

NOTE

DISPROPORTIONATE PUNISHMENT: THE LEGALITY OF CRIMINAL DISENFRANCHISEMENT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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I. INTRODUCTION

The government practice of denying citizens the right to vote as a consequence of criminal conviction (“criminal disenfranchisement”) is applied throughout the world.¹ The historical origins for criminal disenfranchisement laws can be traced to the ancient Greeks and Romans, who took away citizens’ voting rights for crimes that threatened “political harmony.”² Today, countries’ criminal disenfranchisement laws range from temporary deprivation of incarcerated criminals’ right to vote to lifetime disenfranchisement for individuals who have completed their prison terms.³

Two main political theories justify criminal disenfranchisement laws: Lockean social-contract theory and republican-citizenship theory.⁴ Lockean theory asserts that criminals have broken the “social contract” and, as a result, should lose the right to participate in the political process.⁵ Republican theorists argue that

* J.D. 2008, The George Washington University Law School; B.A. 2005, Johns Hopkins University. I would like to thank those individuals who read drafts of this Note and provided me with helpful comments, including Professor Dinah Shelton of the George Washington University Law School, Chris Nalevanko of *The George Washington International Law Review*, Dan Rosenthal of The George Washington University Law School, and Dara Smith, a fellow student. I would also like to thank Professor Joel Grossman of The Johns Hopkins University for encouraging me to write on the topic of criminal disenfranchisement.

1. See discussion *infra* Part II.C. The research for this Note took place in 2007-2008 and, therefore, the Note does not reflect changes to law after 2008.

2. Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 54-55 (2006) (discussing the Ancient Greek and Roman origins of criminal disenfranchisement laws); ALEC EWALD, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 17-18 (2003) (same).

3. Schall, *supra* note 2, at 69-93.

4. EWALD, *supra* note 2, at 23-25.

5. See *id.* at 23; see also LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 32 (2004) (describing the social contract theory).

criminals are less virtuous than other citizens and must be deprived of the right to vote in order to maintain the “purity of the ballot box.”⁶ These two theories remain the driving force behind modern criminal disenfranchisement laws.⁷

Despite the prominence of criminal disenfranchisement laws, scholars and judges often refer to the right to vote as a fundamental right, one that gives effect to all other civil rights.⁸ Accordingly, the right to vote is protected through many instruments of international law. This Note analyzes the legality of criminal disenfranchisement laws under the International Covenant on Civil and Political Rights (ICCPR),⁹ one of the most important international human-rights treaties, which explicitly protects the right to vote in Article 25.¹⁰

The first part of this Note examines relevant provisions of the ICCPR and their applicability to criminal disenfranchisement. The Note then considers the language, drafting history, and supplementary means of interpretation of the ICCPR to determine what, if any, formulation of criminal disenfranchisement law is permissible under ICCPR Article 25(b), the right to vote provision. The third section of the Note categorizes countries' criminal disenfranchisement laws into four groups according to factors such as length of sentence and crimes committed. Finally, the Note analyzes the legality of each group of criminal disenfranchisement law under the ICCPR. The Note concludes that some criminal disenfranchisement laws may be valid under Article 25, but that most countries' laws have a high likelihood of invalidity because they fail to meet the required proportionality standard.

6. See EWALD, *supra* note 2, at 24-25.

7. See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 12 (2006) (discussing the “underlying logics of felon disenfranchisement”).

8. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[The right to vote] is regarded as a fundamental political rights, because [it is] preservative of all rights.”); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 443 (1st ed. 1993) (“The right to vote is without doubt the most important political right.”).

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

10. See *id.* art. 25(b) (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions . . . (b) 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.”).

II. DISCUSSION

A. *The International Covenant on Civil and Political Rights (ICCPR)*

1. International Legal Status of the ICCPR

The ICCPR is a component of the “International Bill of Human Rights.”¹¹ Accordingly, the rights set forth in the ICCPR represent the most basic and fundamental civil and political rights to which all member countries¹² must adhere. The ICCPR also directly references the Universal Declaration of Human Rights (Universal Declaration) and the Charter of the United Nations in its preamble, enhancing its legal status.¹³ As these references show, the ICCPR draws upon fundamental principles of international law embodied in those documents to establish legal standards for the protection of fundamental individual rights among all member countries.¹⁴

The Human Rights Committee (HRC) oversees countries’ compliance with the ICCPR.¹⁵ The role of the HRC is to receive, consider, and comment on reports by states parties to the ICCPR, ensuring continual state compliance with the rights set forth in the treaty.¹⁶ The HRC also issues “general comments” concerning the rights recognized in the ICCPR.¹⁷ These general comments give

11. The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the ICCPR and its optional protocols, and the International Covenant on Economic, Social, and Cultural rights. See Office of the High Commissioner for Human Rights, International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Nov. 19, 2009) (describing the International Bill of Human Rights).

12. Currently, 164 countries are parties to the ICCPR. See ICCPR Parties and Signatories, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1> (last visited Nov. 19, 2009) (search for ICCPR under “International Agreement by Popular Name”).

13. See ICCPR, *supra* note 9, pmb1. (“Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom . . . [and] [c]onsidering the obligation of states under the Charter of the United Nations.”).

14. See Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 32-64 (Louis Henkin ed. 1981) (describing the drafting history of the ICCPR and the importance of the Covenant in relation to other existing human rights documents).

15. See Office of the High Commissioner for Human Rights, OHCHR - Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Nov. 19, 2009) (“The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.”).

16. See ICCPR, *supra* note 9, art. 40.

17. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee – General Comments, <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (last visited Nov. 19, 2009).

guidance to countries seeking to interpret and comply with the ICCPR's provisions. Lastly, the HRC has authority to consider interstate complaints¹⁸ and complaints filed by individuals against states parties and to distribute "views" and recommendations to member states.¹⁹

2. ICCPR Articles Applicable to Criminal Disenfranchisement

Article 25(b) of the ICCPR sets forth the right to vote.²⁰ That provision states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

. . . .
 (b) 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.²¹

Determining the validity of criminal disenfranchisement under Article 25 requires a careful reading of the Article's text, as well as an examination of supplementary sources that elaborate on the permissibility of restricting the right to vote. It is also important to consider other provisions of the ICCPR that help give context and meaning to the right to vote.

First, Article 2(1) of the ICCPR requires that state parties "undertake[] to respect and to ensure . . . the rights recognized in the present Covenant."²² Thus, states parties to the ICCPR have both a positive obligation (action to further the right) and a negative obligation (refraining from action that undermines the right) to uphold the rights stated therein.²³ According to scholar and International Court of Justice judge Thomas Buergenthal, a coun-

18. See ICCPR, *supra* note 9, art. 41 ("A State Party to the present Covenant may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.").

19. See Optional Protocol to the International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 302 (stating that a "[State Party to the protocol] recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant").

20. ICCPR, *supra* note 9, art. 25(b).

21. *Id.*

22. *Id.* art. 2.

23. Human Rights Comm. [HRC], *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

try's positive obligation under Article 2(1) is substantial: "the provision implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights."²⁴ Thus, states parties to the ICCPR must take affirmative steps to protect the rights guaranteed in the Covenant and may only deviate from those rights if the text and overall purpose of the Covenant permit doing so.²⁵ Article 2(1) also generally prohibits discrimination. A criminal disenfranchisement law violates Article 2(1) if used to discriminate against one race, sex, religion, or other protected group of people.²⁶

Second, the third paragraph of Article 10 restricts laws that relate to the penitentiary system.²⁷ Article 10(3) states that, "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."²⁸ Criminal disenfranchisement is usually a component of criminal sentences, and as such, Article 10(3) requires that criminal disenfranchisement laws further "reformation and social rehabilitation."²⁹

Finally, Article 5 plays an important, albeit indirect, role in limiting permissible restrictions on the right to vote. Article 5(2) states:

There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.³⁰

Article 5(2) is known as the "savings clause" of the ICCPR.³¹ This clause "gives expression to the principle that the rights of the Covenant merely represent a *minimum standard* and that the cumulation of various human rights conventions, domestic norms and

24. Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 77 (Louis Henkin ed., 1981).

25. *See id.* at 90-91.

26. *See* ICCPR, *supra* note 9, art. 2(1) ("Each State Party to the [ICCPR] undertakes to respect and to ensure . . . the rights recognized in the [ICCPR] . . . without distinction of any kind, such as race, colour [sic], sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.").

27. *See id.* art. 10(3).

28. *Id.*

29. *Id.*

30. *Id.* art. 5(2).

31. *See* NOWAK, *supra* note 8, at 94-95.

customary international law may not be interpreted to the detriment of the individual.”³² Thus, if “domestic law or domestically applicable norms of international law” are more protective of rights than the ICCPR, Article 5(2) dictates that domestic protections govern.³³

Although Article 25 of the ICCPR is the provision that is most directly relevant to criminal disenfranchisement laws, other articles also limit the scope of restrictions on the right to vote. Specifically, Articles 2 and 10 indicate that states parties must actively seek to fulfill their obligation to give all citizens the right to vote in a non-discriminatory manner, and in a way that contributes to the rehabilitation of prisoners.³⁴ Article 5 supplements these provisions and commands that even if a limitation on the right to vote is permissible under Article 25, countries must look to other binding law and give citizens the most expansive voting-rights protection provided by these other instruments.

B. *The Permissibility of Criminal Disenfranchisement Laws under Article 25*

Turning to the question of whether criminal disenfranchisement is permissible under the ICCPR, it is first important to recognize that Article 25 does not completely ban voting restrictions. A limitation³⁵ on the ICCPR’s right to vote provision is permissible if it does not constitute an “unreasonable restriction.”³⁶ Thus, from a simple textual analysis of the ICCPR, it is clear that a country may limit the right to vote when such a limitation is “reasonable.” The difficult issue, however, is which, if any, types of criminal disenfranchisement laws are “reasonable” under Article 25. Discussion of this issue constitutes the remainder of this Note.

When interpreting a provision of a treaty, the Vienna Convention on the Law of Treaties (Vienna Convention) governs.³⁷ The

32. *Id.*

33. *Id.* at 101.

34. See ICCPR, *supra* note 9, arts. 2(1), 10(3).

35. The term “limitation” refers to a permanent (but permissible) restriction of a right guaranteed by a treaty. “Limitations” are distinct from “derogations,” which are temporary and only applicable in emergency situations. See Alexandre Charles Kiss, *Permissible Limitations on Rights*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290, 290 (Louis Henkin ed., 1981).

36. ICCPR, *supra* note 9, art. 25(b).

37. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 437 (2004) (“The Vienna Convention on the Law of Treaties represents the culminating achievement of a decades-long effort to establish an international grammar for treaty interpretation.”); see also NOWAK, *supra* note 8, at XXIII (noting

Vienna Convention dictates that the primary method of treaty interpretation is to consider “the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty’s] object and purpose.”³⁸ If the primary method of interpretation leaves the meaning of a provision “ambiguous or obscure,” or “leads to a result which is manifestly absurd or unreasonable,” the Vienna Convention provides that supplementary means of interpretation may be considered.³⁹ The next two sections analyze the ICCPR in accordance with the procedures set forth in the Vienna Convention.

1. Interpreting Article 25 by Its Ordinary Meaning in Light of Its Context and the Object and Purpose of the ICCPR

a. Context of Article 25 within the ICCPR

When considering the “ordinary meaning”⁴⁰ of the “unreasonable restriction” clause of Article 25 in light of its context within the ICCPR, the starting point is the text of the treaty.⁴¹ The text, however, sheds little light on the meaning of the “unreasonable restriction” clause.

The drafters of the ICCPR made a conscious decision not to have a general limitation clause for the ICCPR, but to include limi-

that the ICCPR “is subject to the general rules of interpretation found in the [Vienna Convention]”).

38. Vienna Convention on the Law of Treaties art. 31(1), May 13, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

39. *Id.* art. 32(a)-(b) (noting that supplementary means of interpretation include “preparatory work of the treaty and the circumstances of its conclusion”).

40. *Id.* art. 31(1).

41. The Vienna Convention sets forth various factors that should be considered when examining a treaty’s context, starting with the text. *See id.* art. 31(1). Article 31 of the Vienna Convention then states:

- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- (3) There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.

Id. art. 31(2)-(3).

tations only as they pertained to specific rights.⁴² Many provisions of the ICCPR have limitation clauses,⁴³ but Article 25 is the only clause that uses the phrase “unreasonable restrictions.”⁴⁴ Thus, interpretations of limitations clauses used in other articles of the ICCPR do not apply to the “unreasonable restriction” clause of Article 25.⁴⁵

Other provisions of the ICCPR, however, help put Article 25 in context. As noted above, Articles 2 and 10 help define what types of criminal disenfranchisement are permissible. Specifically, Article 2 indicates that a criminal disenfranchisement law cannot operate in a way that is discriminatory against protected classes, and Article 10 indicates that the underlying purpose of any law relating to the criminal-justice process should be to foster the “reformation and social rehabilitation” of offenders.⁴⁶ Thus, these provisions provide at least some restrictions on limitations of Article 25 by criminal disenfranchisement laws.

Aside from the text of the ICCPR, the Vienna Convention says that context also includes any agreements made by the parties to a treaty concerning a specific issue, and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁴⁷ A subsequent practice of state parties “is usually a good indication of what they understand [a treaty] to mean, provided the practice is consistent, and is common to, or accepted by, all the parties.”⁴⁸ “[I]f a clear difference of opinion between the parties exists,” however, a “practice may not be relied upon as a supplementary means of interpretation.”⁴⁹

42. See Kiss, *supra* note 35, at 291-92 (comparing the ICCPR limitation clauses with the general limitation clause in the Universal Declaration of Human Rights and concluding that this signifies the drafters' intention that limitation clauses are interpreted as they apply to specific provisions).

43. See, e.g., ICCPR, *supra* note 9, art. 12 (“[N]ecessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others . . .”), art. 18 (“[L]imitations as are prescribed by law and are necessary to protect public safety, order, health, or morals . . .”), art. 19 (“[N]ecessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.”).

44. See Kiss, *supra* note 35, at 292-93 (discussing the limitations clauses of the ICCPR, but not mentioning Article 25).

45. Cf. *id.* at 294 (“[E]ven while the same words should mean essentially the same thing in all the provisions of a text, their scope and significance may vary according to the provision in which they are included.”).

46. See ICCPR, *supra* note 9, arts. 2(1), 10(3).

47. VCLT, *supra* note 38, art. 31(2)-(3).

48. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 194 (2000).

49. *Id.* at 195.

Many state parties to the ICCPR deprive at least some groups of criminals of the right to vote.⁵⁰ Even so, this practice does not mean that the use of criminal disenfranchisement laws “establishes the agreement of the parties regarding [the interpretation of Article 25].”⁵¹ Not all parties to the ICCPR disenfranchise criminals, and even among those countries that do disenfranchise criminals, the extent of voting deprivation varies greatly.⁵² Countries’ criminal disenfranchisement laws may establish a general consensus that *some form* of criminal disenfranchisement is permissible under Article 25, but the crucial question concerning *which type* of criminal disenfranchisement laws are permissible remains unanswered.

b. The Meaning of Article 25 in Light of the ICCPR’s Object and Purpose

In addition to its context, the Vienna Convention states that Article 25 should be interpreted in “light of [the ICCPR’s] object and purpose.”⁵³ To discern the object and purpose of the ICCPR, it is useful to consider its preamble and statements from the HRC.

The preamble to the ICCPR proclaims that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁵⁴ The preamble also notes that the Covenant expands upon the rights guaranteed in the Universal Declaration and U.N. Charter.⁵⁵ This reference to the Universal Declaration and U.N. Charter indicates that the Covenant “is designed to help protect and ensure individual rights everywhere, and to establish a legal, political, and economic climate in which individual freedom and dignity can flourish.”⁵⁶ Accordingly, the HRC stated that the object and purpose of the Covenant is “to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to

50. See *infra* discussion Part III (discussing types of criminal disenfranchisement laws).

51. VCLT, *supra* note 38, art. 31(3)(b).

52. See *infra* Part III (discussing forms of criminal disenfranchisement laws).

53. VCLT, *supra* note 38, art. 31(1).

54. ICCPR, *supra* note 9, pmb1.

55. See *id.*

56. LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 24 (Louis Henkin ed., 1981).

provide an efficacious supervisory machinery for the obligations undertaken."⁵⁷

The HRC's statement of the ICCPR's object and purpose is technically accurate, but fails to articulate an important purpose of the treaty: to elevate the status of civil and political rights to the level of other established fields of international law.⁵⁸ The ICCPR should be interpreted as a document that both establishes legally binding civil-rights mechanisms,⁵⁹ and furthers the overarching purpose of elevating civil-rights protections to the same status as other aspects of international law.

In light of the ICCPR's object and purpose, individual rights set forth in the convention should be "read broadly, and limitations on rights should be read narrowly."⁶⁰ With respect to Article 25, the object and purpose of the ICCPR suggest there should be a presumption in favor of giving an expansive interpretation to the right to vote and not to the "unreasonable restriction" limitation clause.

2. Interpreting Article 25 by Supplemental Means, Including Drafting History, HRC General Comments, and Court Decisions

The primary means of treaty interpretation do not provide a definitive answer to whether criminal disenfranchisement is a reasonable restriction on Article 25. The Vienna Convention dictates that when the primary methods of interpretation are insufficient, one should examine the preparatory work of the ICCPR and other relevant sources.⁶¹ Specifically, the drafting history of Article 25,

57. Human Rights Comm. [HRC], *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relations to Declarations under Article 41 of the Covenant*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994) [hereinafter *HRC General Comment No. 24*].

58. Cf. HENKIN, *supra* note 56, at 24 (noting that the ICCPR should be read "as an instrument of constitutional dimension which elevates the protection of the individual to a fundamental principle of international public policy").

59. See *HRC General Comment No. 24, supra* note 57, ¶ 7.

60. HENKIN, *supra* note 56, at 24.

61. See VCLT, *supra* note 38, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."). Although Article 32 of the VCLT only refers to the "preparatory work of the treaty and the circumstances of its conclusion," HRC comments and international court decisions interpreting criminal disenfranchisement laws are also critical to understanding the provisions of the ICCPR. See HENKIN, *supra* note 56, at 26 (discussing means

the HRC's general comments and decisions, and court opinions interpreting criminal disenfranchisement laws all provide relevant additional insight into the meaning of Article 25's "unreasonable restrictions" clause.

a. Drafting History Pertinent to Article 25

The drafting history of the ICCPR indicates that the term "unreasonable restriction" referred "primarily to the issue of eligibility to vote."⁶² The drafters of the ICCPR strongly preferred a presumption in favor of universal suffrage.⁶³ The drafters' insistence that the words "universal and equal suffrage" appear in Article 25(b) indicates this preference.⁶⁴ Dissenters wanted to remove mention of universal suffrage because they saw it as "redundant in the light of the introductory clause, 'Every citizen shall have the right.'"⁶⁵ Those in the majority, however, considered the concept of universal suffrage a "most fundamental one" and, therefore, included it in Article 25 despite the potential for redundancy.⁶⁶

The drafters' strong preference for universal suffrage supports an expansive interpretation of Article 25's voting-rights provision. There was, however, some discussion of those who might be excluded from this right.⁶⁷ Some of the drafters proposed that "'property, educational or other qualifications' which restricted electoral rights should be abolished."⁶⁸ The majority rejected this proposal by a vote of 9 to 5, and "observed that in most countries the right to vote was denied to certain categories of persons, such as minors and lunatics."⁶⁹ Thus, the drafters understood the pre-

of interpreting the ICCPR and noting that "interpretation by international bodies whose job it is to monitor the implementation of the agreement, by the [ICJ] and other international adjudicatory or arbitral bodies; by national courts or by scholars; or authoritative interpretations of similar language in other instruments—all fairly enter the process of pursuit of meaning"); NOWAK, *supra* note 8, at XXIV ("[D]ecisions and other resolutions of the [HRC] based on consensus are of a high rank in interpreting the Covenant.").

62. NOWAK, *supra* note 8, at 445.

63. See Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 209, 240 (Louis Henkin ed., 1981) ("Elections must be universal: everyone should be entitled to vote.").

64. MARC BOSSUYT, *GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 474 (1987) (discussing drafting history debates surrounding Article 25).

65. *Id.*

66. *Id.*

67. *Id.* at 473 (discussing drafters' statements concerning Article 25's "unreasonable restrictions" limitations clause).

68. *Id.*

69. *Id.*

sumption in favor of universal suffrage to be subject to some exceptions.

Aside from the few specific categories of voting disenfranchisement mentioned above, the drafting history provides little clarity regarding interpretation of the “unreasonable restrictions” clause of Article 25. Most importantly for the purpose of this Note, the drafting history does not explicitly mention voting deprivation for criminal offenders. Further examination of other sources, therefore, is necessary.

b. HRC Comments and Decisions Pertaining to Criminal Disenfranchisement

The HRC’s General Comments to Article 25 show that proportionality plays a central role in determining the reasonableness of criminal disenfranchisement laws.⁷⁰ Addressing the issue of criminal disenfranchisement directly, the HRC stated in General Comment No. 25 that “[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be *proportionate to the offence and the sentence*.”⁷¹ The comment indicates that countries must make proportionality determinations when applying criminal disenfranchisement laws.⁷² It leaves open, however, the question of *which forms* of criminal disenfranchisement are “proportionate to the offence and the sentence.”⁷³

The HRC has addressed countries’ criminal disenfranchisement laws on multiple occasions, and although its responses to these laws are rarely extensive or detailed, they help clarify what may constitute a “reasonable restriction” under Article 25’s proportionality requirement. In 1993, the HRC considered a Luxembourg law that mandated voting disenfranchisement for anyone convicted of a serious crime, such as murder or rape, and permitted disenfranchisement for anyone convicted of a minor crime.⁷⁴ In all cases, Luxembourg allowed individuals to regain the right to vote by determination of the Grand Duke of Luxembourg.⁷⁵ In response to this law, the HRC noted that Luxembourg’s “depriva-

70. Human Rights Comm. [HRC], *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Dec. 7, 1996) [hereinafter *HRC General Comment No. 25*].

71. *Id.* ¶ 14 (emphasis added).

72. *See id.*

73. *Id.*

74. Human Rights Comm. [HRC], *Report of the Human Rights Committee*, ¶132, U.N. Doc. A/48/40 (Part I) (Oct. 7, 1993).

75. *Id.*

tion of the right to vote as a further sanction in criminal cases” was a “principal subject of concern,” and suggested that the country “consider abolishing the deprivation of the right to vote.”⁷⁶

In 1995, the HRC stated that Hong Kong laws “depriving convicted persons of their voting rights for periods of up to 10 years may be a disproportionate restriction on the rights protected by Article 25.”⁷⁷ Similarly, in 2001, the HRC stated that the United Kingdom should “reconsider” its criminal disenfranchisement law, which applied to all convicted prisoners, because it could not “discern the justification for such a practice 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.”⁷⁸ Lastly, in response to a Luxembourg report in 2003, the HRC reiterated its concern over the fact that “for a large number of offences, the systematic deprivation of the right to vote is an additional penalty in criminal cases.”⁷⁹

The HRC’s strongest and most detailed condemnation of a country’s criminal disenfranchisement law came in 2006, in response to a report submitted by the United States.⁸⁰ The United States disenfranchises most incarcerated criminals and many criminals who have been released from prison.⁸¹ Addressing the U.S. law, the HRC noted that “five million citizens cannot vote due to a felony conviction” in the United States, “and that this practice has significant racial implications.”⁸² The HRC concluded:

The Committee is of the view 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 meet the requirements of [the ICCPR]

76. *Id.* ¶¶ 143, 145.

77. Human Rights Comm. [HRC], *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, ¶ 19, U.N. Doc. CCPR/C/79/Add.57 (Nov. 9, 1995) [hereinafter *HRC Observations (Hong Kong)*].

78. Human Rights Comm. [HRC], *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, ¶ 10, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001) [hereinafter *HRC United Kingdom and Northern Ireland Observations*].

79. Human Rights Comm. [HRC], *Concluding Observations of the Human Rights Committee: Luxembourg*, ¶ 8, U.N. Doc. CCPR/CO/77/LUX (Apr. 15, 2003) [hereinafter *HRC Luxembourg Observations*].

80. Human Rights Comm. [HRC], *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 35, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (July 28, 2006) [hereinafter *HRC United States Observations*].

81. See The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf (last visited Apr. 9, 2008) (discussing criminal disenfranchisement laws in the United States).

82. *HRC United States Observations*, *supra* note 80, ¶ 35.

[The United States] should adopt appropriate measures to ensure that states restore voting to citizens who have fully served their sentences and those who have been released on parole. The Committee also recommends that the [United States] review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of article 25. The [United States] should also assess the extent to which such regulations disproportionately impact on the rights of minority groups and provide the Committee with detailed information in this regard.⁸³

The HRC comment to the United States shows that there is a strong presumption against disenfranchising criminals who have served their prison sentence.⁸⁴ In the same comment, the Committee also reemphasized the proportionality calculation required by Article 25 and noted that respect for the rights of minority groups is also a great concern when countries deny the right to vote.

The HRC's comments show that the reasonableness standard of Article 25 must be construed on a case-by-case basis when applied to criminal disenfranchisement laws. The comments also indicate that the HRC has a cautious and generally disapproving approach to criminal disenfranchisement laws. Yet, although the HRC has emphasized the potential disproportionality of some other countries' laws,⁸⁵ only in the case of the United States did the HRC demand that a country change its law.⁸⁶ In most cases, the HRC urged the country to "reconsider" the law, but did not state absolute disapproval of the criminal disenfranchisement at issue.

c. International Court Decisions Pertaining to Criminal Disenfranchisement

Recent decisions of international courts also support the conclusion that the reasonableness of criminal disenfranchisement as a punishment depends on its proportionality to the offense committed. Although the decisions discussed below do not interpret the ICCPR directly, the rulings are relevant for two reasons. First, to the extent that any of the courts recognize a restriction on criminal disenfranchisement laws that is more protective of the right to vote than Article 25, Article 5(2) of the ICCPR indicates that the more protective law governs.⁸⁷ Second, the decisions illustrate a clear trend in international law against certain forms of criminal disen-

83. *Id.*

84. *See id.*

85. *See, e.g., HRC Observations (Hong Kong), supra* note 77, ¶ 19.

86. *Id.* ¶ 35.

87. *See ICCPR, supra* note 9, art. 5(2).

franchisement.⁸⁸ In particular, the cases show a strong opposition to laws that disenfranchise all incarcerated offenders.

i. Hirst v. United Kingdom

In 2005, the Grand Chamber of the European Court of Human Rights considered the legality of the United Kingdom's criminal disenfranchisement law, which deprived all incarcerated individuals of the right to vote.⁸⁹ After surveying relevant international court decisions and international law, including Article 25 of the ICCPR,⁹⁰ the Grand Chamber found that criminal disenfranchisement must pursue a legitimate aim by proportionate measures.⁹¹ Following this principle, the court ruled that the United Kingdom's criminal disenfranchisement law violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which provides for "free elections."⁹² The court emphasized in its opinion that there was "no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote,"⁹³ and therefore that the law continued to apply indiscriminately to incarcerated individuals.⁹⁴

Despite striking down the United Kingdom's criminal disenfranchisement law, the Grand Chamber noted that there may be instances in which criminal disenfranchisement is an appropriate punishment.⁹⁵ The court stated, for instance, that a government would not be precluded from "taking steps to protect itself against activities intended to destroy the rights or freedoms" in the European Convention.⁹⁶ A crime that might qualify under this standard is one in which a person "seriously abused a public position or

88. The relevance of these court rulings is heightened by the fact that courts interpreting major human rights instruments have contributed significantly to the establishment of evolving human rights norms. See Dinah Shelton, *The Promise of Regional Human Rights Systems*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 351, 373-76 (Burns H. Weston & Stephen P. Marks eds., 1999) (discussing how the jurisprudence of courts interpreting human rights instruments has "become a major source of human rights law"). Moreover, a trend in countries' case law also contributes to the importance of the "practice of states" under the Geneva Convention. See VCLT, *supra* note 38, art. 31(2)-(3).

89. *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, Eur. Ct. H.R. (Oct. 6, 2005), available at <http://www.echr.coe.int/eng> (under "case-law," search HUDOC for opinion).

90. See *id.* ¶ 26.

91. See *id.* ¶ 62.

92. See *id.* ¶ 85 (referencing Article 3 of Protocol I of the Convention).

93. *Id.* ¶ 79.

94. See *id.* ¶ 82.

95. See *id.* ¶ 71.

96. *Id.*

whose conduct threatened to undermine the rule of law or democratic foundations [of the country].”⁹⁷ The court also stressed that “the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned,” and noted that implementing criminal disenfranchisement through “express judicial decision” could be a way to achieve such a result.⁹⁸

ii. *Sauvé v. Canada*

Reasoning similar to the Grand Chamber’s in *Hirst* led the Supreme Court of Canada to hold in *Sauvé v. Canada* that Canada’s blanket criminal disenfranchisement law (depriving all incarcerated individuals of the right to vote) violated the Canadian Charter of Rights and Freedoms (Canadian Charter).⁹⁹ Section 1 of the Canadian Charter states that rights can only be restricted through “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” a provision that resembles the “unreasonable restriction” clause in Article 25 of the ICCPR.¹⁰⁰

The Supreme Court of Canada considered the *Sauvé* case on two occasions.¹⁰¹ In its first decision, the court held that Canada’s blanket criminal disenfranchisement law violated the Canadian Charter because it failed to meet the necessary proportionality standard.¹⁰² After the first *Sauvé* decision, the Canadian Parliament replaced the blanket criminal disenfranchisement law with a law that only applied to prisoners serving two or more years.¹⁰³ In 2002 on its second hearing of *Sauvé*, the Canadian Supreme Court struck down the amended version of the Canadian criminal disenfranchisement law.¹⁰⁴ The court held that merely limiting criminal disenfranchisement to those who are incarcerated for two years or more did not show that the law was a proper means of identifying those who committed serious offenses.¹⁰⁵ The court admonished the government, stating:

97. *Id.*

98. *Id.*

99. *See Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, ¶ 1 (Can.) [hereinafter *Sauvé No. 2*].

100. *See id.* ¶ 2.

101. The first decision was *Sauvé v. Canada (Attorney General)*. [1993] 2 S.C.R. 438 (Can.) [hereinafter *Sauvé No. 1*].

102. *See id.* (“In our view [the criminal disenfranchisement law] is drawn too broadly and fails to meet the proportionality test.”).

103. *See Sauvé No. 2, supra* note 99, ¶ 2.

104. *See id.* ¶ 1.

105. *See id.* ¶ 55.

The question . . . is not *how* many citizens are affected, but whether the *right* is minimally impaired. . . . [T]his legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise. First, it is difficult to substantiate the proposition that a two-year term is a reasonable means of identifying those who have committed “serious,” as opposed to “minor,” offences. If serious and minor offences are defined by the duration of incarceration, then this is a tautology. If the two-year period is meant to serve as a proxy for something else, then the government must give content to the notion of “serious” vs. “minor” offences, and it must demonstrate the correlation between this distinction and the entitlement to vote. It is no answer to the overbreadth critique to say that the measure is saved because a limited class of people is affected: the question is *why* individuals in this class are singled out to have their rights restricted, and *how* their rights are limited.¹⁰⁶

Thus, the court found that the government failed to demonstrate a proper relationship between the criminals serving two or more years and their respective entitlement to vote.¹⁰⁷

iii. *Roach v. Electoral Commissioner*

The rationale for the rulings in *Hirst* and *Sauvé* influenced the Australian High Court’s 2007 decision in *Roach v. Electoral Commissioner*.¹⁰⁸ In *Roach*, the court considered the validity of a blanket voting-disenfranchisement ban for all incarcerated individuals and held that it violated Australian law.¹⁰⁹

The opinion of the chief justice of the Australian High Court illustrates the effect that the decisions in *Sauvé* and *Hirst* had on the court.¹¹⁰ The chief justice relied on the proportionality arguments made in those opinions to conclude that the Australian statute barring all incarcerated prisoners from voting violated the Australian Constitution.¹¹¹ In reaching this conclusion, the chief justice stated that, in enacting the blanket criminal disenfranchisement law for all incarcerated individuals, Parliament had “abandon[ed] any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for their offence [and there-

106. *Id.*

107. *See id.*

108. *Roach v. Electoral Commissioner* (2007) 239 A.L.R. 1 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html> (last updated Oct. 3, 2007).

109. *Id.* ¶ 9 (noting that even if the plaintiff’s challenge to the blanket ban succeeds, the country’s previous three-year ban may still apply).

110. *Id.* ¶¶ 15, 16 (discussing *Sauvé* and *Hirst*).

111. *See id.* ¶ 23.

fore] broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice [(e.g., elections)] by the people.”¹¹²

The chief justice’s reasoning followed the basic proportionality concept set forth in *Sauvé* and *Hirst*.¹¹³ Yet, the chief justice parted ways with those precedents (and, specifically, the ruling in *Sauvé*) on a major issue—the legality of criminal disenfranchisement based on an offender’s incarceration period.¹¹⁴ The chief justice noted in his opinion that, although a blanket criminal disenfranchisement law violated the Australian Constitution, disenfranchisement of all prisoners serving sentences of at least three years would be appropriate because such a law “reflects a judgment by Parliament which marks off serious criminal offending, and reflects the melancholy fact that not all sentences of imprisonment necessarily result from conduct that falls into that category.”¹¹⁵ This conclusion contradicts that reached by the *Sauvé* court, which rejected a similar law that disenfranchised individuals based on the length of their incarceration.¹¹⁶ Thus, although the *Roach* decision contributes to the international consensus that criminal disenfranchisement laws must be proportionate to the offenses of the affected individuals, the decision shows that countries differ significantly in approving various types of criminal disenfranchisement under the proportionality standard. These decisions illustrate, however, that the likelihood a court will strike down a criminal disenfranchisement law increases with the breadth of the law.¹¹⁷

112. *Id.* ¶ 24 (bracketed language added).

113. The Chief Justice noted, however, that direct application of the *Sauvé* and *Hirst* proportionality reasoning would be inappropriate. *See id.* ¶ 17 (“[U]ncritical translation of the concept of proportionality from the legal context of cases such as *Sauvé* and *Hirst* to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action . . . [e]ven so, aspects of the reasoning are instructive.”).

114. *See id.* ¶ 19 (discussing disenfranchisement for prisoners serving three year sentences).

115. *Id.*

116. *See Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, ¶ 19 (Can.) (*Sauvé* No. 2).

117. Jason Morgan-Foster drew a similar conclusion as to how courts around the world are likely to interpret current criminal disenfranchisement laws. *See* Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT’L L. 279, 313 (2006) (“[T]he operative question [in cases such as *Hirst*, *Sauvé*, and others] was the seriousness of the offense for which disenfranchisement would result. The more inclusive the disenfranchisement law, the more minor offenses it included, and the less likely courts were to find it acceptable. Cases with blanket disenfranchisement laws often received unanimous condemnation by the courts, whereas laws limited to a smaller, more serious set of offenses left those courts much more divided.”).

C. *Categories of Criminal Disenfranchisement Laws*

The preceding discussion illustrates that criminal disenfranchisement may be a permissible restriction on ICCPR Article 25 if the requisite proportionality standard is satisfied. The task remaining, then, is to determine which ICCPR member countries meet this standard.

State parties to the ICCPR have criminal disenfranchisement laws that can be categorized into four groups.¹¹⁸ Group I comprises countries that do not disenfranchise criminals. Group II comprises countries that disenfranchise all incarcerated individuals. Group III comprises countries that disenfranchise certain classes of criminals *during* (but not after) the period of incarceration. Finally, Group IV comprises countries that disenfranchise certain classes of criminals *during and after* the period of incarceration. Groups II, III, and IV are analyzed below.¹¹⁹ Group I—countries that do not disenfranchise any incarcerated inmates—are not discussed further because the laws of those countries do not present a conflict with Article 25.¹²⁰ A chart follows the analysis to summa-

118. Other scholars have also attempted to categorize countries' criminal disenfranchisement laws, but not with specific reference to the ICCPR. *See, e.g.*, MASSICOTTE ET AL., *supra* note 5, at 32-33 (mentioning countries that do not disenfranchise, that remove the right to vote for a specified amount of time based on crime or sentence, and that disenfranchise after the prison sentence); LILAH ISPAHANI, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 6-10 (2006) (discussing European countries that allow all prisoners to vote, that disenfranchise "in a limited, targeted and explicitly penal manner," and countries that bar all incarcerated prisoners from voting); BRANDON ROTTINGHAUS, *INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS* 20 (2003) (discussing four categories of criminal disenfranchisement laws: (1) nations that allow prisoners to vote with no restrictions; (2) nations that allow prisoners to vote with some restrictions; (3) nations that do not allow prisoners to vote; and (4) nations that do not allow prisoners to vote and ban voting for a period of time past the incarceration date); THE SENTENCING PROJECT, *BARRIERS TO DEMOCRACY* 5-17 (2007) (discussing countries that disenfranchise criminals during the period of incarceration, probation, postincarceration, and postsentence). In creating the four groups discussed below, this Note expands upon and reformulates the categories discussed in these sources.

119. In analyzing these groups of countries, this Note attempts to provide examples of laws that fall into each of the categories of criminal disenfranchisement laws discussed. In some cases, countries provided updated versions of their penal codes and other statutes online. Other countries, however, do not have statutes that are easily accessible in English online and, therefore, this Note relies on existing hard-copy English translations of these countries' penal codes. While some of these hard-copy translations may not reflect the most recent changes to the statutory law of the countries discussed, the purpose of providing examples of countries' laws is simply to give concrete examples of the various types of criminal disenfranchisement laws for the reader to consider. Thus, a citation to a law that is no longer current is useful for descriptive purposes.

120. It is worth emphasizing, however, that a significant number of countries fall into the Group I category. *See, e.g.*, ROTTINGHAUS, *supra* note 118, at 21-22 (noting that 30

size the findings of this Note regarding the validity of each type of criminal disenfranchisement law.

III. ANALYSIS

A. *Group II: Countries that Disenfranchise All Incarcerated Prisoners*

Countries in Group II disenfranchise all incarcerated inmates without focusing on the specific crime committed or the length of the prisoner's sentence. These countries have blanket criminal disenfranchisement laws that are presumptively invalid under ICCPR Article 25.

An example of a country that falls into this group is Bulgaria. Article 42 of Bulgaria's Constitution states, "[c]itizens who have reached 18 years of age, with the exception of those under interdiction or *servng a sentence of liberty deprivation*, have the right to elect state and local organs and participate in national referenda."¹²¹ Bulgaria's Constitution denies the right to vote to every incarcerated individual.

Group II countries like Bulgaria fail to meet the proportionality standard required by the "unreasonable restrictions" clause of Article 25. The HRC made the proportionality requirement clear in General Comment Number 25 when it stated that criminal disenfranchisement "should be proportionate to the offence and the sentence."¹²² Blanket criminal disenfranchisement laws do not take proportionality into account.

Moreover, the HRC's comments to the United Kingdom in 2001 suggest that the Committee views blanket criminal disenfranchisement laws as a violation of Article 10, as well as Article 25.¹²³ According to the HRC, blanket criminal disenfranchisement laws do not contribute to the "reformation and social rehabilitation"¹²⁴ of prisoners, thereby undermining the goals of Article 10(3).¹²⁵ In

nations—27 of which are parties to the ICCPR—allow all prisoners to vote); ISPAHANI, *supra* note 118, at 6 (noting that 17 European countries—16 of which are parties to the ICCPR—allow all prisoners to vote). This evidence helps to refute any claim that there is a general consensus among member states to the ICCPR that criminal disenfranchisement is a permissible limitation on the right to vote. As discussed above, see *supra* Part.II.B.1.a, the subsequent practice of states should only be considered authoritative if it is "common to, or accepted by, all the parties" to a treaty. AUSTR, *supra* note 48, at 194. The large number of countries that fall into Group I show that there is no such consensus.

121. CONST. REP. BULG. art. 42(1) (emphasis added).

122. See HRC General Comment No. 25, *supra* note 70, ¶ 14.

123. See HRC United Kingdom and Northern Ireland Observations, *supra* note 78, ¶ 10.

124. ICCPR, *supra* note 9, art. 10(3).

125. HRC United Kingdom and Northern Ireland Observations, *supra* note 78, ¶ 10.

a recent article, Jason Schall elaborated on this point, writing, “[n]ot only does felon disenfranchisement not aid rehabilitation, it may in fact impede it. Voting is thought by many to be a virtue-inducing exercise, drawing citizens’ attention to the common good. By blocking the formation of virtue, disenfranchisement may actually serve to make recidivism more likely.”¹²⁶ The blanket criminal disenfranchisement laws of Group II countries fail to pass scrutiny under both Article 10 and Article 25.

Finally, blanket criminal disenfranchisement laws fail to meet the standards set forth in modern international case law. The courts in *Hirst*, *Sauvé*, and *Roach* firmly rejected criminal disenfranchisement laws that fall into Group II. Those courts emphasized the disproportionate nature and indiscriminate application of blanket criminal disenfranchisement laws, and indicated that, at a minimum, a country needs to demonstrate a logical relationship between the criminals affected by a voting disenfranchisement law and their respective offenses.¹²⁷ Group II countries fail to establish this relationship.

The HRC’s comments and modern case law give strong support for the conclusion that blanket criminal disenfranchisement laws violate the ICCPR. Based on this authority, such laws are presumptively invalid under Article 25.

B. *Group III: Countries that Disenfranchise Specific Groups of Criminals during Incarceration*

All countries in Group III disenfranchise incarcerated inmates for some period of time during incarceration. The countries in this group either disenfranchise incarcerated inmates for the entirety of their prison sentence or for a portion thereof. Due to differences among the laws of Group III countries, these countries can be split into three subcategories: (1) countries that disenfranchise criminals based on the crime committed; (2) countries that disenfranchise criminals based on the length of the incarceration period; and (3) countries that disenfranchise criminals as an explicit component of the sentence (i.e., not as a collateral consequence of the sentence).

126. Schall, *supra* note 2, at 75.

127. See *Hirst v. United Kingdom* (No. 2) App. No. 74025/01, Eur. Ct. H.R. ¶ 62 (Oct. 6, 2005); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, ¶ 55 (Can.) (*Sauvé* No. 2); *Roach v. Electoral Commissioner* (2007) 239 A.L.R. 1, ¶ 24 (Austl.).

1. Countries that Disenfranchise Criminals Based on the Crime Committed

Countries that fall into this subcategory of Group III have made a legislative determination that voting disenfranchisement is an appropriate punishment for the commission of certain offenses. France, for example, imposes criminal disenfranchisement for crimes such as torture,¹²⁸ willfully causing the death of another,¹²⁹ and crimes against humanity.¹³⁰ The French example illustrates how Group III countries have narrowed the types of crime that merit voting disenfranchisement. Because these countries have made a determination of which crimes are most proportionate to the punishment of voting disenfranchisement, their laws have a higher likelihood of validity under the provisions of the ICCPR than countries in Group II.

A semblance of proportionality is not enough, however. The HRC has indicated that if a country disenfranchises all criminals who commit a broad or ambiguous group of crimes, such categorizations may fail to meet the proportionality requirement of Article 25. For example, in its concluding observations to Luxembourg, the HRC recommended that the country reform its law, which mandated disenfranchisement for anyone convicted of "serious crimes."¹³¹ The category of "serious crime" is ambiguous and gives little evidence of a proportionality determination. The HRC's comments indicated that such a broadly sweeping category has a high likelihood of invalidity under Article 25 and that compliance with the article requires more specificity.

Specificity alone, however, is not all a county needs to comply with Article 25. Criminal disenfranchisement is not equally proportionate to all offenses. Serious abuses of a public position or actions that harm the democratic process are the types of crimes that directly undermine the goals of Article 25.¹³² Thus, these are crimes for which criminal disenfranchisement is a proportionate

128. See, e.g., C. PÉN. arts. 222-45 (Fr.) (stating that "persons convicted of [these] offences . . . incur the following penalties: (1) forfeiture of civic, civil and family rights [including the right to vote]").

129. *Id.* art. 221-9.

130. *Id.* art. 213-1.

131. HRC, *Report of the Human Rights Committee*, *supra* note 74, ¶ 132.

132. The right to vote is not the only right protected by Article 25 of the ICCPR. Article 25(a) also protects the right "to take part in the conduct of public affairs, directly or through freely chosen representatives," and Article 25(c) protects the right "to have access, on general terms of equality, to public service in [one's] country." ICCPR, *supra* note 9, art. 25(a), (c). Thus, the right to vote is embodied within a provision that has the broad purpose of furthering the democratic structure of each country.

punishment. On the other hand, “[f]or non-political crimes, it is difficult to see the connection between the crime itself and a punishment of disenfranchisement.”¹³³

The court in *Hirst* confirmed that political crimes are most proportionate to criminal disenfranchisement.¹³⁴ To illustrate this point, the court stated that criminal disenfranchisement may be appropriate when a person has “seriously abused a public position or . . . threatened to undermine the rule of law or democratic foundations [of the country].”¹³⁵ Criminal disenfranchisement laws have a higher likelihood of validity under Article 25 if the laws specifically target crimes that harm the political process.

Criminal disenfranchisement laws that deny voting rights on the basis of crimes committed are more likely to be valid under Article 25 if a country has made a clear determination about *which* crimes merit the punishment of vote deprivation. Accordingly, laws in this category have an increased likelihood of legitimacy if, like the law in France, they narrowly target a specific group of offenders.¹³⁶ Singling out only “serious offenders,” however, does not meet the proportionality requirement, because such a categorization is broad and ambiguous. Rather, for a country’s law to have the highest likelihood of validity, the law must narrowly target criminal offenses that can be categorized as “political crimes.”¹³⁷

2. Countries that Disenfranchise Criminals Based on the Length of Incarceration Period

Countries in this subcategory of Group III disenfranchise all criminals sentenced to a specific incarceration period. For example, Article 58 of the constitution of the Republic of Malta provides:

No person shall be qualified to be registered as a voter for the election of members of the House of Representatives if:

. . . .

(b) *he is under sentence of death imposed on him by any court in Malta or is serving a sentence of imprisonment (by whatever named called) exceeding twelve months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court.*

133. See Schall, *supra* note 2, at 75.

134. See *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, Eur. Ct. H.R. ¶ 71 (Oct. 6, 2005).

135. *Id.*

136. See generally C. PÉN (Fr.).

137. See Schall, *supra* note 2, at 75.

. . . .¹³⁸

Malta's constitutionally mandated voting-deprivation law for any person imprisoned for a term exceeding twelve months does not take the offender's crime into account and focuses solely on the length of the sentence. The breadth of such laws and the lack of any proportionality determination for specific crimes make the laws in this subcategory of Group III less likely to withstand scrutiny under Article 25 than laws that disenfranchise criminals based on crimes committed.

Countries that disenfranchise criminals on the basis of incarceration terms do not account for the specific circumstances of an offender, and therefore these countries disregard the basic proportionality requirement set forth by the HRC in General Comment 25.¹³⁹ The Court in *Sauvé* expressed the reason for the presumptive invalidity of laws in this subcategory when it stated, "it is difficult to substantiate the proposition that a two-year term is a reasonable means of identifying those who have committed 'serious,' as opposed to 'minor,' offences [T]he question is *why* individuals in this class are singled out to have their rights restricted."¹⁴⁰ As the *Sauvé* court indicated, laws in this subcategory are flawed because there is no relationship between the substantive offenses committed and the resulting vote deprivation.¹⁴¹

A reasonable counterargument to the *Sauvé* critique, however, is that only the most heinous criminals—and therefore those most deserving of disenfranchisement—are sentenced to incarceration terms that trigger a country's criminal disenfranchisement law. The chief justice of the High Court of Australia made a similar argument in *Roach*.¹⁴² Referring to Australia's previous criminal disenfranchisement law, which denied the right to vote to any offender incarcerated for a term of three years or more, the chief justice wrote, "I have no doubt that the disenfranchisement of prisoners serving three-year sentences was valid . . . [the] specification of a term reflects a judgment by Parliament which marks off serious criminal offending."¹⁴³ According to the chief justice, a criminal disenfranchisement law based on the length of incarceration is

138. CONST. REP. MALTA art. 58 (emphasis added).

139. See *HRC General Comment No. 25*, *supra* note 70, ¶14.

140. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, ¶ 55 (Can.) (*Sauvé* No. 2).

141. *Cf. id.* (stating that the government needs to demonstrate the correlation between serious and minor offenses and the entitlement to vote.).

142. *Roach v. Electoral Commissioner* (2007) 239 A.L.R. 1, ¶ 19 (Austl.).

143. *Id.*

reasonable because the legislature has made a conscious determination that offenders sentenced to that term are “serious” offenders and are most deserving of disenfranchisement.

As discussed above, however, there is a specific category of offenses for which criminal disenfranchisement is most proportionate. This category comprises electoral offenses or crimes that undermine the democratic process. Schall emphasizes the disconnect between a broad disenfranchisement law and the offenders it encompasses, writing, “the only crimes which disenfranchisement could possibly inhibit are undertakings involving voter fraud. The commission of all other crimes is completely unconnected to voting and would not be aided by extending the franchise to felons.”¹⁴⁴ Moreover, Professor Alec Ewald notes that, as a form of “[i]ncapacitation—preventing an offender from repeating his transgression—[criminal disenfranchisement] is a plausible purpose for disenfranchisement laws covering only those who break election law.”¹⁴⁵

The counterargument set forth by the chief justice of the Australian High Court in *Roach* is, therefore, not persuasive because it sanctions criminal disenfranchisement laws that are far too broad to meet the proportionality standard of Article 25. Malta’s electoral laws illustrate this point. As mentioned above, Malta disenfranchises any offender sentenced to more than twelve months.¹⁴⁶ Malta’s electoral laws, however, dictate that the punishment for election fraud or disrupting the electoral process shall be incarceration for a period not to exceed six months.¹⁴⁷ Thus, Malta’s criminal disenfranchisement law is underinclusive and overinclusive at the same time. The law is underinclusive because it fails to incorporate electoral fraud and similar crimes which are most related to the punishment of voting disenfranchisement.¹⁴⁸ The law is also

144. Schall, *supra* note 2, at 76.

145. Alec Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1106 (2002) (bracketed language added for purposes of clarification).

146. CONST. REP. MALTA art. 58.

147. See General Elections Act, ch. 354, § 112 (1991) (Malta), available at <http://www.parliament.gov.mt/> (under “Legislative Instruments”).

148. See Schall, *supra* note 2, at 76 (“[T]he only crimes which disenfranchisement could possibly inhibit are undertakings involving voter fraud. The commission of all other crimes is completely unconnected to voting and would not be aided by extending the franchise to felons.”); Ewald, *supra* note 145, at 1106 (noting that criminal disenfranchisement has little deterrent or retributive value for most criminals, but stating that “[i]ncapacitation—preventing an offender from repeating his transgression—is a plausible purpose for disenfranchisement laws covering only those who break election law”).

overinclusive, however, because it includes criminals who commit a wide variety of crimes, such as drug-related offenses, that have a less direct relationship to the electoral process or democratic structure of society.¹⁴⁹

The over- and underinclusiveness problems discussed above indicate that laws in this subcategory of Group III are unlikely to meet the proportionality requirement of Article 25. Rather, criminal disenfranchisement in these countries is likened better to an unrelated “additional penalty”¹⁵⁰ for which there is no clear justification.

3. Countries that Disenfranchise Criminals as an Explicit Component of the Sentence

Countries that fall into this subcategory of Group III give courts discretion to apply voting disenfranchisement as a distinct component of a criminal's sentence in addition to imprisonment. The penal code of Greece, for example, states:

In a case of a sentence of imprisonment, deprivation of civil rights [including the right to vote] shall be imposed for a period of not less than one nor more than five years, except in cases specially provided by law, *and only if the sentence is one of at least one year and the offense demonstrates the immoral character of the offender through the manner and purpose of the commission, the type of offense or other circumstances.*¹⁵¹

Drawing on this general disenfranchisement provision, the Greek penal code provides that complicity in high treason¹⁵² and offenses by officials¹⁵³ (e.g., bribery and abuse of office) are those for which a court *may* impose voting disenfranchisement as an additional punishment. Because laws like that of Greece allow for a proportionality consideration that takes into account the specific

149. Cf. Andrea Steinacker, *The Prisoner's campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 821 (2003) (noting that “there is no evidence to show that someone convicted of a felony—a drug crime, for example—is more likely than the average citizen to commit voter fraud . . . [j]ust because someone has been convicted of one felony does not mean they will continue to commit crimes, and it does not mean that the ex-felon will automatically vote to weaken the criminal law”).

150. *HRC Luxembourg Observations*, *supra* note 79, ¶ 8.

151. POINIKOS KODIKAS [P.K.] [Criminal Code] art. 61 (Greece), in *THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GREEK PENAL CODE* 57 (Dr. Nicholas B. Lolis trans., 1973) (emphasis added).

152. *Id.* art. 136 (“In cases under Article 135 [including conspiracy to commit high treason and other related offenses], the court, in addition to imprisonment, may impose deprivation of civil rights (Article 61).”).

153. *Id.* art. 263 (“If a court imposes punishment of imprisonment for not less than three months for any of the offenses under Article 235 to 261 inclusive [offenses by officials], it may at the same time also impose temporary deprivation of civil rights.”).

nature of an individual's offense on a case-by-case basis, criminal disenfranchisement laws in this category are the most likely to be upheld under Article 25.

There are two possible variations of laws in this subcategory of Group III. First, there are laws similar to the Greek law discussed above which, in limited circumstances, permit a court to disenfranchise an offender, *but only if* the individual has committed one of a predetermined group of crimes.¹⁵⁴ For example, if a Greek court finds that a person is guilty of bribery of an official, *and* sentences him to imprisonment for at least three months, the court *may* also deprive him of his right to vote.¹⁵⁵ The Greek law, therefore, allows for both legislative and judicial considerations of proportionality. The legislature has made an initial determination that certain crimes, such as treason, demonstrate the type of "immoral character" for which voting disenfranchisement is an appropriate punishment.¹⁵⁶ After an offender falls within one of the legislatively predetermined categories, Greece allows a judge to make a final individualized determination of whether the specific offender in question deserves disenfranchisement.¹⁵⁷

The second variety of laws in this subcategory of Group III are those that give courts complete discretion to impose voting disenfranchisement regardless of the crime committed.¹⁵⁸ These laws grant judges total authority to disenfranchise any criminal that comes before the court.¹⁵⁹

Both varieties of laws in this subcategory of Group III allow for a high degree of judicial discretion in making a disenfranchisement determination. As a general matter, international courts have looked favorably upon this practice.¹⁶⁰ For example, the court in *Hirst* specifically noted its approval of criminal disenfranchisement through "express judicial decision."¹⁶¹ One compelling reason for increasing judicial discretion in voting-disenfranchisement deci-

154. *See id.* art. 61.

155. *See id.* art. 263.

156. *See id.* art. 61.

157. *Id.* art. 136.

158. *See, e.g.,* Portugal. According to Laleh Ispahani, Portugal only disenfranchises criminals "through a judge's order imposed by a court of law." ISPAHANI, *supra* note 118, at 7 (citing Electoral Law for the Portuguese Parliament Election, Law No.14/179 of May 16, art. 2).

159. ISPAHANI, *supra* note 118, at 7.

160. *See, e.g.,* *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, Eur. Ct. H.R. ¶ 71 (Oct. 6, 2005) (noting favorably "the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision").

161. *Id.*

sions is that leaving the legislative branch to “draft[] a statute that would properly calibrate seriousness of offense, number of offenses, and how recently they occurred is probably impossible.”¹⁶² Unlike the legislature, an independent judge is well positioned to account for an offender’s unique circumstances when considering whether criminal disenfranchisement is a proportionate punishment for that person.

Despite the general preference for judicial discretion in criminal disenfranchisement laws, the two varieties of laws in this subcategory do not allow for equally reliable proportionality determinations. In determining which variety has a higher degree of permissibility under Article 25, it is useful to keep in mind that a criminal disenfranchisement law with a high likelihood of proportionality under Article 25 is one that disenfranchises only those criminals whose crimes threaten the electoral process or undermine the democratic structure of society.¹⁶³ For this reason, the first variety of criminal disenfranchisement laws discussed in this section is preferable to the second. Laws which allow for both a judicial and legislative proportionality determination are more likely to target narrowly those criminals who commit offenses of a political nature. By contrast, the second variety of laws—providing judges complete discretion to disenfranchise offenders at will—would likely lead to the same under- and overinclusiveness problems as laws that disenfranchise based on the length of an offender’s sentence. There would be nothing to limit a judge from simply taking away the right to vote from “serious” offenders, as opposed to those offenders who commit electoral or other political crimes.

The laws of countries that limit judicial discretion to disenfranchise offenders through legislative mandate, such as Greece, have a high presumption of validity under Article 25. Judicial discretion in sentencing voting disenfranchisement is present, but only for those crimes which the legislature has determined that voting disenfranchisement can be a proportionate punishment.¹⁶⁴ Under this type of law, therefore, voting disenfranchisement would

162. See Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 175 (2001).

163. See Schall, *supra* note 2, at 76 (discussing which crimes merit the punishment of criminal disenfranchisement); Ewald, *supra* note 145, at 1106 (same); Steinacker, *supra* note 149, at 821 (same).

164. Of course, a criminal disenfranchisement law like that of Greece is also subject to criticism. As this Note shows, many countries’ legislatures have adopted criminal disenfranchisement laws that focus on offenders for whom disenfranchisement is not a proportionate punishment. Assuming, however, a conscientious legislature that focuses on

not be merely an unrelated “additional punishment,”¹⁶⁵ would not apply indiscriminately to a large heterogeneous group of offenders, and would be consistent with the goals of Article 10(3) (i.e., rehabilitation).

C. *Group IV: Countries that Disenfranchise Criminals
after the Period of Incarceration*

Countries in Group IV disenfranchise criminals after their incarceration period.¹⁶⁶ There are two broad categories of Group IV countries:¹⁶⁷ (1) those that disenfranchise criminals for a period other than life, and (2) those that disenfranchise criminals for life.¹⁶⁸

There are many indications that any criminal disenfranchisement falling into either category of Group IV violates the “unreasonable restrictions” clause of Article 25. The strongest statement that these laws are invalid is the HRC’s Concluding Observations to the United States in 2006.¹⁶⁹ In its comments to the United States,

proportionality when crafting its criminal disenfranchisement law, the first variety of law discussed above is preferable to the second.

165. See *HRC United Kingdom and Northern Ireland Observations*, *supra* note 78, ¶10.

166. Group IV countries and Group III countries overlap in some cases. For instance, a country may disenfranchise criminals during incarceration (thereby falling into one of the Group III categories) and also after incarceration (thereby falling into Group IV). If this is the case, a country’s criminal disenfranchisement law is subject to the analysis and conclusions of both sections.

167. These two broad categories may also be split into subcategories similar to those described in Group III countries. For instance, a country that disenfranchises a criminal for life may do so on the basis of the crime committed, the length of the sentence, etc. To the extent that the same analysis is applicable to the laws of countries in both Group III and Group IV, however, it is not repeated here.

168. See, e.g., Italy. Italy’s penal code has sections that are representative of both categories. Article 19 of the Italian Penal Code states that “[t]he collateral punishments for crimes shall be . . . disqualification for public office.” CODICE PENALE [C.P.] [Penal Code] art. 19 (Italy), in *THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE ITALIAN PENAL CODE* 7 (Edward Wise trans., 1978). Article 28 of the Italian Penal Code states that “[d]isqualification for public office shall be permanent or temporary. Permanent disqualification for public office, except as the law provides otherwise, shall deprive the convicted person of: (1) the right to vote or to participate in any election, and every other political right.” *Id.* art. 28. Finally, Article 29 of the Italian Penal Code states that

a sentence to life imprisonment and a sentence to imprisonment for a term of not less than five years shall entail permanent disqualification of the convicted person for public office; and a sentence to imprisonment for a term of not less than three years shall entail his disqualification for public office of a period of five years.

Id. art. 29 (emphasis added). The United States also disenfranchises certain criminals for life. See *The Sentencing Project, Felony Disenfranchisement Laws in the United States*, *supra* note 81 (discussing state laws that disenfranchise criminals for life and periods other post-incarceration periods).

169. See *HRC United States Observations*, *supra* note 80, ¶ 35.

the HRC condemned the U.S. practice of disenfranchising all incarcerated prisoners, but also stressed that it was concerned “*in particular* [with the disenfranchisement of] those who are no longer deprived of liberty.”¹⁷⁰ The HRC made clear that the United States “*should* adopt” measures to restore the right to vote to offenders who served their sentences.¹⁷¹ By contrast, the HRC only requested that the United States “review” laws that disenfranchise incarcerated inmates.¹⁷²

The strong language used by the HRC in reference to the United State’s postincarceration disenfranchisement practices is noteworthy. In the HRC’s observations to other countries, the HRC’s approach to criminal disenfranchisement laws usually allowed for more discretion on the country’s behalf.¹⁷³ For example, the HRC asked other countries to “consider” changing their laws.¹⁷⁴ Thus, the HRC’s command that the United States “should adopt” measures to restore voting rights to individuals who have been released from prison illustrates the HRC’s strong disapproval for such laws.¹⁷⁵

Another reason that criminal disenfranchisement laws in Group IV are presumptively invalid is because they undermine the objective of Article 10, which states that rehabilitation and reformation of prisoners must be the goals of the penitentiary system.¹⁷⁶ Postincarceration criminal disenfranchisement does not facilitate ex-offenders’ reintegration into society. Rather, as Pamela Karlan writes, postincarceration disenfranchisement does just the opposite:

It is impossible to see how lifetime or extended postincarceration disenfranchisement rehabilitates anyone; indeed, the very message of such exclusion is to suggest that ex-offenders are beyond redemption. It is telling that the period when rehabilitation was a dominant goal of criminal punishment [in the United States] coincided with an era in which many states either abandoned or relaxed their disenfranchisement provisions because disenfranchisement was “viewed as impeding rehabilitation.”¹⁷⁷

170. *Id.*

171. *Id.* (emphasis added).

172. *See id.*

173. *See* discussion of HRC comments *supra* Part II.B.2.b.

174. *See HRC Luxembourg Observations, supra* note 79, ¶ 1324.

175. *HRC United States Observations, supra* note 78, ¶ 35.

176. ICCPR, *supra* note 9, art. 10.

177. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004).

Karlan also stresses that “[r]estoration of voting rights can help ex-offenders reintegrate into the community, a significant factor in avoiding future criminal behavior.”¹⁷⁸ Thus, postincarceration disenfranchisement laws are unlikely to withstand scrutiny under Article 10 or Article 25 of the ICCPR.

Although both categories of laws in Group IV are presumptively invalid under Article 25, laws that disenfranchise ex-offenders for a term other than life are preferable to permanent disenfranchisement laws. Postincarceration voting disenfranchisement laws that allow ex-offenders to vote at some future date may still contribute to an individual’s reintegration into society, whereas permanent disenfranchisement only reinforces the notion that “ex-offenders are beyond redemption.”¹⁷⁹ For this reason, temporary postincarceration criminal disenfranchisement laws have a higher likelihood of validity under Article 25 than laws that take away ex-offenders’ right to vote for life.

D. *Table—Validity of Criminal Disenfranchisement Laws under Article 25 of the ICCPR.*

The following table summarizes the preceding discussion regarding the validity of each group of criminal disenfranchisement laws under the ICCPR:

178. *Id.*

179. *Id.*

TABLE 1: VALIDITY OF CRIMINAL DISENFRANCHISEMENT LAWS

GROUP	VALIDITY UNDER ICCPR		
Group I: no voting disenfranchisement for incarcerated criminals	No violation because no limitation on Article 25 right to vote.		
Group II: voting disenfranchisement for all incarcerated criminals	High likelihood of invalidity. Such laws go against the reasoning of the HRC's comments. Group II laws also undermine the goals of ICCPR Article 10 and are inconsistent with modern trends of international case law.		
Group III: voting disenfranchisement for specific groups of incarcerated criminals	<p>Subcategory I: based on crime committed</p> <p>High likelihood of validity if country shows a legislative proportionality determination relating criminal disenfranchisement to specific offenses that merit vote deprivation. Higher likelihood of validity if laws target only political offenses.</p>	<p>Subcategory II: based on length of incarceration</p> <p>High likelihood of invalidity. No determination of proportionality to specific crimes. Arbitrary application to large heterogeneous groups of offenders.</p>	<p>Subcategory III: explicit component of sentence</p> <p>Presumptively valid if laws allow for both legislative and judicial determinations of proportionality and target political offenses.</p>
Group IV: voting disenfranchisement post-incarceration	<p>Subcategory I: disenfranchisement for period other than life.</p> <p>Presumptively invalid given recent pronouncement of the HRC to the United States. More likely to be upheld than Subcategory II because laws in Subcategory I allow for reenfranchisement at some point after incarceration and are therefore more in line with the goals of Article 10.</p>	<p>Subcategory II: disenfranchisement for life.</p> <p>Presumptively invalid given recent pronouncement of the HRC to the United States and incompatibility with Article 10.</p>	

IV. CONCLUSION

Analysis of Article 25 of the ICCPR reveals that criminal disenfranchisement may constitute a permissible limitation on the right to vote when it is applied to those criminals for whom voting disenfranchisement is a proportionate punishment. Under this standard, however, many countries' laws have a high likelihood of invalidity.

Countries that disenfranchise all incarcerated criminals (Group II) have laws that are presumptively invalid because these countries' laws fail to show that the legislature has established any relationship between the offenses committed and the punishment of voting disenfranchisement. There is no evidence that countries in Group II have crafted their laws with proportionality in mind. Similarly, laws that disenfranchise criminals after the period of incarceration are also presumptively invalid given the HRC's recent strongly-worded condemnation of such laws to the United States, and because postincarceration laws are incompatible with the reintegration and rehabilitation goals of Article 10.

Laws that disenfranchise specific groups of criminals during their period of incarceration (Group III), therefore, have the highest likelihood of validity under Article 25. Within Group III, the laws with the highest likelihood of validity are those that allow for both legislative and judicial determinations of proportionality. Only in this subcategory of Group III is a country able to target narrowly electoral or other political offenses, crimes for which criminal disenfranchisement is an arguably proportionate punishment, and take into account an offender's specific circumstances. These laws provide the greatest protection for Article 25's right to vote provision and narrowly interpret Article 25's "unreasonable restriction" limitation clause. Thus, criminal disenfranchisement laws that allow for judicial and legislative proportionality determinations are most consistent with the object and purpose of the ICCPR.

The conclusions of this Note suggest that countries should review their criminal disenfranchisement laws for compliance with Article 25. In particular, countries should consider which offenses are most proportionate to the punishment of voting disenfranchisement and narrowly target these crimes with their criminal disenfranchisement laws. As this Note argues, electoral and political crimes are most proportionate offenses to the punishment of criminal disenfranchisement, and therefore laws that target these crimes are least likely to be struck down. Criminal disenfranchise-

ment laws must be drafted and applied narrowly because only then will the right to vote under ICCPR Article 25—adopted as a means to further universal suffrage—receive adequate protection.