

2016

Pass Senate Bill 355: How Proposed Minnesota Legislation Brings The U.S. Into Compliance With International Norms

Maria Warhol

Follow this and additional works at: <https://scholarship.law.umn.edu/jii>

Recommended Citation

Warhol, Maria, "Pass Senate Bill 355: How Proposed Minnesota Legislation Brings The U.S. Into Compliance With International Norms" (2016). *Journal of Inequality Inquiry*. 10.
<https://scholarship.law.umn.edu/jii/10>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Journal of Inequality Inquiry collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Pass Senate Bill 355: How Proposed Minnesota Legislation Brings the U.S. into Compliance with International Norms

Maria Warhol[†]

Introduction

As the 2016 presidential election approaches, the issue of voting rights in the United States is more salient than ever. While millions of people will take advantage of their right to vote in the election, nearly six million U.S. citizens are unable to vote as a result of a felony conviction.¹ Of this disenfranchised population, only 25% are incarcerated.² The remaining 75% are in the process of completing supervised release (probation or parole) or have served their sentence entirely.³ This concern only deepens when data reveals that disenfranchisement policy disparately impacts some communities more than others.⁴ These concerning figures impact almost every state in the United States.⁵

In response to the growing body of scholarship criticizing the policy of disenfranchising felons, states have begun to amend their felon disenfranchisement laws. These reforms include: repealing lifetime disenfranchisement, expanding the voting rights of those on supervised release, and easing the restoration process for individuals seeking reinstatement of the right to vote after

[†] J.D. University of Minnesota Law School, 2016.

1. THE SENTENCING PROJECT, FACT SHEET: FELONY DISENFRANCHISEMENT LAWS 1 (2014), http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf [hereinafter FACT SHEET].

2. THE SENTENCING PROJECT, DEMOCRACY IMPRISONED: A REVIEW OF THE PREVALENCE AND IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 4 (2013), http://sentencingproject.org/doc/publications/fd_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf [hereinafter DEMOCRACY IMPRISONED].

3. *Id.*

4. *Id.* at 2; FACT SHEET, *supra* note 1, at 1–2. Both of these sources discuss the disparate impact on minority communities and the relationship between race and disenfranchisement. While this area of disenfranchisement is no less important, this Article focuses on the broader issue of disenfranchisement as a whole.

5. FACT SHEET, *supra* note 1, at 1 (noting that Maine and Vermont allow those in prison to vote).

completion of a sentence.⁶ These changes show a move in the right direction, but many states still retain laws that disenfranchise not only those on supervised release, but also those who have fully completed their sentence.⁷ As a result, the United Nations Human Rights Committee has expressed concerns regarding such policies and their impact on the rights of individuals to vote.⁸ The Human Rights Committee reviewed United States policy as part of a report concerning the fulfillment of treaty obligations under the International Convention on Civil and Political Rights (ICCPR).⁹ The report puts into focus the United State's current disconnect with international treaty law and norms with regard to the internationally recognized right to vote.¹⁰

This Article will discuss the current problems with felon disenfranchisement in the United States and, using draft language from Minnesota Senate Bill 355,¹¹ illustrate how states should take steps to meet international obligations and maintain their control over the election process. This Article will conclude that individual states in the U.S. should draw from the Minnesota bill language in order to make progress towards meeting international norms and obligations. Part I presents disenfranchisement policy on a global level, primarily comparing the United States and Europe. Part II addresses the international and domestic problems with state policies on felon disenfranchisement. Finally, Part III will discuss the language in Minnesota Senate Bill 355 and how this language addresses the specific problems identified with felon disenfranchisement. Part III will also discuss how the language can be made applicable to all states in order to bring the United States as a whole into international compliance. Each of these parts, taken together, provides a workable solution for the problems facing felon disenfranchisement policy in the United States.

6. NICOLE D. PORTER, *THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2010*, at 1 (2010), http://www.sentencingproject.org/doc/publications/publications/vr_expandingthevotefinaladdendum.pdf.

7. See FACT SHEET, *supra* note 1, at 1.

8. U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 24 U.N. Doc. CCPR/C/USA/CO/4 (April 23, 2014) [hereinafter UNHRC].

9. *Id.* at 1.

10. *Id.* at 11.

11. S.F. 355, 89th Leg., Reg. Sess. (Minn. 2015).

I. Felon Disenfranchisement World Wide

Placing the vast majority of felon disenfranchisement policies in the United States in context with other Western democracies, many states have policies stricter than those found elsewhere in the world. In the United States, twelve states disenfranchise felons, for at least some period, after their sentence is completed, while an additional twenty-three disenfranchise individuals, not only while serving time in prison, but also for any time on probation or parole.¹² There are several states that only disenfranchise prisoners while they are serving time in prison, but this is a minority of the states.¹³ Compare this with countries under the jurisdiction of the European Court of Human Rights (ECHR), and the eleven countries that only bar all those serving a sentence in prison from voting.¹⁴ Many countries also disenfranchise in a more limited way: targeting particular crimes and using disenfranchisement as a specific penalty.¹⁵ These countries specify that disenfranchisement must be imposed by a judge as an added penalty in individual cases.¹⁶ Contrasting most greatly with the approach in the United States, a large group of countries allow prisoners to vote even while serving in prison.¹⁷

Variations in disenfranchisement policies highlight differences in how the United States Supreme Court and the ECHR deal with the right to vote. In the United States, the right to vote has been recognized as fundamental since 1886 because of its role in preserving all other rights.¹⁸ The Court's jurisprudence continued to emphasize that anyone qualified had the right to

12. JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2014), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf. The number of states disenfranchising individuals on probation and parole can be divided into two categories: nineteen disenfranchise both probationers and parolees, while four only disenfranchise those who are out on parole. For the purposes of this Article, they are joined together because of their similarities when looking at the broader global context. *See id.*

13. *Id.* (discussing disenfranchisement in every state and providing a comprehensive overview of varying state policies).

14. *See* AM. CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES (2006), https://www.aclu.org/files/images/asset_upload_file825_25663.pdf [hereinafter OUT OF STEP]; Yujin Chun, *Felony Disenfranchisement in the U.K. & the U.S.*, 1 CORNELL INT'L L.J. ONLINE 86, (2013).

15. OUT OF STEP, *supra* note 14, at 7.

16. *Id.*

17. *Id.*

18. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

vote¹⁹ and that the right to vote could not be denied outright by the states.²⁰ Despite the Supreme Court's emphasis on the importance of the right to vote, the most strict felon disenfranchisement policies still constitute good law. In considering challenges to state policies, the Supreme Court found the language of the Fourteenth Amendment permits felon disenfranchisement, and the Court used this language to distinguish felon disenfranchisement policies from other limitations on voting it had previously found invalid.²¹ Other challenges have also failed, including those alleging that felon disenfranchisement laws have a disproportionate impact on minority communities and those claiming that felon disenfranchisement is not punishment but a collateral consequence.²² This treatment of felon disenfranchisement by the courts leaves strict state policies in place and prevents states from moving toward approaches more in line with international standards.

Unlike courts in the United States, the ECHR does not distinguish felon disenfranchisement from other limitations on the right to vote. The ECHR protects the individual right to vote under Article 3 of Protocol No. 1.²³ When the court reviews country policies that have been challenged under this article, three elements merit consideration: (1) restrictions cannot curtail the right to vote in a way that impairs the essence of the right and deprives it of effectiveness, (2) restrictions must serve a legitimate aim, and (3) restrictions must be proportional means of achieving that legitimate aim.²⁴ In emphasizing the importance of these three elements in the protection of the right to vote, the ECHR has found blanket bans on disenfranchisement to be in contravention of Article III, while also noting that a member state may enact

19. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884).

20. *Guinn v. United States*, 238 U.S. 347, 362 (1915).

21. U.S. CONST. amend. XIV (prohibiting denial of the right to vote "except for participation in rebellion, or other crime"); *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

22. *See Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010); *Hayden v. Peterson*, 594 F.3d 150 (2d Cir. 2010); *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005). *But see Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down a felon disenfranchisement law on the grounds that it is racially discriminatory).

23. Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, E.T.S. No. 010 [hereinafter Protocol].

24. *Mathieu-Mohin v. Belgium*, App. No. 9267/81, Eur. Ct. H.R. at 18 (1987).

voting restrictions as long as the three elements are met.²⁵ The analysis does not, however, preclude member states from having policies that disenfranchise individuals as a collateral consequence to other forms of punishment.²⁶ This treatment by the ECHR reflects the approach taken by member states to provide more protections for the individual right to vote, and starkly contrasts with the approach taken in the United States.

II. U.S. Felon Disenfranchisement

The approach to felon disenfranchisement in the United States today fails to protect an internationally recognized fundamental right.²⁷ The right to vote is recognized throughout the world as a fundamental way of upholding all other rights.²⁸ The fundamental nature of the right to vote finds several iterations throughout the world, including in Article 3 of Protocol I of the ECHR²⁹ and in the ICCPR.³⁰ These treaties, as interpreted, establish a norm in international law that the individual right to vote should be protected. Both the ECHR and the United Nations (UN) have interpreted the right in such a way as to make state disenfranchisement policies in the United States problematic.³¹ Current policies in U.S. states have not only been found to go against the protection of rights under the ICCPR, but are also inconsistent with interpretations by the ECHR. Both the ICCPR and the ECHR have held that policies similar to the most lenient U.S. state policies are inconsistent with international norms.³²

In addition to the failure to protect an internationally recognized fundamental right, the current approach fails to meet international treaty obligations.³³ The United States signed and

25. *Hirst v. U.K.* (No. 2), 2005-IX Eur. Ct. H.R. 187, 209–10.

26. *Scoppola v. Italy* (No. 3), App. No. 126/05, Eur. Ct. H.R. at 22–23 (2012).

27. *See* International Covenant on Civil and Political Rights art. 25, March 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . . guaranteeing the free expression of the will of the electors.”).

28. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

29. Protocol, *supra* note 23.

30. ICCPR, *supra* note 27.

31. *Hirst v. U.K.* (No. 2), 2005-IX Eur. Ct. H.R. 187, 209–10; *see Scoppola v. Italy* (No. 3), App. No. 126/05, Eur. Ct. H.R. at 22–23 (2012); UNHRC, *supra* note 8 (stating that the U.S. “should ensure that all states reinstate voting rights to felons who have fully served their sentences”).

32. UNHRC, *supra* note 8, at 10.

33. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights

ratified the ICCPR and, as a signatory nation, has specific obligations. One of these is to uphold the internationally recognized fundamental right to vote.³⁴ Failure to meet this portion of the treaty obligation under the ICCPR is most prominent in states that disenfranchise individuals after their release from prison.³⁵ This problem is not limited to those states that disenfranchise after completion of a sentence, but extends to states that disenfranchise individuals while they on probation or parole. A UN committee tasked with evaluating country compliance with the ICCPR noted felon disenfranchisement as an area where the United States falls short.³⁶ As a strong player not only in the United Nations, but also throughout the world, any failure by the United States to meet international treaty obligations is problematic.

The problem with current state policies, when compared to the international field, stems from the denial of the right to vote to large numbers of individuals, whether they have completed their sentence or are on some form of supervised release. The number of individuals disenfranchised as a result of policies aimed at felons has risen along with the increase in the number of individuals convicted of felonies.³⁷ While the number of felons rises, a majority of those who are disenfranchised are not currently serving in prison, but come from a group of individuals living in the community at large. As a result, large portions of certain communities are unable to participate in the process that determines the laws and ordinances that will apply to them as they continue to live in the community. The problem extends to the inability of disenfranchised individuals to vote to preserve their other important rights. This means that states fail to meet the international norm that regards voting as fundamental to the preservation of other rights. In addition, this lack of input goes against what the Supreme Court precedent regarding the same.³⁸

art. 25 (Mar. 23, 1976).

34. *Id.*

35. THE SENTENCING PROJECT, POLICY BRIEF: FELONY DISENFRANCHISEMENT 1 (2015), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

36. UNHRC, *supra* note 8, at 11.

37. *See, e.g.*, PORTER, *supra* note 6, at 13; THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2014), http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf [hereinafter FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES].

38. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 225 (1985) (holding that the

The variance between state disenfranchisement laws and the lack of notice to felons about the policies in their states causes another problem. Specifically, the lack of information prevents many eligible former felons from participating in the voting process because they received no notice that their voting rights were restored.³⁹ This collateral disenfranchisement further causes problems because, in addition to those felons and former felons who are disenfranchised by state law, many felons eligible to vote are not notified when their rights could be restored. This dilutes the voting power of communities with a high number of felons. The overall negative impact on the community between the initial disenfranchisement and the disenfranchisement caused by lack of notice has far reaching consequences that must be addressed through policy reform.

III. Solving the Problems: Minnesota Draft Legislation

In response to the problems stemming from felon disenfranchisement policies in the United States, many states have begun taking action in an attempt to revise their own laws. Such policy revisions attempt to address the issues surrounding felon disenfranchisement while still allowing states to maintain the integrity of their elections. When revising policy, states should focus on two main domestic problems: (1) disenfranchisement of felons on probation or parole, and (2) inadequate information regarding the reinstatement of voting rights. In so doing, states would move closer to complying with international norms and U.S. treaty obligations. During the 2015–2016 regular session, Minnesota lawmakers introduced draft language amending the state disenfranchisement statute to address each of these two problems, as well as the broader problem of international compliance.⁴⁰

a. Re-Enfranchisement of Those in the Community

Under current Minnesota law, individuals who live in the community under some form of supervised release—either probation or parole—and those serving in prison are subject to

disenfranchisement of former felons constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment if it is shown to have a disparate impact on minority populations or a racially discriminatory motivation).

39. See, e.g., FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES at 1–2, *supra* note 37.

40. See S.F. 355, 89th Leg., Reg. Sess. (Minn. 2015).

state felon disenfranchisement policy.⁴¹ The disenfranchisement of these individuals fits with two of the identified problems: failure to meet international norms and obligations and the denial of the right to vote to large numbers of individuals working and living in the community. The proposed amendment to the Minnesota law governing felon disenfranchisement addresses both of these problems.

Legislation to amend the current Minnesota felon disenfranchisement policy has been proposed in both the House and the Senate. Senate Bill 355 uses clear language and falls in line with international norms.⁴² The language generally amends the current policy to specify that an individual regains the right to vote when any imposed and executed incarceration is completed.⁴³ The proposed language would end the Minnesota practice of disenfranchising individuals until they complete their entire sentence, including any probation and parole. While the proposed language has been drafted specifically as an amendment to Minnesota law, the language could easily be adapted amend other states' disenfranchisement laws, allowing for increased participation by non-incarcerated felons.

The proposed language limits the number of individuals impacted by felon disenfranchisement. On the domestic level, amending policies to only apply disenfranchisement to individuals currently incarcerated allows for greater voter participation. As international norms and Supreme Court jurisprudence recognize, the right to participate in elections through voting preserves several other important rights. By permitting felons on probation and parole to vote, this amendment would allow those individuals to protect and promote other important rights. Further, when more individuals living in a community are eligible to vote, the outcome of an election is more likely to be representative of that community.

Moving towards the re-enfranchisement of those living in the community through the amended language would also bring the United States more in line with the rest of the international community. While the language remains on the restrictive side compared to other Western democracies, it would bring the United States closer to the international ideal without forcing states to give up control over the election process. Several countries in

41. MINN. STAT. § 201.014 (2015).

42. *See* S.F. 355.

43. *Id.*

Europe, including the United Kingdom, have policies similar to the proposed Minnesota language. Moving in this direction would result in a step forward toward fulfilling international obligations. It is imperative that states take such steps to remedy their non-conformance with international norms.

b. Notification of Restoration of Rights

Senate Bill 355 provides a tenable solution to the problems with notification of the restoration of voting rights. Misinformation and lack of information has been identified as one of the problems with felon disenfranchisement in the United States. The proposed legislation requires notification be given to individuals regarding their eligibility to vote after a felony conviction.⁴⁴ Specifically, it requires the Secretary of State to provide a complete and accurate publication outlining voting rights for felons. The publication must be available not only to those involved in the corrections system, but also to the public through the Secretary's website.⁴⁵ In addition, the proposed bill requires correctional facilities and their officers, as well as probation officers and other supervised release agents, to provide notice of an individual's re-enfranchisement under the statute.⁴⁶

The proposed language clearly addresses the problem of disenfranchisement as a result of lack of information regarding eligibility. The requirement of actual notice by correctional and probation officers allows those transitioning from incarceration to parole or probation to be fully informed about their right to vote immediately upon their entry into the community. This will also allow those whose sentence does not include incarceration to find more clarity regarding their voter eligibility. In addition, the publication requirement expands the reach of information to those who may not currently be in the system, but who have been convicted of a felony in the past and are unsure whether they have regained the right to vote.

The requirement of notice not only solves the problems in Minnesota, where the legislation is proposed, but should also solve the nation-wide problem if used a model in other states. Such an application across states would allow for the encouragement of the right to vote, bringing the United States closer to other Western democracies. Many European nations ensure clarity by including

44. *Id.*

45. *Id.*

46. *Id.*

disenfranchisement as part of an individual's sentence and by providing notice to an individual upon their release from incarceration. Clarity would lead to more individuals becoming aware of their rights, and, as a result, the negative impacts of varying state policies would be mitigated. This would allow more individuals the opportunity to vote, more accurately reflecting the idea that the right to vote is fundamental—both in the United States and in every nation around the world.

Conclusion

Given the current climate surrounding voting rights in the United States, it seems very unlikely that states will come completely in line with international standards and remove blanket disenfranchisement. Understanding that reality, language such as that proposed in Minnesota Senate Bill 355 is a compromise between the ability of states to preserve the integrity of their voting process and the need for states to address the discord with domestic and international law. This compromise language allows blanket disenfranchisement of those incarcerated to continue, but allows those on probation or parole to partake in a right considered fundamental throughout the world. Minnesota Senate Bill 355 preserves a practice found acceptable by the United States Supreme Court while also ensuring the right to vote to the widest range of individuals as required by international norms and obligations. Without this compromise, the United States will remain behind other world democracies in its treatment of the fundamental rights of those living and working in the community.