

# Barred from Voting

The racially discriminatory Effect of Criminal  
Disenfranchisement in the United States

By Kevin zhao

# I. Introduction

- In 1998, a joint study conducted by the Human Rights Watch and The Sentencing Project found that in the United States, under the felony disenfranchisement laws of many states, over 3.9 million citizens are either currently or permanently barred from voting, including over one million of whom have already completed their sentence.

- According to the same report, of the 3.9 million who are denied the vote, 36 percent or 1.4 million are African American men (13 percent of the male African American population).
- Ten states disenfranchise more than one in five adult African American men; and in seven of those states, one in four are disenfranchised for life.
- Similarly, a more recent report conducted by the National Commission on Election Reform concluded that presently, nearly “7 percent of all African Americans cannot participate in the electoral process.”

## II. Intent vs. Effect

- The current interpretation of the equal protection amendment (14th) is one of racially discriminatory intent without regard for its effects.
- In 1984, the Eleventh Circuit Court of Appeals ruled that laws showing a "preponderance of evidence that racial discrimination was a substantial or motivating factor" were indeed in violation of the 14th amendment. (*Hunter v. Underwood*, 1984).
- This interpretation was reaffirmed in *McCleskey v. Kemp* in 1987 when the Supreme Court ruled that the death penalty was constitutional despite its racist effect because it was free of racially discriminatory intent.

- However, interpreting racially discriminatory policies and laws in an intent based framework undermines the fundamental mission of the U.N. Charter and all other human rights treaties in promoting and affirming equal and universal rights for all citizens of humanity.
- All racially oppressive policies, regardless of discriminatory intent, must be abolished.

# III. Historical Background

- The legacy of racial discrimination and differential treatment of African Americans in the United States goes all the way back to the pre-slavery period. Even as early as the 1600s, black indentured servants were punished harsher and worked harder than white indentured servants.
- After slavery became more and more institutionalized, so did the degree of differential treatment. Several states, such as Louisiana and Mississippi, had special “Negro courts” where the judges were a combination of justices and slave owners.

- After the Civil War, a series of laws, called “Black Codes”, were implemented by Southern states to reaffirm white supremacy through again, differential treatment. These “Black Codes” intentionally sought out crimes that African Americans were more prone to commit (such as vagrancy, larceny, adultery) and increased the severity of those punishments.

- As a result of these racially discriminatory laws, the incarceration rate for African Americans was far higher than white Americans.
- For example, in North Carolina during 1875, of the 647 people in their penal system, 569 were African American.
- Louisiana in 1901, had 984 African Americans in their penal system compared to only 157 white Americans.
- Even as late as 1926, South Carolina's "chain gang" had 1,017 African Americans, but only 298 white Americans.

# Iv. Current Realities of Criminal Justice

- In twelve states, 10 to 15 percent of all adult black men are incarcerated,
- In ten states, 5 to 10 percent of all adult black men are incarcerated.
- In twelve states, black men are incarcerated at rates between 12 and 16 times greater than those of white men
- In fifteen states, black women are incarcerated at rates between 10 and 35 times greater than white women.

- The Sentencing Project estimates that 1 in 10 African American males in the age group between 25 and 29 is in state or federal prison, compared to just over 1 in 100 white males.
- If the black males from local jails are included in the figures, the proportions rise to nearly 1 in 7.

# V. The war on drugs

- Throughout the 1970s, blacks were arrested approximately twice as often as whites for drug related crimes.
- However by 1988, with the “War on Drugs” in full swing, blacks were arrested for drug related offenses at five times the rate of whites.

- In individual states, the racial disparities were even more appalling.
- During the 1980s in Minnesota, drug related arrests of African Americans grew by 500 percent while drug related arrests for whites only increased by 22 percent.
- In North Carolina, between 1984 and 1989, minority arrests for drug related offenses increased by 183 percent while increasing only 36 percent for whites.

- In 1996, African Americans constituted 62.6 percent of all drug related offenders admitted into state prisons, meanwhile whites only constituted 36.7 percent.
- In the states of Illinois and Maryland, African Americans comprise 90 percent of all drug admissions.
- “Nationwide, the rate of drug admissions to state prison for black men is thirteen times greater than the rate for white men. In ten states, black men are sent to state prison on drug charges at rates that are 26 to 57 times greater than those of white men in the same state.”

*~Punishment and Prejudice: Racial Disparities in the War on Crime*

## vi. Impact of criminal disenfranchisement on African American Citizens

- As mentioned before, 1.4 million of the 3.9 million disenfranchised citizens are African American men.
- In two states, Alabama and Florida, over 31 percent of all black men are permanently barred from voting.
- In five other states, Iowa, Mississippi, New Mexico, Virginia and Wyoming, between 24 to 28 percent of all black men are permanently disenfranchised.

- “Given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their life. In states with the most restrictive voting laws, 40 percent of African American men are likely to be permanently disenfranchised.”

*~Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*

## Vi. Regaining the vote ?

- In eight states, a direct pardon or order from the governor is required for re-enfranchisement.
- In two states, an ex-felon must obtain an order from the parole or pardon boards before their right to vote is reinstated.
- For federal felonies cases, the quest to regain the vote is even harder. In sixteen states, the only way for an offender convicted of a federal felony to regain the vote is to receive a presidential pardon.

## vii. Un treaties

- When the United States ratified the UN Charter in 1945, it promised to encourage and promote principles of universal human rights "without distinction as to race, sex, language, or religion" (Article 55 c).
- While the term "human rights" is never specifically defined within the Charter itself, the *Universal Declaration of Human Rights* is commonly accepted as the primary document for interpreting what human rights are.
- Article 21 of the UDHR explicitly states that "the will of the people shall be the basis of the authority of government" and that the equal, universal suffrage shall be granted to all.

- Article 25 (b) of the International Covenant on Civil and Political Rights, which the United States ratified in 1992, declares that “To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”
- While the United States made some key reservations before ratifying the ICCPR, nothing was mentioned about the right of universal suffrage under Article 25.

- When looking at other Western democracies' criminal disenfranchisement laws, the United States stands alone.
- In fact, according to The Sentencing Project and the Human Rights Watch, the "United States may have the world's most restrictive criminal disenfranchisement laws."
- Most other democracies only bar criminals who have undermined the "democratic order" (ie electoral crimes, treason, buying/selling votes) from voting; and virtually no other democratic country denies the vote to criminals who have already served their sentence.

- The most important international treaty that the criminal disenfranchisement laws are in violation of is the International Convention on the Elimination of All Forms of Racial Discrimination which was ratified by the U.S. Senate in 1994.
- According to Article 2.1(c), "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the *effect* of creating or perpetuating racial discrimination wherever it exists."

- Unlike the other treaties, the United States specifically made a reservation regarding Article 2.1 (c) of CERD.
- The reservation was essentially about the supremacy of the U.S. constitution; since the Supreme Court ruled in *McCleskey v. Kemp* that laws must be judged in terms of racially discriminatory intentions not effects, the U.S. reserved the right not to rescind those laws.

- However, it should be clear that the effect of these laws and policies, regardless of reservation, undermines and goes against everything the UDHR, ICCPR, CERD, and U.N. Charter stands for: equal treatment and protection of rights "without distinction to race, sex, language, or religion."

## viii. What be done to increase international pressure?

- Some dialogue regarding this issue has already been set in motion in the conclusion put forth by the Committee on the Elimination of Racial Discrimination's Report on the United States in 2001.
- While they offered no immediate recommendations, they specifically mentioned concern about "the political disenfranchisement of a large number of ethnic minorities by denying them the right to vote through disenfranchisement laws..."

- We need to make sure that the international community does not cease its pressure and criticism concerning this issue by continuing communications with UN bodies such as the Human Rights Committee, the CERD Committee, and even the Special UN Rapporteur on Racism and Xenophobia.