

“Breaking Barriers to the Ballot: Human Rights and Felon Enfranchisement”

**April 17-18, 2007
Miami, Florida**



Memorandum

To: Participants at the April 17-18, 2007 Workshop on Human Rights & Felon Enfranchisement, Miami, Fla.

From: Laleh Isphani, Senior Policy Counsel, ACLU Racial Justice Program

Re: Human Rights Strategies for Felon Enfranchisement Campaigns

Date: June 25, 2007

The purpose of this memo is to briefly summarize the proceedings of the April 17-18, 2007 workshop held in Miami, Florida, titled “Breaking Barriers to the Ballot: Human Rights and Felon Enfranchisement.” Specifically, the workshop was geared towards educating U.S. social justice advocates on the use of human rights standards and comparative law on felon disenfranchisement, and how these can be used to bolster (not replace) their efforts to end regressive practices in their respective states. The workshop was organized by the national ACLU Racial Justice and Human Rights programs, hosted by the ACLU of Florida, and attended by an array of national and state-based felon enfranchisement and human rights advocates, including policy advocates, formerly incarcerated persons, ACLU staff, grassroots activists, attorneys and others.

Background

***International Human Rights Documents Protect
Voting Rights for People with Criminal Convictions*¹**

The United States has signed and agreed to abide by several treaties that address the right to vote, most notably the Covenant on the Elimination of all forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR), and American Declaration on the Rights & Duties of Man (ADRDM).² These obligations are binding on both the federal government and the states. The treaties emphasize principles of universal and equal suffrage, counsel against ‘blanket’ voting bans (bans on entire classes of persons, e.g., all felony probationers), and require any deprivation of voting rights to be objective, reasonable, and proportional to both offense and sentence. Additionally, any deprivation of voting rights may not disproportionately

¹ For a comprehensive discussion of relevant human rights treaties, case law, and policy statements by a wide variety of international organizations, see the ACLU report in your conference workshop folders, *Out of Step With the World: A Brief Overview of Felon Disfranchisement in the U.S. and other Democracies*, also available online at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>.

² This last is, strictly speaking, a declaration and not a legally binding treaty, but the jurisprudence of both the [Inter-American Court of Human Rights](#) and the [Inter-American Commission on Human Rights](#) holds it to be a source of binding international obligations for the member states of the Organization of American States.

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affect minority groups. More broadly, the treaties declare that people deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. They also underscore that the purpose of prison is rehabilitation; and rehabilitation, in their view, begins upon entry into a prison, not on exit. In addition to these binding treaties, there are other documents and agreements that offer similar protections for voting such as the European Convention on Human Rights (a regional treaty for European countries) as well as non-binding but influential and widely accepted documents such as the Universal Declaration of Human Rights (UDHR) and the U.N.’s Standard Minimum Rules for the Treatment of Prisoners, which is a code of good practice for U.N. member states such as the U.S.

Disfranchisement Policies in Other Democracies

Other democracies disfranchise far fewer people with criminal convictions, if they disfranchise anyone at all. While 11 states in the U.S. have bans that disfranchise a total of 2.1 million people who have fully completed their felony sentences, and ten of these states have essentially permanent bans on some or all offenders, virtually no other democratic nation disfranchises its citizens after completion of sentence. In fact, many democratic nations permit, and even enable, people with felony convictions to vote in prison. In Europe, nearly half, or 17 of its countries, allow prisoners to vote, and some but not all prisoners may vote in 11 others. The remaining 12 European nations deny prisoners the vote, but generally do not bar parolees and probationers from the ballot box. In the Americas, 12 nations disfranchise those not currently imprisoned, and ten have some post-incarceration disfranchisement but these are generally reserved for those convicted of specific crimes or limited to persons serving a certain length of sentence.³

How Human Rights Tribunals and Foreign Courts Treat Disfranchisement

Courts overseas increasingly view felon disfranchisement as a human rights issue. Recent decisions by national and regional courts in Canada, Israel, South Africa and Europe all affirm the right of a citizen to vote while incarcerated. In fact, all foreign constitutional courts that have evaluated disfranchisement laws have found the automatic, blanket disqualification of prisoners to violate basic democratic principles. As the Supreme Court of Israel wrote, “without the right to elect, the foundation of all other basic rights is undermined.” These courts and others have found felon disfranchisement inconsistent with domestic law as well as the international laws set forth above that guarantee the human right to vote.

Disfranchisement of people with criminal convictions is not the democratic norm. The United States is one of the only democracies to disfranchise its citizens long after completion of their criminal sentences. This is not only undemocratic, it violates an individual’s basic right to suffrage and representation. In sum, American disfranchisement policies are unlike those of most of its peer democracies, and are increasingly at odds with

³ This data is preliminary. An ACLU study of the disfranchisement laws in the Americas is pending.

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modern understandings of universal human rights suffrage laws. The United States is truly out of step with the world on the issue of felon disenfranchisement.

Introduction and Workshop Overview

Over 5.3 million Americans are unable to vote because of a prior criminal conviction. State disenfranchisement laws range from permanent disenfranchisement for people with felony convictions to full enfranchisement of people currently incarcerated for felony convictions. In addition, 35 states disenfranchise 4 million people with felony convictions who are no longer in prison but have completed their sentences or are living in their communities on probation or parole. These policies are dramatically different from the policies adopted by European and other democracies, and also inconsistent with the protections afforded by human rights treaties and rulings of various human rights courts and the high courts of other democracies, briefly summarized above. Laws disenfranchising people with felony convictions also have a disproportionate impact upon minorities and minority communities, in violation of the CERD treaty.

As advocates work on felon enfranchisement reform in the U.S., we ought to urge that courts and legislatures consider the forceful evidence gathered by experts, some of it presented at this workshop, of the abundant human rights standards and cases that support more progressive policies on the issue.

An emphasis on human rights represents a new avenue for advocacy in the South, where courts and legislatures have historically been particularly hostile to election law reform and other changes in voting laws to remove obstacles to democratic participation. Given the special attempt made by Southern legislatures and courts to restrict voting participation by African Americans, it is no accident that many southern states persist in maintaining some of the nation's most regressive disenfranchisement policies.

Over the course of the workshop, panelists addressed the issue of felon disenfranchisement through overviews of domestic policy and litigation, and discussion of human rights standards. Additionally, through concrete examples of work on immigration reform in Texas and juvenile justice in Mississippi, advocates demonstrated how universal human rights standards have been used to advance domestic issues. In breakout sessions, participants discussed the principal obstacles to enfranchisement reform, from general strategic hurdles, to certain, specific roadblocks, as well as the delicate issues involved in messaging this issue to key groups. Participants used human rights standards, case law and terms to develop solutions to these problems.

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Summaries of Breakout Sessions

Strategy Breakouts

Litigation

Since the 1974 U.S. Supreme Court decision in *Richardson v. Ramirez*, constitutional challenges to felon disenfranchisement laws have met with limited success. Most current felon enfranchisement litigation involves challenges to: (1) financial obligations such as fines and restitution imposed as a pre-condition to restoration of the right to vote; (2) interpretations or implementation of felony disenfranchisement laws; and (3) extensions of disenfranchisement provisions to crimes beyond their purview, i.e., disenfranchising people for crimes that should not have disqualified them from voting in the first place.

While judges are not obliged to (1) follow treaties (because they require implementing legislation which the government resists passing), (2) follow foreign law, or (3) examine issues in a comparative context, the practice and substance of international human rights law *are* increasingly becoming relevant to U.S. courts and policymakers. The Supreme Court has begun looking at the laws and policies of other nations as well as international human rights standards articulated in various treaties for guidance in the Court's interpretation of the Constitution and federal statutes in several very high profile legal cases, including cases concerning the execution of juveniles, the mentally impaired, privacy rights and affirmative action.

State courts also have looked to international human rights law when offered as an interpretive guide for the development of rights enumerated in state constitutions or statutes. These include the highest courts in Washington, Oregon, New Hampshire, Missouri and West Virginia. The issues examined include the right to privacy, the right to education, and the treatment of prisoners. The documents these courts have cited range from the broad and overarching Universal Declaration of Human Rights to the more specific, International Covenant for Civil and Political Rights and the regional treaty, the European Convention on Human Rights.⁴

Thus, in future litigation, litigants should consider citing international or comparative law on felon disenfranchisement including decisions from the high courts in Israel, South Africa and Canada, and the *Hirst* decision from the European Court of Human Rights. All these decisions recognize the fundamental importance of the franchise, and support voting rights for even the incarcerated, based on principles of democracy, universal suffrage, rehabilitation and human dignity, notions also dear to Americans.

⁴ The Opportunity Agenda, *Human Rights In State Courts: An Overview and Recommendations for Legal Advocacy* (2006), available at http://www.opportunityagenda.org/site/c.mwL5KkN0LvH/b.1405941/k.99A0/Policy_Briefs_Publications.htm.

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Advocates might also urge courts that felon enfranchisement is an emerging norm of customary international law and as such is federal common law that, unlike treaties, does not need implementing legislation to be binding in the United States. Advocates can raise international claims to counter felon disfranchisement laws either directly in their litigation, e.g., federal common law claims (see above), or indirectly, through the submission of an amicus brief on international and comparative law on disfranchisement, or urging courts to interpret ambiguous felon disfranchisement laws so that they comply with U.S. international obligations, i.e., the *Charming Betsy* principle.

If advocates have exhausted all efforts to counter felon disfranchisement laws at the domestic level, they can then consider filing claims challenging felon disfranchisement laws and policies before an international body, whether at the U.N. or regional level. For example, the ACLU has filed a petition challenging felony disfranchisement law and policies in New Jersey with a regional human rights body, the Inter-American Commission on Human Rights.

Strategy Breakouts

Legislation

Messaging and framing this issue is of key importance when appealing to legislators. Of course, some legislators will no doubt refuse to acknowledge that what other nations do is relevant to their policymaking decisions and will be entirely dismissive of human rights principles, and the comparative perspective. Nevertheless, these principles and perspective can still be cited, by linking the reform to these principles and perspective, or they may be selectively emphasized depending on the audience.

To successfully urge reform on U.S. legislators, focus on (1) cutting bureaucracy and costs associated with post-sentence and/or complex disfranchisement policies; (2) preventing erroneous purges where state or county administrative error leads to eligible voters being removed from the voting rolls; and (3) placing the state's policy in the regional, and then the national, context. Legislators seem more amenable to change if the state policy appears unusually burdensome/restrictive relative to that of neighboring states. Just as advocates might compare the practices of certain surrounding states with the target state in question, they also can use comparative data to show that a state's laws are more broadly “out of step” with those of other western democracies including those in Europe and the Americas.

Advocates might also lobby lawmakers to improve federal and state compliance with international human rights obligations. For example, the U.N. Human Rights Committee monitoring member countries' compliance with the ICCPR, reviewed U.S. performance of its ICCPR obligations last year. At the end of the review process, the Committee issued a recommendation that the U.S. and its states should extend voting rights to all except the incarcerated, because blanket bans, such as those in all 48 U.S. states that ban people with convictions from voting, were inconsistent with the treaty and served no rehabilitative purpose. Advocates working on legislative reform should bring this recommendation to the attention of policymakers in their states.


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Strategy Breakouts

Organizing/Public Education



Advocates can incorporate human rights messaging in their public education, rallies, protests and cultural events. In this regard, we might reevaluate the current messaging on felon enfranchisement and create positive messages that leverage human rights principles: broad enfranchisement is democratic⁵, fair/equal⁶, rehabilitative⁷, and advances public safety.⁸




Human rights language should emphasize that felon disfranchisement is not a “minority” issue, though it certainly disproportionately impacts minorities and violates international covenants, notably CERD. While the discriminatory intent of a policy is the standard applied in the U.S., one that is very hard to demonstrate, it is the discriminatory *effect* of a policy that violates the treaty.

Coalitions should be broad, diverse and fully inclusive of the impacted community. Advocates should incorporate members of the impacted community in roles other than just the public face of the coalition – they should serve as planners, leaders, etc. People with felony convictions in and out of prison, with and without the right to vote, should not only be aware of this issue, but should be positioned to effectively advocate for broader suffrage laws consistent with treaty obligations and closer to analogous policies in other democratic nations.

To most effectively advocate the above, utilize technology (web sites, list serves and groups, video testimonials, etc). This may facilitate connections to the international voting community, build grassroots support, educate the public and facilitate better internal communication among coalitions to advance change.

Common Roadblock Breakouts

Requirement of Restitution



People concerned about victims’ rights and people who believe that restitution is a part of a felony sentence often support the coupling of financial obligations with the right to vote. Advocates should, of course, acknowledge the importance of the financial obligation but must decouple it from the right to vote and emphasize everyone’s common interest in rehabilitation. Language from the ICCPR and the UDHR on “universal and equal suffrage”, and from CERD on non-discrimination (in effect, not just intent) should be used to attack the ‘poll tax’ nature of this requirement.



⁵ See Article 21 (1) and (3) of the *Universal Declaration of Human Rights*.

⁶ See Article 21(3) of the *Universal Declaration of Human Rights*; Article 25 of the *ICCPR*, and Article 5(C) of *ICERD*.

⁷ See Article 10 of the *ICCPR*.

⁸ One study shows that former felons who vote are 50% less likely to be re-arrested than those who do not.

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Relatedly, advocates might refrain from using the phrase “paid their debt to society.” It may reinforce the idea that restitution is part of one’s debt that must be paid back. And, importantly, advocates should frame rights restoration as helping formerly incarcerated persons to pay restitution, particularly in states such as Florida in which occupational licenses may only be acquired after full restoration of civil rights including voting rights (whether by law or practice). Advocates should actively pursue alliances with victims’ rights organizations, a strategy that coalitions in both Florida and Washington State have pursued.

Common Roadblock Breakouts

State Officials’ Misinformation

State surveys in many states have revealed that local election officials frequently misinform voters with felony convictions about whether and when they may again vote, resulting in a denial of their human right to vote. Advocates should use the human rights strategy “naming and shaming” for exposing misinformation by drawing press attention to misinformation issues, and highlighting how out of step the US is in implementing its international undertakings. This can serve to embarrass officials and possibly influence policymakers and federal, state and local level to rectify these issues.

Advocates could also: (1) create registration “toolkits” to advise formerly incarcerated persons about their right to vote (or how to regain it) and widely disseminate this information through official channels (where possible) and community groups, including religious organizations and other entities; (2) pressure states to streamline rights restoration processes so access to the ballot is facilitated; (3) educate those in positions of influence – state bar associations, departments of corrections officials, elections administrators, etc., and try to reach informal agreements or more formal understandings with these entities; and (4) create and disseminate educational materials on misinformation like ACLU’s “Purged” and Alec Ewald’s “*Crazy-Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law*”.

Common Roadblock Breakouts

Legislative Exceptions for Certain Crimes

Advocates should generally avoid allowing any exceptions to universal enfranchisement. Exceptions (such as those based on the nature of the crime committed, i.e. “violent” or “non-violent”) multiply quickly and create onerous bureaucratic requirements in addition to defying established human rights norms, including universal and equal suffrage for all. In states where exceptions for certain crimes exist, or are unavoidable when seeking reform, advocates should isolate legislators’ personal agendas with respect to exceptions; rationalize universal enfranchisement; push for incremental movement toward universal enfranchisement, in the mold of death penalty advocates, and consistent with the universal and equal suffrage dictates of binding treaties.



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Messaging Breakouts

Messaging to the Religious Community

Religious groups can be valuable allies in re-enfranchisement campaigns. To date, many in the religious community have not become engaged on this issue because it has not been brought to their attention, and because some members of the religious community are connected to conservative politicians. Advocates should develop messaging campaigns for religious groups and highlight the following human rights concepts: (1) felon enfranchisement is a matter of redemption and basic human dignity, and, (2) religious organizations have the capacity, even the duty, to hold the U.S. government accountable for violations of human dignity, including through deprivation of voting rights. Invoking the biblical injunction to promote second chances may be particularly persuasive with some audiences.

Before such a messaging campaign is initiated, organizations should conduct trainings for religious leaders that highlight the relevant treaties’ and foreign jurisprudential emphasis on rehabilitation, human dignity, and community. They should also address the purposes of incarceration and punishment versus rehabilitation. Suggested references from the human rights and foreign law field include *Sauvé*, *August and Another*, the International Covenant on Civil and Political Rights, the European Committee on Crime Problems, and the Standard Minimum Rules for the Treatment of Prisoners.

Messaging Breakouts

Messaging to the Impacted Community

Participants identified a number of factors that keep formerly incarcerated people from becoming more fully involved in this issue: (1) members of the impacted community believe there are more urgent concerns than voting upon release, so it is up to advocates to show how using the vote may help alleviate some of those concerns, and (2) the advocacy community sometimes neglects formerly incarcerated persons in its pursuit of other allies, and should make a more concerted effort to ensure they play a leadership role. The impacted community must be both made aware of the movement for felon enfranchisement and fully integrated into that movement.

In messaging to the impacted community, advocates should equate the right to vote with dignity⁹ and rehabilitation¹⁰ by invoking the relevant treaty language and principles from case laws in recruitment/organizing materials and events.

⁹ For example, *August and Another*: “the vote of each and every person is a badge of dignity and personhood”; Article 10, *ICCPR*: “All persons deprived of their liberty shall be treated with humanity and with respect for the **inherent dignity** of the human person...”

¹⁰ For example, *European Committee on Crime Problems Recommendation R (2003) (23)*: “Prison life should be arranged so as to approximate as closely as possible the realities of life in the community.”




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Messaging Breakouts

Messaging to the Law Enforcement Community



Participants discussed how to bridge the gaps between advocates and various law enforcement entities, including prosecutors. There is no organized opposition from the law enforcement community, but in states such as Florida and Alabama, opposition from the state Attorney General stymied progress on felon enfranchisement; in Kentucky, an ongoing dispute with the public defender has been equally counterproductive. The best law enforcement allies are minority law enforcement associations like the NBPA (National Black Police Association) and national corrections associations and organizations like the American Correctional Association and Association of Paroling Authorities International who have taken a positive position on the issue or otherwise expressed interest in doing so.

Effective messaging to the law enforcement community should incorporate human rights language and comparative experience: (1) use language of human rights cases¹¹ to change the perception that voting is a privilege rather than a right; (2) draw on the statements of current U.S. corrections officials as well as those in other countries, officials who have expressed support for enfranchisement as a tool in rehabilitation (their support may be referenced to corrections officials here when their support for reform is needed); (3) educate these officials on the human rights standards and comparative policies, and more broadly prisoners' rights standards that are premised on notions of rehabilitation and also dignity in international human rights texts;¹² (4) link civic participation to reentry: get this community to recognize that bringing people into the political process makes them stakeholders, and helps deter them from future crime;¹³ (5) show disfranchisement serves none of the four penal purposes – deterrence, rehabilitation, incapacitation and retribution; (6) emphasize the correlation between voting and reduced re-arrest rates; and (7) appeal to the desire of law enforcement entities to strengthen ties with the (civilian) communities they serve.

Conclusion

Felon disfranchisement policies undermine the *rehabilitation* and reintegration of people with felony convictions; involve onerous *bureaucracy*; reflect a racially discriminatory *history* as well as current disparities in sentencing and other aspects of the criminal justice system and *disproportionately impact* minority communities. These burdens are particularly acute in the South. A human rights framework can be useful in tackling the challenges that advocates face when dealing with these matters. Human rights strategies can be utilized in legislative advocacy, litigation, and public education. Human rights strategies can also be important in addressing specific roadblocks, and human rights

¹¹ See *Hilla Alrai*: “We must separate contempt for his act from contempt for his right”

¹² For example, Article 10, *ICCPR*.

¹³ See *European Committee on Crimes Problems Recommendation No. R (2003) (23)*

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language can be utilized to help frame the issue and successfully communicate with diverse audiences.

Human rights treaties and case law, as well as case law from the high courts of other nations, can provide U.S. advocates with particularly useful standards and principles to affirm the right to vote for people with criminal convictions. As our courts, legislatures, and communities become more receptive to human rights concepts such as universal suffrage and human dignity, felon enfranchisement advocates should use comparative and human rights tools to advance reform through litigation, public education and legislative advocacy. Using a comparative analysis allows advocates to highlight disparities between state policies in the U.S. and most other democracies, which have much broader and well-reasoned enfranchisement policies. Human rights frameworks and mechanisms are not a substitute for existing advocacy strategies but can be used to complement them and provide additional arguments to counter the opposition in the courts, legislatures and communities.

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