffrage."[364]

Elections may be considered "the defining institutions of modern democracy,"[365] and "nearly every country claims to be democratic or at least to be laying the foundations for an eventual democracy."[366] Guy Goodwin-Gill in *Free and Fair Elections* suggests that the principle that the will of the people as expressed in elections conducted on the basis of universal suffrage is the sole basis for governmental authority is uncontested.[367]

A recent survey demonstrates that in the preceding three decades, every new national constitution enunciated a citizen's right to vote.[368] A

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[361] NEHEMIAH ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION 132 (1958).

[362] World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 8, U.N. DOC. A/CONF.157/24 (Part 1) (1993) [hereinafter *Vienna Declaration*]. Article 26 calls upon all countries to accede to international human rights instruments.

[363] Commission on Human Rights, 55th Sess., Mar. 22, 2009-Apr. 30, 2009, Res. 57/1999, *Promotion of the Right of Democracy*, U.N. DOC. E/CN.4/ 1999/167 (Apr. 27, 1999), p. 194 (adopted by 51 votes to 0, with China and Cuba abstaining).

[364] Commission on Human Rights, 66th Sess., Mar. 15, 2004-Apr. 23, 2004, Res. 31/2004, *Strengthening of Popular Participation, Equity, Social Justice and Non-Discrimination as Essential Foundations of Democracy*, U.N. DOC. E/CN.4/ 2004/127, p. 128, para. 9 (Apr. 19, 2004) (adopted by 28 votes to 14, with 11 abstentions).

[365] KATZ, *supra* note 5, at 4.

[366] *Id.*

[367] GUY GOODWIN-GILL, FREE AND FAIR ELECTIONS 75 (2006).

[368] Alexander Kirshner, *The International Status of the Right to Vote*, http://www.demcoalition.org/pdf/International_Status_of_the_Right_to_Vote.pdf (last visited Feb. 12, 2011).

universal right to political participation, not contingent on treaty arrangements, is thus thought to have emerged.[369]

How should such consistent and continuous reference to democracy and elections affect the interpretation of Article 25? Jennings and Watts refer to Oppenheim's restrictive principle, *in dubio mitius*, stipulating that among possible interpretations, the one less onerous on the country assuming an obligation should be chosen.[370] Orakhelashvili questions, however, whether the restrictive principle should be applied with regard to human rights treaties,[371] and Nowak asserts that human rights treaties should be interpreted liberally (*in dubio pro libertate*) and dynamically.[372]

The European Court of Human Rights held that the European Convention is a "living instrument" which must be interpreted in light of present-day conditions.[373] Furthermore, by its very nature, interpretation of international human rights law must be dynamic, adapting, and evolving to keep pace with changes in social thought and attitudes.[374] For instance, the Court in *Hirst* (no. 2) applied a contemporary rights-enhancing interpretation to determine the compatibility of the European Convention with legislation prescribing convicts' disenfranchisement and effectively reversed an earlier judgment[375] where such an interpretation had not been advanced.

Further guidance may be provided by international and regional documents addressing penal matters. For instance, Principle 6 of the UN Basic Principles for the Treatment of Prisoners exhibits a "residual liberty" approach by stipulating that "[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain . . . human rights and fundamental freedoms."[376]

Rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners considers rehabilitation to be the preferred goal of punishment—stating that "[t]he period of imprisonment [should be] used to ensure, so far as possible, that upon his return to society, the offender

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369 Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 541 (1992).

370 OPPENHEIM'S INTERNATIONAL LAW 1278 (Robert Jennings and Arthur Watts eds., 9th ed. 1992).

371 Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529 (2003).

372 NOWAK, *supra* note 302, at XXIV.

373 Soering v. U.K., App. No. 14038/88, 11 Eur. H.R. Rep. 439, at ¶ 102 (1989).

374 Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. B) at 26 (1995).

375 X v. Federal Republic of Germany, App. No. 2728/66, 25 Eur. Comm'n H.R. Dec. & Rep. 38 (1967).

376 Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, U.N. DOC. A/RES/45/111 (Dec. 14, 1990).

is not only willing but able to lead a law-abiding and self-supporting life."[377]

The European Code of Good Practice in Electoral Matters defines universal suffrage as its guiding electoral principle. It requires that convicts' disenfranchisement be provided for by law, and that it be imposed explicitly by a court as punishment for a serious offense and in observance of proportionality.[378]

In view of the above, international bodies and documents seems to attribute ever-greater significance to the promotion of democracy and universal suffrage. Moreover, dynamic interpretations of human rights treaties appear to be favored. Both developments suggest that expansive convicts' suffrage better reflects the contemporary purpose and meaning of Article 25.

### 6. Harmonized Treaty Interpretation

Article 25 is not free-standing but, rather, a part of the ICCPR, which, in turn, is part of the human rights treaty regime. Accordingly, other treaty provisions may aid in its interpretation. Article 10(1) of the ICCPR promulgates that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[379] Article 10(3) provides that the "penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation."[380]

According to the HRC, a penitentiary system should not only be retributive; it should also seek the reformation and social rehabilitation of prisoners.[381] The HRC observations *supra* regarding the U.S. and U.K.

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[377] United Nations, Econ. & Soc. Council, Standard Minimum Rules for the Treatment of Prisoners U.N. Doc. A/CONF/611, annex I (Aug. 30, 1955), *available at* http://www.unhcr.org/refworld/docid/3ae6b36e8.html. A similar stipulation appears in EUR. CONSULT. ASS., *Recommendation of the Committee of Ministers on the European Prison Rules*, ¶ 102 (Jan. 11, 2006), *available at* https://wcd.coe.int/ViewDoc.jsp?id=955747 ("[T]he regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.").

[378] European Commission for Democracy Through Law, *Code of Good Practice in Electoral Matters*, § 1(1)(d) (Oct. 30, 2002), *available at* http://www.venice.coe.int/docs/2002/CDL-AD(2002)023-e.pdf.

[379] ICCPR, *supra* note 21, art. 10(1).

[380] *Id.* art. 10(3).

[381] Human Rights Committee, General Comment 9, para. 4 (Sixteenth Session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. DOC. HRI/GEN/1/REV.9 (VOL. I) at 180 (May 27, 2008), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/pdf/G0842235.pdf.

noted that the rehabilitative requirement of Article 10(3) is significant for assessing disenfranchisement policies.[382]

Alongside the reference in Article 25 to the general anti-discrimination clause in Article 2(1), Article 26 requires states to prohibit discrimination and guarantee equal and effective protection against discrimination.[383] Adopting a similar construction to that of Article 2(1), the HRC opined that the term "discrimination" refers to any "distinction, exclusion, restriction or preference" based on grounds such as the ones enumerated in the Article or on other status which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[384]

Importantly, according to the HRC, for differential treatment *not* to constitute discrimination under Article 26, it has to be shown that the measure aims to achieve a legitimate purpose and that the adopted criteria are reasonable and objective.[385] For instance, when U.S. disenfranchisement policies were assessed, the HRC observed that such policies disproportionately affect minorities (even though the HRC ultimately stopped short of holding such policies to be incompatible with the treaty).

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") sets a results-based test for racial discrimination.[386] Article 5(c) thereof proclaims that State parties undertake to "prohibit and to eliminate racial discrimination in all its forms and to guarantee . . . the enjoyment of . . . [p]olitical rights, in particular the right . . . to vote . . . on the basis of universal and equal suffrage."[387] A United Nations committee report on American disenfranchisement practices expressed concern regarding disenfranchisement's disproportionate effect on African-Americans. The committee report called for the U.S. to restrict disenfranchisement only to persons convicted of the most serious crimes, and to restore voting automatically upon completion of the criminal sentence.[388]

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[382] *See* Report of the Human Rights Committee, *supra* note 342; Consideration of Reports, *supra* note 346.

[383] ICCPR, *supra* note 21, art. 26.

[384] Human Rights Committee, General Comment 18, para. 10 (Thirty-Seventh Session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. DOC. HRI/GEN/1/REV.9 (VOL. I) at 197 (May 27, 2008), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/pdf/G0842235.pdf.

[385] *Id*. para. 13.

[386] International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

[387] *Id*. art. 5(c).

[388] Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by State Parties under Article 9 of the International Convention on*

It seems that treaty bodies, which advance a harmonized interpretation of Article 25 with other ICCPR provisions as well as with provisions of other treaties, increasingly adopt a skeptical view of convicts' disenfranchisement and view with concern the disproportionate effects of the practice on marginalized groups.

#### 7. Interim Observations

Article 25 of the ICCPR was drafted in light of Article 21 of the UDHR. Under the ICCPR, states-parties have assumed an internationally binding obligation to guarantee universal citizen suffrage. Nevertheless, the phrase "unreasonable restrictions" has qualified the scope of this obligation. The *Travaux Préparatoires* indicate that the drafters intended to leave substantial discretion to states-parties, though it is unclear whether they meant for such discretion to apply to questions of convicts' disenfranchisement. HRC jurisprudence suggests that Article 25 does not proscribe convicts' disenfranchisement. Moreover, the absence of reservations to Article 25 with regard to convicts' disenfranchisement may indicate that state-parties did not perceive such policies to be incompatible with their treaty obligations.

Nonetheless, recent developments in the human rights discourse, including the adoption of the Vienna Declaration, UN resolutions regarding prisoners, and the European guidelines regarding elections, coupled with an interpretation that takes into account other treaty provisions, suggest that presently, disenfranchisement of ex-convicts, as well as blanket disenfranchisement of convicts, may be incompatible with treaty obligations.

### C. *Raising the Threshold Internationally: Proposing a New Optional Protocol Proscribing Convicts' Disenfranchisement*

#### 1. Introductory Remarks

The comparative and international analyses demonstrate that under circumscribed conditions determined by a balancing or proportionality review, disenfranchisement is considered by some courts and international bodies to be compatible with retributive penal theories, and, with regard to electoral offenses, compatible with incapacitation theories.

It is posited *infra* that notwithstanding the limited applicability of such penal theories, the imposition of disenfranchisement as a punishment should cease due to its adverse effects as well as to the special nature of voting.

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*the Elimination of All Forms of Racial Discrimination*, ¶ 27, U.N. DOC. CERD/C/USA/CO/6 (May 8, 2008), *available at* http://www.universalhumanrightsindex.org/documents/824/1310/document/en/pdf/text.pdf.

2. The Adverse Effects of Disenfranchisement

a. *Adverse Effects on Convicts*

It was suggested in Part I section B *supra* that disenfranchisement is a form of punishment. Punishment inevitably entails the deprivation of certain rights and freedoms of convicts, including, when incarceration is imposed, temporary deprivation of liberty.[389] However, it does not follow that punishment must also be *degrading*. Degradation means, literally, reducing the status of someone and treating him or her as inferior. Is degradation an inevitable, justifiable or unacceptable aspect of punishment? According to Fitzmaurice, "it is obvious that all punishment is degrading, at least if it involves imprisonment and the (mostly unpleasant and often humiliating) incidents of prison life and discipline."[390] Hampton argues that punishment *ought* to degrade or demean convicts.[391] Contrarily, Duff asserts that penal systems which display disrespect, indignity or degradation are objectionable because these are intrinsically inappropriate ways for societies to treat their members.[392]

The comparative and international analyses (in Part II section C and Part III section B *supra*, respectively) demonstrate a conceptual divide regarding the status and treatment of convicts between the United States, on the one hand, and continental Europe and the international treaty regime, on the other hand. In the former, by and large, convicts are perceived as deserving hard treatment, whereas in the latter, state authorities are expected to treat convicts as respectable individuals.[393] In view of the above, it is interesting to note that it was the United States Supreme Court which invalidated legislation revoking citizenship of certain convicts, describing it as "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[394]

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[389] Mark Carter, *Retributive Sentencing and the Charter: The Implications of* Sauvé v. Canada (Chief Electoral Officer), 10 CAN. CRIM. L. REV. 43, 50 (2005).

[390] Tyrer v. U.K., App. No. 5856/72 2 Eur. H.R. Rep. 1, 17-18 (1978).

[391] Jean Hampton, *Punishment, Feminism and Political Identity*, 11 CAN. J.L. & JURIS. 23, 41 (1998).

[392] Anthony Duff, *Punishment, Dignity and Degradation*, 25 OXFORD J.L. STUD. 141, 149 (2005).

[393] JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 7 (2003); *see also* Genevra Richardson, *The Case for Prisoners' Rights, in* ACCOUNTABILITY AND PRISONS: OPENING UP A CLOSED WORLD 19, 24 (Mike Maguire, Jon Vagg & Rod Morgan eds., 1985) (suggesting that "normalization requires that conditions within prison approximate as closely as possible to those outside and would encourage the retention of the rights and duties normally pertaining to free individuals").

[394] Trop v. Dulles, 356 U.S. 86, 101 (1958).

This article submits that denying convicts the right to vote, perhaps their most expressive activity as community members[395] and a symbol of their political existence, may carry degrading effects similar to the loss of citizenship.

It is interesting to note that disenfranchisement advocates differ regarding the practice's presumed degrading nature. Whereas Planinc suggests that disenfranchisement shows society's disapproval by shaming convicts into feeling less dignified,[396] the dissent in *Sauvé* (no. 2) submitted that disenfranchisement *respects* convicts' dignity by treating them as "rational, autonomous individuals."[397]

It may be true that "in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity, . . . [and that] a community should be empowered to exclude from its elections persons with no real nexus to the community as such."[398] However, this statement raises the issue of whether an individual's community membership may be rescinded or abridged at the community's will.

This article submits that for individuals, voting is a symbol of political equality[399] and of normative status.[400] Political liberties are a "public affirmation of the status of equal citizenship for all,"[401] and those possessing them retain their self-respect and self-confidence.[402] By contrast, disenfranchisement degrades convicts by intentionally denying them a political right which they previously possessed and which is retained by all other mentally competent adult citizens. It arguably institutionalizes a double polity: the first, consisting of fully enfranchised, politically equal citizens, rules over the second, consisting of the disenfranchised.[403] Scholars have argued that the right to vote stems from a pre-political right to *individual* self-determination,[404] and that the franchise *defines* membership in a community.[405] Seen in this light, disenfranchisement

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395 Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 177 (2008).

396 Planinc, *supra* note 50, at 162.

397 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 73 (Can.) (Gonthier, J., dissenting).

398 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1084 (2d ed. 1988).

399 MANZA & UGGEN, *supra* note 58, at 18.

400 JAMES BOHMAN, DEMOCRACY ACROSS BORDERS: FROM DÉMOS TO DÉMOI 111 (2007).

401 RAWLS, *supra* note 37, at 545.

402 Furman, *supra* note 122, at 1217.

403 Katherine Pettus, Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity 21-22 (2002) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

404 Cholbi, *supra* note 55, at 549.

405 Heather Lardy, *Citizenship and the Right to Vote*, 17 OXFORD J.L. STUD. 75, 85 (1997).

arguably marks convicts as societal outcasts,[406] and may amount to their exclusion from their political community.

Crucially, disenfranchised convicts cannot exchange their defunct community membership for another. Unlike, for instance, membership of a sports club, membership in one political community cannot be substituted for membership in another community at the member's will. As was noted in Part II *supra*, some states prohibit voluntary renouncement of citizenship. Even if an individual can renounce her citizenship, other states are generally not obliged to admit her into their communities.[407] Individuals thus cannot freely choose to become members of another political community, and depriving them of a significant (constitutive even) component of their community membership is particularly problematic.

b. *Adverse Effects on Convicts as Members of Social Groups*

In addition to the adverse effects of disenfranchisement on convicts as individuals, disenfranchisement affects them as members of social groups. Waldron contends that individuals have an effective right to vote only when their votes are counted and given effect as part of *collective* decision-making, leadership, and authority, in which others participate as well.[408]

Convicts, like other citizens, hold views on policy issues and wish to express them by voting.[409] Moreover, making sound public decisions requires assembling diverse perspectives and experiences, including those of convicts; for instance, with regard to the manner in which the penal system functions.[410] It can thus be argued that convicts' suffrage may facilitate better informed policy-making, whereas their disenfranchisement inhibits it.

Moreover, since minorities and marginalized groups are disproportionately represented among convicts, their disenfranchisement may skew election results, if such groups tend to favor certain parties or blocs.[411]

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406 Ronald Dworkin, *What is Equality?*, 22 U.S.F. L. REV. 1, 4 (1987).

407 TOMAS HAMMAR, DEMOCRACY AND THE NATION STATE: ALIENS, DENIZENS AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION 30-31 (1989).

408 WALDRON, *supra* note 305, at 233.

409 *See, e.g.*, Cormac Behan & Ian O'Donnell, *Prisoners, Politics, and the Polls*, 48 BRIT. J. CRIMINOLOGY 319, 330 (2008) (noting that during the 2006 Irish general elections when arrangements were made for the first time for prisoners to register to vote, 71.4 percent of the registered prisoners voted).

410 Jeremy Waldron, *A Rights Based Critique of Constitutional Rights*, 13 OXFORD J.L. STUD. 23, 37 (1993).

411 Daniel Murphy, Adam Newmark & Phillip Ardoin, Felon Disenfranchisement Policies in the States, Presentation at the Annual State Politics and Policy Conference 2 (May 13-14, 2005).

Enfranchising convicts may thus ensure that the election outcomes better reflect the views of different societal groups.

It is noteworthy that convicts may be the group most adversely affected by society's most coercive powers. Following Dahl's strong principle of equality,[412] society should seek continued authorization from affected groups for exercising its powers over them.

Indeed, because penal policies directly affect convicts, it is particularly significant for them to be able to initiate reforms.[413] For instance, if the recreational use of marijuana is prohibited in a given society, and the population is divided on the question of prohibition, it would seem flawed to deny individuals who were convicted for using marijuana the ability to aid in overturning the legislation.

It may also be argued that disenfranchisement particularly affects *prisoners* due to their physical isolation from the outside world, and lack of public and political sympathy.[414] Prisoners are no politician's constituents, and are unlikely to have other interest groups representing their interests. Moreover, the interests of prison authorities often clash with those of prisoners,[415] for instance regarding prison maintenance and discipline. Disenfranchisement thus further sidelines legitimate concerns of prisoners.

### 3. Voting Eligibility in Light of the Balancing or Proportionality Review

It is contended that questions related to voting eligibility should be assessed differently than those relating to voting regulation. The former determine whether one has a right to vote, whereas the latter address the conditions and procedural regulations which facilitate the exercise of an already existing right to vote.

Non-invidious registration or procedural requirements may cause voters inconveniences. For instance, in all representative democracies, even those based on proportional representation, political parties need to pass an effective percentage bar due to the limited number of seats in the legislature(s). Consequently, voters supporting marginal parties may have to "settle" for less radical lists. Other voting regulations like prior registration exist in some political systems, and may impose technical difficulties, yet provided that they are benign, they do not intentionally disenfranchise individuals. Contrarily, disenfranchisement of convicts, by definition, intentionally abrogates their right to vote, either temporarily or permanently.

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412 *See generally* DAHL, *supra* note 3.

413 Mitchell, *supra* note 6, at 836.

414 STEVE FOSTER, HUMAN RIGHTS AND CIVIL LIBERTIES 320 (2006).

415 John Kleinig & Kevin Murtagh, *Disenfranchising Felons*, 22 J. APPLIED PHIL. 207, 229 (2005).

In *August*, the South African Constitutional Court rejected an analogy between citizens abroad, pilots or long-distance truck drivers, and prisoners, holding that the former "could point to difficulty rather than impossibility of enjoyment of rights," whereas the latter are "prevented from exercising their voting rights."[416]

German constitutional law usefully distinguishes between the *essence* of basic rights, which legislation may not infringe *under any circumstances*, and their penumbra, which may be restricted, pursuant to generally applicable laws.[417]

In the British disenfranchisement judgment that was set aside by the European Court of Human Rights in *Hirst* (no. 2), Lord Kennedy maintained:

> Of course as far as an individual prisoner is concerned, disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and "the free expression of the opinion of the people in the choice of the legislature."[418]

The latter part of Lord Kennedy's statement may follow from the unique stipulation in the ECHR, discussed in Part II section C *supra*, which does not make an explicit reference to a "right" to vote.

The former part may, however, reflect broader reluctance to accept that some rights may have an inviolable core, emanating from the more general debate between advocates of a "relative" theory of rights (like Robert Alexy) and those who suggest an "absolute theory" of rights. Alexy distinguishes between *rules* and *principles*, suggesting that rules are definitive, non-balanceable norms, whereas principles are competing optimization requirements, which should be implemented to the "greatest possible extent," applying proportionality.[419] If rights are regarded as principles, they do not have inviolable "core" content. Rather, the "core" of a right is what is left *after* balancing has taken place.[420] Nevertheless, it follows from Alexy's structure that the question whether a right should be considered a (non-balanceable) rule or a (balanceable) princi-

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[416] August v. Electoral Commission 1999 (3) SA 1 (CC) at 26 para. 30 (S. Afr.).

[417] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 19(2) (Ger.).

[418] R. (Pearson and Martinez) v. Home Secretary; Hirst v. Attorney General, [2001] E.W.H.C. 239 (Admin) (Kennedy, L.J.) (U.K.). The European Court of Human Rights discussed the notion of the "very essence" of the right to vote in Gitonas et al. v. Greece, 26 Eur. H.R. Rep. 691, ¶ 39 (1997).

[419] ALEXY, *supra* note 301, at 192.

[420] *See, e.g.*, Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 180 (2006) (suggesting that courts use proportionality to denote an inviolable "core" of the right at issue, which they define without reference to public interest).

ple does not depend on the type of right that is engaged or on its content but, rather, on linguistic formulae. Consequently, the core and penumbra of the right to vote may be defined either as a rule *or* as a principle, depending on the legal stipulation that a given jurisdiction adopts.

In contradistinction, Möller suggests that normative assessment regarding the importance of rights or interests relative to one another ought to determine which rights or interests should *generally* take precedence when a conflict arises.[421] Following Möller, when a given society sets its voting qualifications based on certain interests, such as voters' desired nexus to the community, these qualifications may result in political exclusion. Determining whether such exclusion is justified requires a normative ranking of values.

This article submits that when the core of the right to vote of convicts (who are mentally competent adult citizens) clashes with penal justifications which presumably advance societal interests, the right to vote ought to take normative precedence, since the adverse effects of disenfranchisement trump its purported benefits. Consequently, reverting to balancing or proportionality review to assess specific disenfranchisement legislation is misguided.

Nevertheless, as the analysis in Part II section B *supra* demonstrated, the above position does not reflect a mainstream view. The non-American judgments rejected regulatory justifications for disenfranchisement, and assessed instead the legitimacy of particular provisions as a form of punishment. Nonetheless, by engaging in balancing or proportionality review that weighs the essence of the right to vote of some convicts against societal interests reflected by penal justifications, courts accepted that it may be possible to exercise disenfranchisement in a proportionate manner. While the use of balancing or proportionality review in Canada and South Africa is arguably required by general limitations clauses of their respective constitutions,[422] proportionality was consciously "read" into provisions of the ECHR and Australian Constitution by the respective courts.[423]

4. The Significance of the Right to Vote's Facilitative Role

a. *The Facilitative Role of the Right to Vote*

The right to vote fulfils, inter alia, a facilitative role—voters partake in decision-making regarding the ways in which their societies intend to achieve their common goals, including protection of rights. Voting may

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[421] Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5 INT'L J. CON. L. 453, 465 (2007).

[422] *See* Canadian Charter of Rights and Freedoms, § 1; S. AFR. CONST., 1996, § 36.

[423] Hirst v. U.K. (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40 (2004) (Fourth Section Chamber); Hirst v. U.K. (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006) (Grand Chamber); Roach v. Electoral Comm'r, [2007] 233 CLR 162 (Austl).

thus be considered a necessary, though not sufficient, condition for guaranteeing other rights.[424]

Additionally, elections are means of obtaining the consent of the governed,[425] because a representative democracy is defined by the people's election of a government of their choice.[426] Cassese also suggests reading Article 1 of the ICCPR as enunciating an *individual* right to participate in national affairs in addition to the collective right to self-determination.[427]

Moreover, democratic rights are emancipatory in that they prevent individuals from being potentially subjected to the arbitrary will of others.[428] Indeed, Habermas argues that legitimation of political authority in associations of free equal legal persons requires democratic modes of decision-making.[429]

b. *The Cultural Relativity Challenge*

Commitment to the universality of human rights is often enunciated.[430] For instance, the "Vienna Declaration and Programme of Action" was adopted unanimously by representatives of 171 countries that participated in the World Congress on Human Rights. The declaration proclaims that "while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind . . . it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms."[431] Nevertheless, the *content* of many rights remains contentious. For instance, prohibitions on Muslim head coverings are considered to be an infringement of freedom of religion in some societies, while in others they are presumed to advance gender equality.[432]

International standardization of human rights obligations is thus occasionally challenged based on a notion of "cultural relativism."[433]

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[424] Fox, *supra* note 369, at 595.

[425] Samuel Issacharof, *Fragile Democracies*, 120 HARV. L. REV. 1465, 1470 (2006-2007).

[426] ANTONIO CASSESE, U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 137 (1979).

[427] *Id.* at 142.

[428] MICHAEL E. GOODHART, DEMOCRACY AS HUMAN RIGHTS: FREEDOM AND EQUALITY IN THE AGE OF GLOBALIZATION 147 (2005).

[429] JORGEN HABERMAS, THE POSTNATIONAL CONSTELLATION 65 (2001).

[430] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 157 (2d ed. 2003).

[431] *Vienna Declaration*, *supra* note 362, at ¶ 5.

[432] *See, e.g.*, Reuven (Ruvi) Ziegler, *The French Headscarves Ban: Intolerance or Necessity?*, 40 JOHN MARSHALL L. REV. 235 (2006).

[433] For a general exposition of cultural relativism, see Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984). In recent decades, there has also been a particular focus on an "Asian values" dimension of the cultural relativism claim. For such an account, see Damien Kingsbury, *Universalism*

An-Na'im contends that the international human rights system's claim "to universal cultural legitimacy should be based on a moral and political 'overlapping consensus' among major world cultural traditions," which has not yet fully emerged.[434] Mutua asserts that human rights documents are veiled attempts to universalize the particular civil and political rights that are either accepted or aspired to by Western liberal democracies.[435]

Contrarily, "universalists" assert that the idea of cultural relativity is premised on the universality of the principle that everyone should follow and be defined by their own culture; hence it is internally contradictory.[436] Moreover, suggesting that Europe has a longstanding democratic tradition, or that a tradition of obedience to authority is especially "Asian," is empirically wrong. If respect for human rights emerged from Europe despite its despotic and intolerant past, human beings arguably possess some characteristics by virtue of which *any* cultural tradition should respect human rights.

Even those who believe that the contentious nature of some rights, like freedom of religion, justifies adhering to cultural relativity objections should acknowledge that the right to vote merits a different approach due, in part, to its facilitative nature. Waldron's famous depiction of the right to vote as "the right of rights,"[437] rather than emphasizing its moral or substantive primacy, connotes that when individuals vote, they partake in decision-making processes that implicate the protection of other rights. He suggests that reasonable right-bearers resolve their disagreements about respective (other) rights through the political process.[438] Political equality should hence be considered a pluralistic notion that is not contingent on a particular view of human life.[439] Consequently, enfranchisement of previously excluded groups or individuals does not require holding a particular position on what constitutes in Aristotelian terms

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*and Exceptionalism in "Asia"*, *in* HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE 19 (Damien Kingsbury & Leena Avonius eds., Palgrave Macmillan 2008).

[434] Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 173 (Rebecca J. Cook ed., 1994).

[435] MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 173 (2002).

[436] James Sweeney, *Margin of Appreciation Cultural Relativity and the European Court of Human Rights in the Post Cold-War Era*, 54 INT'L & COMP. L.Q. 459, 460-61 (2005).

[437] WALDRON, *supra* note 305, at 232. Waldron's notion of a "right of rights" should be distinguished from Arendt's notion of nationality as the "right to have rights." HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 178 (1951).

[438] WALDRON, *supra* note 305, at 282.

[439] Joshua Cohen, *For a Democratic Society*, *in* THE CAMBRIDGE COMPANION TO RAWLS 109-10 (Samuel Freeman, ed., 2003).

"the good life."[440] McGinnis and Somin suggest that international law should not regulate issues involving "controversial substantive rights" which, they argue, are better determined by domestic democratic processes. International law should instead establish norms facilitating democracy in order to ensure that citizens can hold their governments accountable.[441]

c. *The Deference Challenge*

The deference doctrine suggests that judiciaries (particularly unelected ones) should not second guess decisions made by democratically accountable legislatures regarding contestable moral issues.[442] For instance, since the passage of the 1998 British Human Rights Act, deference has arguably been invoked by courts to justify their non-interference.[443] When deference is given to legislatures, courts do not engage in judicial review, but instead assume that the legislation is valid without assessment (*see, e.g.*, the dissent in *Hirst* (no. 2)).

Even if deference may be justified in certain cases, this article submits that deference is unsuitable for situations when the scrutinized legislation concerns voting eligibility, such as convicts' disenfranchisement. The dissents in *Sauvé* (no. 2) and *Hirst* (no. 2), which were discussed in Part II section 3 *supra*, have thus erred in deferring to their respective legislatures.

The better approach was taken by the United States Supreme Court, which held (regarding a different challenge to voting qualifications) that "deference usually given to judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials."[444] In *Sauvé* (no. 2), the Supreme Court of Canada held that "it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy . . . that courts must be vigilant."[445]

5. A Helpful Analogy: The Death Penalty Protocol

It was concluded in Part III *supra* that Article 25 of the ICCPR cannot be convincingly interpreted to proscribe convicts' disenfranchisement. It

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[440] GOODHART, *supra* note 410, at 147.

[441] John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. Rev. 1739, 1742 (2009).

[442] *See, e.g.*, T.R.S. Allan, *Human Rights and Judicial Review: A Critique of Due Deference*, 65 C.L.J. 671 (2006).

[443] Richard Edwards, *Judicial Deference under the Human Rights Act*, 65 MOD. L. REV. 859, 860-61 (2002).

[444] Kramer v. Union Free School District No. 15, 395 U.S. 621, 627-28 (1969). *But see* Richardson v. Ramirez, 418 U.S. 24, 55 (1974) (holding that "the people of the state of California" should decide whether to retain ex-felons' disenfranchisement).

[445] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 15 (Can.).

is thus submitted that aside from adopting appropriate domestic legislation, states-parties to the ICCPR should adopt an optional protocol proscribing disenfranchisement (the alternative, amending the ICCPR itself, is a highly cumbersome process).[446]

Analogies may be drawn between the proposed protocol and the Death Penalty Protocol. First, the inflictions of the death penalty and of disenfranchisement as punishments are arguably linked. Both practices pose a threat to the "democratic principle" properly understood. Burt contends that the death penalty rejects the democratic principle of equal citizenship.[447] In comparison, it was suggested *supra* that disenfranchisement degrades convicts to an inferior position in their political communities.

Second, like the Death Penalty Protocol, the proposed protocol would not require implementing domestic legislation, save for repealing existing disenfranchisement provisions – in American constitutional law terms, it can take the form of a "self-executing" treaty.[448]

Third, the sort of evasion that may be common practice concerning implementation of human rights treaties[449] can hardly occur under the Death Penalty Protocol, since it is relatively easy to observe whether or not the death penalty is practiced.[450] The same may apply, *mutatis mutandis*, to proscribing disenfranchisement.

Fourth, it is plausible to draft the proposed protocol in unequivocal terms, like the Death Penalty Protocol. An unambiguous stipulation proscribing disenfranchisement will reduce the risk of raising interpretive disputes, unlike, for instance, the United States' objection to the HRC's interpretation of the ICCPR's territorial scope provision.[451]

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[446] Amending the ICCPR requires the convening of an amendment conference upon the request of at least one-third of State parties, following a proposed amendment; a majority vote at the resulting conference; General Assembly approval of the proposed amendments; and ratification by a two-thirds majority of State parties. Crucially, amendments only bind countries which have accepted them. Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749, 758 (2008).

[447] Robert Burt, *Democracy, Equality, and the Death Penalty*, *in* THE RULE OF LAW 80, 90 (Ian Shapiro ed., 1994).

[448] WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 182 (3d ed. 2002).

[449] *See generally* Hathaway, *supra* note 310, at 2005-06.

[450] Eric Neumayer, *Death Penalty Abolition and the Ratification of the Second Additional Protocol*, 12 INT'L J. HUM. RTS. 3, 7 (2008).

[451] The U.S. argued that "we must accept the Convention the way it was written, not the way the Committee wishes it to be." United States Mission to the United Nations in Geneva, Statement by the United States Mission to the U.N. on behalf of the United States Delegation to the U.N. Human Rights Committee (July 28, 2006), http://www.state.gov/documents/ organization/132314.pdf (last visited Feb. 12, 2011).

Fifth, the need for the Death Penalty Protocol arose because Article 6 of the ICCPR ("the right to life") explicitly authorized the death penalty's application, albeit for serious crimes.[452] As noted in Part III *supra*, Article 25's "unreasonable restrictions" clause necessitates separate treaty proscription.

The analysis in Part II *supra* pointed to a trajectory in comparative jurisprudence towards expanding convicts' suffrage. The rapid change in global practices regarding the imposition of the death penalty provides a helpful analogy. By 1965, only 25 countries had formally repealed the death penalty. The number grew to 89 by 2001; 41 of these countries also acceded to the [1991] Death Penalty Protocol.[453] As of September 2009, 117 countries had repealed the death penalty in law or in practice, and 71 had acceded to the protocol.[454] The death penalty cannot be imposed by any of the international criminal tribunals which were set up after the protocol was adopted, including the International Criminal Court.[455]

The protocol has arguably had an "acculturation" effect.[456] Neumayer contends in this context that having a higher percentage of countries in a given region that abolished the practice raises the likelihood that neighboring countries will change their policy.[457] However, acculturation is far from assured. Goldsmith, for instance, argues that countries rarely increase protection of their citizens' rights because of international law.[458] Nevertheless, it can be modestly hoped that an optional protocol to the ICCPR will generate debate in countries where disenfranchisement is practiced. Following ratification of the protocol, other countries may undergo an acculturation process, and the proposed protocol may thus gradually alter the international legal landscape regarding convicts' disenfranchisement.

## IV. Conclusion

Had this article been written a century ago, it would have probably offered comparative perspectives on the disenfranchisement of women. By 1911, Australia and New Zealand had enfranchised women. A lively

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[452] Schabas, *supra* note 448, at 47.

[453] Roger G. Hood, The Death Penalty: A Worldwide Perspective 10 (3d ed. 2002).

[454] Alan W. Clarke et al., *Does the Rest of the World Matter? Sovereignty, International Human Rights Law, and the American Death Penalty*, 30 Queens L.J. 260, 262 (2004).

[455] Schabas, *supra* note 448, at 199.

[456] Goodman and Jinks, *supra* note 314, at 648.

[457] Eric Neumayer, *Death Penalty: The Political Foundations of the Global Trend toward Abolition*, 9 Hum. Rts. Rev. 241, 253 (2008).

[458] Jack Goldsmith, *Should International Human Rights Law Trump U.S. Law*, 1 Chi. J. Int'l L. 327, 337 (2000).

debate was taking place in the United States. Many other countries were not even considering female suffrage. Times have changed.

Successful struggles for suffrage expansion have led to a legal reality where almost all mentally competent adult citizens are guaranteed a right to vote in their country of citizenship. The transition from exclusionary to nearly universal suffrage altered the way in which voters are perceived. Political equality rather than presumed moral virtuousness guides countries in determining and denying suffrage.

Against this background, convicts' disenfranchisement is increasingly considered an affront to the democratic paradigm, and regulatory justifications for its imposition are gradually substituted for penal justifications. This article argues that even if certain penal goals may be satisfied by disenfranchisement, it is a normatively flawed punishment. Disenfranchisement fails to treat convicts as politically equal (albeit recalcitrant) community members, and it adversely affects them both as individuals and as members of social groups.

The question whether disenfranchisement should be imposed as a punishment may, in principle, arise in every society in which elections are held and punishments are imposed. A global discourse is thus pertinent. Part II highlighted the fact that judiciaries the world over are able and willing to engage in a transnational discourse, in which ideas are exchanged and cross-referencing is frequent.

American jurisprudence is noticeably absent from this ongoing transnational discourse on convicts' disenfranchisement. This truancy may be explained by the unique constitutional arrangements regarding disenfranchisement, as well as by general hesitations on the part of some American jurists to engage in transnational discourse. Nonetheless, a trajectory emerges from the non-American discourse toward heightened scrutiny of disenfranchising legislation. Although the judgments analyzed in Part II subjected disenfranchisement to balancing or proportionality review, rather than entirely dismissing it as an unacceptable form of punishment, the seeds for proscription of convicts' disenfranchisement have been planted.

Part III analyzed the compatibility of convicts' disenfranchisement practices with the right to vote under Article 25 the ICCPR, one of the most widely ratified human rights treaties. It was concluded that the ambiguous stipulation of Article 25, which permits the imposition of "reasonable restrictions" on the exercise of right to vote, does not fully proscribe disenfranchisement as a punishment. Nonetheless, in order to comply with the treaty, disenfranchising legislation has to pursue legitimate aims and has to be proportionate.

In view of the above, it is submitted that convicts' disenfranchisement has become a suspect practice. A considerable number of countries proscribe it altogether, while in others its application is strictly scrutinized. By contrast, in the United States, a recent legislative initiative aimed at re-enfranchising all ex-felons failed to materialize before the 111th Con-

gress adjourned. Notably, the proposed legislation refrained from restricting the disenfranchisement of serving prisoners; it was thus lagging behind contemporary comparative jurisprudence.

Nevertheless, a global consensus has yet to emerge. It thus seems doubtful that the proposed optional protocol will be ratified soon by the U.S. and, for that matter, by many states-parties to the ICCPR, where disenfranchisement is currently practiced. However, the proposed protocol may generate further debate, and coupled with an invigorated transnational judicial discourse, may prompt more countries to eventually meet its heightened standard.

Defending rights of convicts is hardly a popular task. However, defending their right to vote means, inter alia, defending the substantive democratic legitimacy of criminal law, which labels certain community members as convicts by proscribing their acts and which sanctions the imposition of punishments. Convicts' disenfranchisement is a hurdle on the path towards the democratic project's successful completion. It can and should be removed.