

Enfranchising Delawareans Convicted of Felonies in the Interest of Dignity

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I. Purpose and Introduction

A. Restoring voting rights for Delaware citizens convicted of felonies will promote a more dignified and equitable life in the First State.

This paper argues in favor of restoring the franchise to people with felony convictions in the interest of dignity. The Delaware Constitution and Code disenfranchises people convicted of felonies during their sentence, and permanently disenfranchises people who commit certain felonies. This punishment infringes on the inherent dignity of all people to have agency over their lives; and to participate in the democratic process to decide who will make choices that determine their standard of living.

Historical context to the disenfranchisement of people convicted of felonies shows the intended racist origins of this practice. The racial disparities in the Delaware criminal justice system exist today as a legacy of slavery in the state.

The proposed constitutional amendment and legislation presented in this paper would prohibit the use of disenfranchisement as a punishment for a crime; and grant suffrage to people with felony convictions who are incarcerated, on parole, on probation, or under community supervision. This legislation intends to protect the inherent dignity possessed by all people and the values enshrined by the United States Constitution and the Bill of Rights in the Delaware Constitution.

B. Introduction to the Delaware Constitution and Code, which allows for the disenfranchisement of citizens with felony convictions.

In the interest of dignity, the Delaware General Assembly must amend the Article V Section 2 of Delaware Constitution and Title 15 Chapter 61 of the Delaware Code to remove conditions that deny over 11,000 people of their right to vote due to a felony conviction.¹

The state's constitutional provision instating disenfranchisement as a punishment for crime originated when Delaware ratified its third constitution in 1831.² Article V Section 2 of the Delaware Constitution and Title 15 Chapter 61 of the Delaware Code disenfranchise people convicted of felonies while they serve out their sentence.³ The relevant portion of the constitution defines “sentence” to “include all periods of modification of a sentence, such as, *but not limited to*, probation, parole and suspension.” (Emphasis added.)⁴ However, the Delaware Constitution provides that incarcerated people awaiting trial and people convicted of misdemeanors can vote by sending an absentee ballot from prison.⁵

Conditions based on what type of felony the State convicted an individual of and the sentencing determines the length of time a person remains disenfranchised. Article V Section 2

¹ State-by-State Data, <https://www.sentencingproject.org/> (Last visited April 19, 2021).

² Del. Const. Art. IV § 2 (1831) available at https://images.procon.org/wp-content/uploads/sites/48/1831_del_constitution.pdf. See also, Historical Timeline US History of Voter Disenfranchisement (August 23, 2020) available at <https://felonvoting.procon.org/historical-timeline/#1800-1849>

³ See, Del. Const. art. V § 2 See also, 15 Del. Code 61 <https://delcode.delaware.gov/title15/c061/index.html>

⁴ 15 Del. Code 61 <https://delcode.delaware.gov/title15/c061/index.html>

⁵ Del. Const. art. V § 2

of the Delaware Constitution categorizes people with felony convictions in two ways: those convicted of a disqualifying felony, and those who are convicted of another felony.⁶ Delaware defines a disqualifying felony of moral turpitude as, “...murder or manslaughter, (except vehicular homicide)... any felony constituting an offense against public administration involving bribery or improper influence or abuse of office, or any like offense under the laws of any state or local jurisdiction, or of the United States, or of the District of Columbia... or any felony constituting a sexual offense, or any like offense under the laws of any state or local jurisdiction or of the United States or of the District of Columbia.”⁷

The Delaware criminal justice system does not afford voting rights to people who accept a plea deal if it results in a felony conviction. A person who pleads guilty to a felony charge will lose their right to vote, even if the court issues a reduced sentence. If a person pleads *nolo contendere* and admits no guilt, but receives a felony conviction, they will lose their right to vote until the completion of their sentence. Rule 11 of Criminal Procedure for the Superior Court of the State of Delaware details the procedure for a guilty plea or a plea of *nolo contendere*, which includes ensuring a defendant is aware of their rights before the court enters the plea and sentences the defendant.⁸ The Delaware Code defines “convictions” as “a verdict of guilty by the trier of fact, whether judge or jury, or a plea of guilty *or a plea of nolo contendere* accepted by the court.” [Emphasis added].⁹

The state will reinstate the franchise to a person convicted of a non-disqualifying felony after their release from prison and at the conclusion of their sentence only if they reregister to vote.¹⁰ Moreover, a person convicted of a disqualifying felony will not receive the right to vote upon finishing their sentence unless they apply for a formal pardon to restore that right from the Governor.¹¹

II. Participatory Dignity and Enfranchisement

A. Dignity demands that all people retain voting rights, regardless of felony conviction status.

Dignity inherently coincides with democratic values. Participatory dignity refers to both the space where citizens engage in political action and the citizens’ political action in itself.¹² By virtue of the democratic process, this participation both stems from and promotes the dignity innate to every person.¹³

First, dignity fundamentally promotes democratic values.¹⁴ The framework for equal protection in democracies exists in the inherent dignity afforded to all people regardless of age,

⁶ Id.

⁷ Id.

⁸ Del. R. Crim. P. 11.

⁹ 11 Del. C. 1953, § 222

¹⁰ Supra note 4 at § 6103(a).

¹¹ Supra note 5.

¹² Erin Daly & James R. May, Dignity Law: Global Recognition, Cases, and Perspectives, 461 (2020).

¹³ Id.

¹⁴ Erin Daly, Dignity in the Service of Democracy, SSRN, January 19, 2011, at 15, available at, <https://ssrn.com/abstract=1743773>

gender, sexuality, race, religion, or socioeconomic status.¹⁵ In societies that recognize the dignity of its citizens by encouraging self-expression and personal development, people increasingly participate in political activity and in the public forum.¹⁶ Furthermore, a democratic society promotes a dignified existence by allowing people to express their views and make decisions that shape their lives. Hannah Arendt theorized that citizens who can engage in the political process enjoy “the right to have rights,” affording them protection from tyranny and allowing them to voice their opinions.¹⁷

However, many “democratic” governments actively deny large portions of its population from voting, in violation of people’s inherent participatory dignity rights. Arendt describes the dignity of people excluded from engaging in the political process as “abstract nakedness;” those who lost these rights, such as stateless people and disenfranchised people, remain “vulnerable to tyranny.”¹⁸

The disenfranchisement of Delaware citizens convicted of felonies fundamentally conflicts with dignity rights innate to all people. By denying people convicted of felonies the right to vote, Delaware also denies these people the dignity to make important political decisions that affect their lives. As members of the human race, people with felony convictions possess dignity and deserve equal voting rights. The racial discrimination which exists in the criminal justice system violates the inherent dignity of those who encounter it, further explained in a later section of this paper.

In the interest of dignity, the government must protect the right to vote so individuals can engage in the political process. Through participatory democracy, citizens can ensure the government passes legislation that respects “each human being, individually and collectively, and particularly of those who have been marginalized in the past.”¹⁹

B. Delawareans convicted of felonies deserve participatory dignity in order to shape their lives and bring attention to prison conditions.

People disenfranchised due to felony convictions remain vulnerable to the tyranny of the state because of the limited recourse available to incarcerated people and the stigma attached to people formerly convicted of crime. In Delaware, the lack of an adequate grievance policy in its prisons denied incarcerated people their inherent dignity— infringing on their right to health and to pursue legal remedies.

Between 2015 and 2017, people incarcerated in the James T. Vaughn Correctional Center in Delaware increasingly criticized the prison’s living conditions and lack of access to medical

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. at 16.

¹⁹ Id. at 15.

treatment.²⁰ Additionally, incarcerated people emphasized that the prison did not afford them sufficient legal resources, such as access to the courts, updated law libraries, and counsel.²¹

Policies that the Delaware Department of Corrections enacted insufficiently addressed the injustices in Vaughn.²² No adequate procedure existed for incarcerated people to submit grievances, leading incarcerated people increasingly reached out to the American Civil Liberties Union and the Delaware-New Jersey National Lawyers Guild Prisoner's Legal Advocacy Network to explain the worsening conditions in the prison.²³ The ACLU and PLAN found that the DDOC inadequately provided incarcerated people with easily-accessible policies compared to other jurisdictions.²⁴

The lack of transparency not only affected people incarcerated at Vaughn, but their families and prisoners-rights advocates as well. The DDOC only publicly provided that it will develop grievance policies.²⁵ Substantive policies solely accessible through a records request or by court subpoena limit options for people to help people incarcerated in the state.²⁶ For example, in order to file a public records request, an individual must pay a fee and be a citizen of Delaware.²⁷

Moreover, these policies prevent incarcerated people from bringing their grievances in front of the court. Federal law requires incarcerated people to exhaust the prison's internal remedies before they can bring a case in front of the court.²⁸ Without transparent policies, the DDOC essentially denies people in detention the right to seek remedies through litigation.

The infringement of the incarcerated people's dignity and lack of recourse led to an uprising at Vaughn.²⁹ Prisoners took four correctional officers hostage, and the eighteen-hour standoff resulted in the death of a correctional officer.³⁰ Prisoner-rights advocates argue that the violence could have been prevented had the prison administrators and DDOC listened to incarcerated people and addressed the injustices at Vaughn.³¹

The Delaware General Assembly did not respond to the uprising by investigating why people incarcerated at Vaughn resorted to violence in order to call attention to prison conditions. Instead, the legislature introduced legislation to reinstate capital punishment, so that prosecutors

²⁰ DDOC Reforms Needed to Avert Another Vaughn Incident: Initial Findings of Joint Research & Data Analysis Exercise, 3 (June 6, 2017) available at <https://www.nlg.org/wp-content/uploads/2017/06/DDOC-Reforms-Needed-to-Avert-Another-Vaughn-Incident.pdf>

²¹ Id.

²² Id. at 5-6.

²³ Id. at 4.

²⁴ Id.

²⁵ Id. at 6

²⁶ Id. at 6-7.

²⁷ Id. at 7.

²⁸ Id. at 7-8.

²⁹ Kamala Kelkar, Delaware Returns to Death Penalty Debate After Prison Uprising (April 16, 2017) <https://www.pbs.org/newshour/nation/delaware-death-penalty-prison-uprising>

³⁰ Id.

³¹ Megan Pauly, Analysis of Prisoner Grievance Letters Finds Pre-Uprising Spike (June 7, 2017) <https://www.delawarepublic.org/post/analysis-prisoner-grievance-letters-finds-pre-uprising-spike>

could seek the death penalty against the incarcerated people involved with the death of the correctional officer.³²

Both the DDOC and the Delaware General Assembly violated the dignity of people incarcerated at Vaughn. However, after this uprising, these governing bodies cannot deny the importance of participatory dignity— when the government allows people to participate in civic and political spaces, they both exercise their inherent dignity and can use their political power to demand more dignity.³³ If incarcerated people had a voice within the prison, the DDOC could have addressed the egregious violations of their dignity.

Furthermore, participating in the political process provides incarcerated people with autonomy and control over their lives. The Delaware Constitution and Code does not afford this recourse to people convicted of felonies, which manifests in political actors neglecting the needs of a vulnerable population. Participatory dignity gives a voice to the people, and if enfranchised, people with felony convictions can demand respect from their elected officials. If the legislature respected the grievances of incarcerated people at Vaughn, their first response would rectify the dignity violations in the prison, instead of further violating incarcerated people’s dignity with the threat of capital punishment.

III. Analyzing Laws Disenfranchising Delaware’s Incarcerated and Formerly Incarcerated Population through a Dignity Perspective

A. Racism and implicit bias in Delaware’s criminal justice system disenfranchises a disproportionate amount of Black people.

Although, as of 2020, 11,524 Delawareans in total lost their right to vote due to a felony conviction, 7,839 of those people are black.³⁴ Overt racism and implicit bias in the criminal justice system contributes to this disparity.

A report submitted to the Delaware Supreme Court found that, between 2012 and 2014, despite recent criminal justice reform, the report found racial disparities in arrests, sentencing, and criminal convictions.³⁵ Although Black people account for 22% of the Delaware’s general population, they constitute “42% of arrestees, 42% of criminal dispositions, 51% of incarceration sentences, and 57% of Delaware’s incarcerated population.”³⁶ Although the courts convict proportionally less Black people of a class A through F felony, Black people, “constitute a larger proportion of arrests for these offense groups (58%) than for all offenses (42%).”³⁷

Delaware Sentencing Accountability Commission developed a five-level, graduated sanctions system used by the courts during sentencing.³⁸ From level one to level five, the sentence levels include: unsupervised, field supervision, intensive supervision, partial

³² Supra note 29.

³³ Supra at 461.

³⁴ Supra note 1.

³⁵ John M. MacDonald et al. evaluating the Role of Race in Criminal Adjudications in Delaware, 3 (2016).

³⁶ Id.

³⁷ Id. at 10.

³⁸ Id. at 15.

confinement, and incarceration.³⁹ However, under the Delaware Constitution, a person convicted of a felony will still lose their right to vote until the conclusion of their sentence, regardless of the sanction level.

Some of the recent reforms reduced racial disparities in sentencing.⁴⁰ However, the report to the Delaware Supreme Court found that, “[a]pproximately 51% of cases with at least one incarceration sentence involve African Americans. The difference between the composition of arrest and incarceration sentences cases grows by 8.5% for African Americans while it decreases by 8.8% for Whites.”⁴¹ Across all five levels of criminal sanctions, Black people in Delaware “receive a larger proportion of sentences at greater levels of graduated sanctions.”⁴² Furthermore, Black Delaware citizens are more likely to be sentenced to incarceration and have a prior felony conviction.⁴³

Racial discrimination in the criminal justice system leads to racial disparities in the prison system. According to the 2020 United States Census, white people make up about 62% of Delaware’s population; black people account for about 23%; Hispanic people make up about 9%; Asian and Pacific Islanders account for a little more than 4%; Native people make up less than 1%; and almost 3% of people identified as two or more races.⁴⁴ Compared to the racial demographics of Delaware’s incarcerated population, the differences are astounding. As of 2017, 56% of Delaware’s incarcerated people identify as black; white people make up only 40%; Hispanic people account for 4%; and Native and Asian people each account for less than 1% of the prison population.⁴⁵

However, pretrial detention explains approximately 20% of the racial disparity in the prison population.⁴⁶ This highlights another racial justice issue– the for-profit cash bail system used by the Delaware criminal justice system.

Furthermore, racially discriminatory parole sentencing affects the franchise of Delaware citizens convicted with felonies since the restoration of their voting rights occurs at the conclusion of their sentence, including parole. Longer parole sentences increase the likelihood that a person will violate the conditions of their release.⁴⁷ Parole boards release Black people with felony convictions strategically, increasing the likelihood that they will violate parole compared to White parolees.⁴⁸ Therefore, the discriminatory effects of Black people with non-disqualifying felony conviction receiving longer parole sentences not only include a longer period of disenfranchisement, but also an increased chance of reentering the prison system.

³⁹ Id.

⁴⁰ Id. at 10.

⁴¹ Id. at 14.

⁴² Id. at 15.

⁴³ Id.

⁴⁴ United States Census Bureau Quick Facts- Delaware (2020) <https://www.census.gov/quickfacts/DE>

⁴⁵ Vera Institute, Incarceration Trends in Delaware (2019) available at <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-delaware.pdf>

⁴⁶ Supra note 35 at 26.

⁴⁷ Stéphane Mechoulan & Nicolas Sahuguet, Assessing Racial Disparities in Parole Release, (2015) at 42.

⁴⁸ Id. at 43

1. Delaware’s restrictions on voting rights for people convicted of felonies stems from a legacy of slavery and racism.

The context of when a bill passed or the state constitution ratified can determine if the legislature intended to use the law to racially discriminate. As stated in the introduction, Delaware began disenfranchising people as a punishment for committing a crime when it ratified its third constitution in 1831.⁴⁹ According to the 1860 Census, just before the onset of the Civil War, Delaware had 1,900 black people in bondage.⁵⁰ During the mid-19th century, racial tension grew in Delaware because it contained the largest free black population per capita in the country.⁵¹ Because the Delaware legislature passed an increasing number of these laws as the free black population grew, the government officials likely intended to use the constitutional provision to discriminate against free black people.

Several racial discriminatory laws passed in Delaware’s antebellum period explicitly intended to oppress the free black people in the state. Black codes passed in 1832 regulated the lives of free black people systematically.⁵² Labor laws passed during the mid-nineteenth century regulated what employment Black people could hold, while coercive labor laws allowed the state to sell “idle and poor” free black people back into slavery for a year.⁵³ In 1863, during the midst of the Civil War, the Delaware legislature passed a law that would not allow a free black person to, “enjoy any rights of a free man other than hold property or to obtain redress in law or in equity for any injury to his person or property.” The sheer number of laws restricting the rights and freedoms of free black people in Delaware passed during the time period when the state ratified its third constitution to include disenfranchising people as a punishment for crime shows that this provision likely meant to discriminate by race.

At the end of the Civil War, Delaware refused to join the other Union states in supporting abolishment of slavery. The United States passed the 13th Amendment to the Constitution in 1865, freeing Black people in bondage.⁵⁴ However, Delaware did not ratify this amendment until 1901.⁵⁵

Although the Delaware legislature implemented this constitutional provision 190 years ago, the racist intent overtly manifests itself in the disproportionate incarceration and disenfranchisement of its Black citizens.

2. Dignity, voting rights, and racial justice remain interdependent in American democracy.

In the United States, marginalized groups continue to fight to secure their dignity and the right to vote, despite the Constitution guaranteeing those rights. Before the Voting Rights Act passed in 1965, right-wing groups lobbied state legislatures to implement tactics such as “so-

⁴⁹ Mark Eichmann, Juneteenth Did Not Mean Freedom for Delaware Slaves, (June 19, 2020) <https://whyy.org/>

⁵⁰ *Id.*

⁵¹ William H. Williams, *Slavery and Freedom in Delaware, 1639-1865* 198 (1996)

⁵² *Id.* at 198.

⁵³ *Id.* at xviii and 198.

⁵⁴ *Supra* note 49.

⁵⁵ *Id.*

called” literacy tests designed to bar Black people from registering to vote.⁵⁶ John Lewis, an inspirational civil rights leader, witnessed firsthand the effects of states’ laws preventing Black people from exercising their right to vote.⁵⁷ He and other movement leaders braved violence from police and White citizens to protest these racially discriminatory laws, most notably in Selma, Alabama on March 7, 1965.⁵⁸

On March 15, 1965, in response to the violence against Black Americans who protested for equality under law in Selma, President Lyndon B. Johnson gave a speech on the dignity of equal voting rights to Congress.⁵⁹ His famous first line firmly establishes a connection between dignity and enfranchisement in the American tradition– “I speak tonight for the dignity of man and the destiny of democracy.”⁶⁰ President Johnson reframed famous lines from the Declaration of Independence, Thomas Paine, and Patrick Henry in a dignity context:

Those words are a promise to every citizen that he shall share in the dignity of man. This dignity cannot be found in a man's possessions; it cannot be found in his power, or in his position. It really rests on his right to be treated as a man equal in opportunity to all others. It says that he shall share in freedom, he shall choose his leaders, educate his children, and provide for his family according to his ability and his merits as a human being.⁶¹

President Johnson promised to send legislation to Congress to protect the inherent dignity by granting protections to Black Americans’ enfranchisement.⁶² He argued that the Constitutional requirement, obligation to morality, and fulfillment of human rights surpassed States’ rights to bar people from voting due to their race.⁶³

Using President Johnson’s dignity framework, John Lewis argued for renewing provisions of the Voting Rights Act which would expire in 2007, stating, “[l]et us indeed continue to ensure the dignity of man and the destiny of democracy here in America as we export these values around the world.”⁶⁴ However, in 2013 the Supreme Court decision in Shelby County v. Holder stripped away some of the protections afforded by the VRA.⁶⁵ The VRA required certain counties to submit proposed changes to their election law to the United States Attorney General or a panel of District Court judges in Washington, DC to ensure that the law would not disenfranchise Black voters; this prevented the implementation of 86 proposed changes from 1998 through 2013.⁶⁶ After the decision in Shelby, counties formerly bound to the

⁵⁶ John Lewis, The Voting Rights Act - Ensuring Dignity and Democracy, 32 HUM. Rts. 2, 2005

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Lyndon B. Johnson, President Johnson's Special Message to the Congress: The American Promise, LBJ Presidential Library, (Last Accessed March 19, 2021), available at <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise>

⁶⁰ Id.

⁶¹ Id. (Emphasis added.)

⁶² Id.

⁶³ Id.

⁶⁴ Supra note 56 at 6.

⁶⁵ Catalina Feder et al., Voter Purges After Shelby: Part of Special Symposium on Election Sciences, Sage Journals 687 (2020).

⁶⁶ Id.

VRA preclearance section targeted Black citizens through erroneously purging the voter rolls and passing restrictive new voter registration policies.⁶⁷ Instead of considering the dignity of voters, especially minority voters, as Justice Ginsburg did in her dissent,⁶⁸ the majority held that the VRA infringed on the dignity of states.⁶⁹

Like the laws states passed to prevent the Black people from registering to vote prior to the Voting Rights Act and after the Shelby decision, Delaware's codified disenfranchisement of people convicted of felonies deprives a disproportionate amount of Black people of their right to vote and infringes on their inherent dignity.

B. Reforms of Delaware's Code and Constitution expanded voting rights for people convicted of felonies and ended prison gerrymandering, which establishes precedent to expand voter eligibility to re-enfranchise its citizens with felony convictions.

Activists in Delaware succeeded in reforming many laws restricting voting rights of people with felony convictions. Since the turn of the millennium, the Delaware legislature passed several major reforms. In the year 2000, the legislature amended Title 15 Chapter 61 of the Delaware Code to enfranchise most people with felony convictions, with the exception of people convicted of a disqualifying felony, after a five-year waiting period.⁷⁰ In 2013, the legislature passed the Hazel D. Plant Voter Restoration Act, which removed the five-year waiting period and restored the right to vote to most people convicted of felonies after the completion of their sentence, parole, probation, and community supervision.⁷¹ Recently, in 2016, the Delaware legislature passed the bill SB 242 which removed financial barriers to re-enfranchisement, such as the payment of fines, fees, and restitution, before restoring voting rights.⁷²

Furthermore, activists in Delaware succeeded in ending prison gerrymandering. In 2010, the legislature amended Title 29 Chapter 8 of the Delaware Code to not count incarcerated people in the district of the prisons after the decennial census.⁷³ This is accomplished in two ways. First, people in prisons who did not reside in the state prior to incarceration would not count as part of the county's population for redistricting purposes.⁷⁴ Second, incarcerated people who resided in Delaware prior to incarceration will be counted at their last known address in the state for the census.⁷⁵ Ending prison gerrymandering shows the awareness of the Delaware legislature to inequities that exist in the political and prison system.

⁶⁷ Id. at 690.

⁶⁸ Shelby County v. Holder, 570 U.S. 529, 565 (2013).

⁶⁹ Id. at 543

⁷⁰ Supra note 4. See also, Delaware 140th General Assembly Chapter 314 available at <https://legis.delaware.gov/SessionLaws/Chapter?id=19687>

⁷¹ Voting Rights Restoration Efforts in Delaware (Feb. 18, 2018) <https://www.brennancenter.org/>

⁷² Id.

⁷³ 29 DE Code § 804A (2019)

⁷⁴ Id.

⁷⁵ Id.

IV. Dignity-Based Arguments for Enfranchising People in Incarceration

A. Through a dignity-based framework, international law and norms require that people regain their right to vote once freed from incarceration.

Participatory dignity often manifests as the civil and political rights a country grants its citizens, including suffrage. Many international and nongovernmental organizations recognize the value of civil and political rights in their charters and covenants.

Since its 1945 founding, the United Nations recognized the importance of dignity inherent in all people in the Preamble of its Charter.⁷⁶ In the Universal Declaration of Human Rights, ratified in 1947, the United Nations further emphasized the importance of dignity.⁷⁷ The drafters used dignity as a framework for all of the provisions within the UDHR.⁷⁸

In 1966, the United Nations adopted the International Covenant on Civil and Political Rights, which then entered into force in 1976.⁷⁹ The ICCPR recognized that suffrage remains one of the most crucial rights to maintain an individual's dignity. Article 25 Section (b) of the ICCPR states that, "[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions.... [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors..."⁸⁰ The distinctions in Article 2 of the ICCPR include: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁸¹ The other statuses recognized by the United Nations include incarceration status and criminal convictions.⁸²

The United States Senate ratified the ICCPR in 1992, which President George H.W. Bush then signed into law.⁸³ However, it included Reservations, Understandings, and Declarations which weakened the United Nations' ability to enforce the treaty against the United States.⁸⁴ The first declaration made by the United States stated, "...that the provisions of Articles 1 through 27 of the Covenant are not self-executing."⁸⁵ This prevents the relevant provisions of the ICCPR that would expand protections of voting rights from becoming actionable, which this paper will examine further in a later section.

Eleven countries objected to the United States' RUDs to the ICCPR because without the articles, there lacks a true purpose to ratify this treaty.⁸⁶

⁷⁶ Supra note 12 at 23.

⁷⁷ Id. at 27.

⁷⁸ Id.

⁷⁹ International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Kristina Ash, U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence, 3 Nw. J. Int'l Hum. Rts. 3 (2005).

⁸⁴ Supra note 79.

⁸⁵ Id.

⁸⁶ Supra note 83 at 6.

In 2006, the United Nations Human Rights Committee opened an investigation on the United States' compliance with Article 25 of the ICCPR.⁸⁷ The Committee found that the United States did not comply with its duties under this Covenant because of its practice of disenfranchising people convicted of crimes and incarcerated people.⁸⁸

The European Convention on Human Rights, despite not containing a dignity provision, uses Article 3 of Protocol 1, the provision against cruel and unusual punishment, to reinstate the franchise to people released from prison on license, regardless of the conditions of release.⁸⁹ Although not a party to this agreement, the United States can utilize its constitutional provision that protects citizens against cruel and unusual punishment to give the franchise to people with felony convictions.

B. In allowing disenfranchisement as a punishment for crime, the Delaware Constitution contradicts the rights it grants to all people, and infringes on the inherent dignity all people possess.

Like the United States Constitution and many other state constitutions, the Delaware Constitution contains a Bill of Rights, found in Article 1. The constitutional provision allowing disenfranchisement for punishment for a crime contradicts many of the rights guaranteed by the Delaware Constitution.

Article 1 Section 3 of Bill of Rights in the Delaware Constitution demands that “[a]ll elections shall be free and equal.”⁹⁰ How can an election be “free and equal” when, as of 2020, over 11,000 people lost their right to vote as a result of the provisions in the Delaware Constitution and Code?⁹¹ Furthermore, 68% of Delaware’s disenfranchised population identifies as black, in a state where less than a quarter of the population identifies as black.⁹² The denial of inherent participatory dignity, coupled with blatant racial discriminatory effects, contradicts with the state’s guaranteed right of “free and equal” elections.

Article 1 Section 11 of the Delaware Constitution’s Bill of Rights prohibits cruel and unusual punishments. The state allowing some incarcerated people to vote while denying the same right from others appears cruel and unusual on its face. Prosecutors hold discretion to charge a person with a misdemeanor or a felony charge, which can be arbitrary. Also, a co-conspirator may face a reduced charge in exchange for testifying against their partner, which creates a possibility that strips one person of their suffrage, even when involved in the same crime.

Article 1 Section 21 states that “[e]quality of rights under the law shall not be denied or abridged on account of race, color, national origin, or sex.”⁹³ The disproportionate amount of

⁸⁷ U.N. Committee Says U.S. Bans on Former Prisoner Voting Violate International Law, <https://www.aclu.org/>

⁸⁸ *Id.*

⁸⁹ *Hirst v. the United Kingdom (No. 2)* ECHR 681, available at <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-1463854-1529848%22%5D%7D>;

⁹⁰ Del. Const. art. 1 § 3

⁹¹ *Supra* note 1.

⁹² *Id.*

⁹³ Del. Const. art. 1 § 21

black people incarcerated in Delaware and who became disenfranchised due to felony convictions constitutes as *de facto* discrimination of their race.

C. The United States Constitution should protect the rights of incarcerated people to vote.

Delaware initiated the grand experiment of democracy when it became the first state to ratify the United States Constitution.

The United States Constitution should, in theory, grant suffrage to all people regardless of their felony conviction status. The Bill of Rights and subsequent Amendments afford many rights and protections to American citizens. The Sixth Amendment states that people in the justice system are innocent until proven guilty.⁹⁴ Although Delaware allows people in detention awaiting trial to vote using an absentee ballot, many states do not.⁹⁵ Denying a person from exercising their fundamental right to vote without due process violates their Sixth Amendment rights.

The Eight Amendment protects people from cruel and unusual punishment. Disenfranchising a person, essentially stripping them of their fundamental right to participate in the political process, is a cruel punishment.⁹⁶ It is also unusual as most democratic nations do not permanently ban a person from voting as punishment for a crime.⁹⁷

Under the Equal Protections Clause of the Fourteenth Amendment, the United States government should not deny the right to vote based on felony conviction status.⁹⁸ However, the United States Supreme Court held that the government may constitutionally disenfranchise people convicted of felonies in Richardson v. Ramirez.⁹⁹ Section 2 of the Fourteenth Amendment states that the state may disenfranchise a person due to their “participation in rebellion, or other crimes.” The court determined that the term “other crimes” in this clause included felony convictions. However, this Supreme Court decision does not prohibit state or federal legislature from passing legislation to ban this practice.

The Supreme Court recognized some states unconstitutionally disenfranchised people with felony convictions because the legislature intended the racially discriminatory effect. In Hunter v. Underwood, the Court struck down Section 182 of the Alabama state constitution which disenfranchised people convicted of a crime enumerated in the provision, any felony, and the broad provision of “any crime... involving moral turpitude.”¹⁰⁰ The state government could revoke voting rights when convicting a person of a misdemeanor not specifically listed in the

⁹⁴ U.S. Const. amend. VI

⁹⁵ Danielle Root & Lee Doyle, Protecting the Voting Rights of Americans Detained While Awaiting Trial (August 23, 2018) <https://www.americanprogress.org/>

⁹⁶ U.S. Const. amend. VIII

⁹⁷ Alessandra Luini del Russo, Prisoners' Right of Access to the Courts: A Comparative Analysis of Human Rights Jurisprudence in Europe and the United States, 13 J. Int'l L. & Econ. 1 (1978).

⁹⁸ U.S. Const. amend. XIV

⁹⁹ Richardson v. Ramirez, 418 U.S. 24 (1974)

¹⁰⁰ Hunter v. Underwood, 471 U.S. 222, 226 (1985).

Constitution by using Alabama case law as precedent, or through the Attorney General's opinions.¹⁰¹

The Court of Appeals found indisputable evidence of the racially discriminatory intent of this constitutional provision, despite the racially neutral language on its face.¹⁰² Thereafter, the Supreme Court affirmed the appellate court's application of Arlington Heights v. Metropolitan Housing Development Corp. to determine if the provision violated the Equal Protections Clause.¹⁰³ The facts supporting the Court of Appeals holding that the provision unconstitutionally racially discriminated include:

The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.¹⁰⁴

The Supreme Court found Section 182 unconstitutional due to the original racially discriminatory intent, “[w]ithout deciding whether § 182 would be valid if enacted today without any impermissible motivation.”¹⁰⁵

The constitutional provision disenfranchising Delaware citizens convicted of felonies originated from the legislature's fear of a growing population of free Black citizens in the slave state.¹⁰⁶ Even today, Delaware convicts a disproportionate amount of Black people with felonies, resulting in a disproportionate number of disenfranchised Black people.¹⁰⁷ Article V Section 2 of the Delaware Constitution cannot survive a constitutional challenge, because it prohibits states from enforcing racially-neutral laws passed with the intent to discriminate against people based on race.

Article VI Clause 2 of the Constitution states, “...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.” Because the United States Senate ratified the ICCPR, and President Bush signed it in 1992, Supremacy Clause demands that the treaty preempt existing federal and state legislation.¹⁰⁸ Under this assumption, the ICCPR, now the supreme law of the land, supersedes individual states' laws that disenfranchise incarcerated people and people convicted of crimes.

The issue remains that the United States declared that it would not self-execute the first twenty-seven provisions of this treaty, including the article granting voting rights to people

¹⁰¹ Id. at 224.

¹⁰² Id. at 227.

¹⁰³ Id. See also, Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-265 (1977).

¹⁰⁴ Id. at 227.

¹⁰⁵ Id. at 233.

¹⁰⁶ William H. Williams, Slavery and Freedom in Delaware, 1639-1865,

¹⁰⁷ U.S. Const. art. VI, cl. 2.

¹⁰⁸ S. Exec. Rept. No. 102-23, at 1.

convicted of felonies.¹⁰⁹ When drafting the RUDs, the United States Senate intended “to clarify that the Covenant will not create a private cause of action in U.S. courts.”¹¹⁰ However, instead of clarifying the United States' obligations under the treaty, this declaration opened up confliction interpretations of whether the rights afforded by the ICCPR exist under American law.¹¹¹

Some legal scholars propose the rights afforded by the ICCPR exist under American law, but that the Senate's declaration creates no standing for people to bring a lawsuit under the non-self-executing articles of the treaty.¹¹² Others believe that the RUDs prohibit United States courts from enforcing the articles of the ICCPR.¹¹³ The Whitney Doctrine provides that because a self-executing treaty incorporates into American law under the Supremacy Clause, one must assume a non-self-executing treaty will not automatically incorporate.¹¹⁴

However, the plain text of the Supremacy Clause assumes treaties become judicially enforceable when ratified by the Senate, regardless of the RUDs submitted to the United Nations.¹¹⁵ Although the Senate made its declarations with clear legislative intent that the ICCPR does not create a judicially private action, the argument that the treaty's provision automatically incorporates into domestic law would convince one who ascribes to a Textualist or Founder's Intent interpretation of the Constitution.

V. Policy Recommendations Focused on the Dignity of People who are Incarcerated

A. Amend the Delaware Constitution to prohibit the use of disenfranchisement as a punishment for a felony conviction.

This proposal would repeal the relevant portions of Article V Section 2 of the Delaware Constitution, and add an amendment prohibiting the use of disenfranchisement as a punishment for felony convictions. The current constitutional provision revoking the voting right of Delaware citizens convicted of felonies codifies the legacy of slavery and racism in the state. Coupled with institutional racism in the criminal justice system, this constitutional provision perpetuates racial injustice and violates the dignity of Black Americans. Furthermore, this provision infringes on the dignity of all people with felony convictions, regardless of race, by excluding tens-of-thousands of people from the political process.

B. Repeal Title 15 Chapter 61 of the Delaware Code and pass legislation to enfranchise all people, regardless of their felony conviction status.

This proposed legislation would repeal Title 15 Chapter 61 and end the disenfranchisement of people with felony convictions. After the state releases a person convicted of a felony from incarceration, it should automatically restore that person's voting rights, regardless of if that person is on parole, probation, or under community supervision. Delaware

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 19.

¹¹¹ Chrissy Fox, Implications of the United States' Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations, 11 TUL. J. INT'L & COMP. L. 309 (2003).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 309-310.

¹¹⁵ *Id.* at 310.

should also allow people convicted of felonies to vote absentee while incarcerated, a right already extended to people convicted of misdemeanors and people in prison awaiting trial.¹¹⁶

Furthermore, after the legislature grants suffrage to people convicted of felonies, this proposed legislation requires the state to inform the affected individuals about their restored voting rights. This would prevent *de facto* disenfranchisement caused by unawareness that the legislature restored their voting rights.

VI. Sample legislation

A. Proposed Amendment to the Delaware Constitution

AN ACT TO AMEND ARTICLE V SECTION 2 OF THE DELAWARE CONSTITUTION

Striking the phrases, "...or person convicted of a crime deemed by law felony," and

...and the General Assembly may impose the forfeiture of the right of suffrage as a punishment for crime. Any person who is disqualified as a voter because of a conviction of a crime deemed by law a felony shall have such disqualification removed upon being pardoned, or after the expiration of the sentence, whichever may first occur. The term 'sentence' as used in this Section shall include all periods of modification of a sentence, such as, but not limited to, probation, parole and suspension. The provision of this paragraph shall not apply to (1) those persons who were convicted of any felony of murder or manslaughter, (except vehicular homicide); or (2) those persons who were convicted of any felony constituting an offense against public administration involving bribery or improper influence or abuse of office, or any like offense under the laws of any state or local jurisdiction, or of the United States, or of the District of Columbia; or (3) those persons who were convicted of any felony constituting a sexual offense, or any like offense under the laws of any state or local jurisdiction or of the United States or of the District of Columbia.

Addition to this section in bold:

§ 2. Qualifications for voting; members of the Armed Services of the United States stationed within State; persons disqualified; forfeiture of right.

Section 2. **The General Assembly recognizes the dignity suffrage affords to the citizens of this State.** Every citizen of this State of the age of twenty-one years who shall have been a resident thereof one year next preceding an election, and for the last three months a resident of the county, and for the last thirty days a resident of the hundred or election district in which he or she may offer to vote, and in which he or she shall have been duly registered as hereinafter provided for, shall be entitled to vote at such election in the hundred or election district of which he or she shall at the time be a resident, and in which he or she shall be registered, for all officers that now are or hereafter may be elected by the people and upon all questions which may be submitted to the vote of the people; provided, however, that no person who shall attain the age of twenty-one years after the first day of January in the year of our Lord, nineteen hundred, or after

¹¹⁶ Supra note 5.

that date shall become a citizen of the United States, shall have the right to vote unless he or she shall be able to read this Constitution in the English language and write his or her name; but these requirements shall not apply to any person who by reason of physical disability shall be unable to comply therewith; and provided also, that no person in the military, naval, or marine service of the United States shall be considered as acquiring a residence in this State, by being stationed in any garrison, barrack, or military or naval place or station within this State; and no person adjudged mentally incompetent or incapacitated under the provisions of this Constitution from voting, shall enjoy the right of an elector. **The General Assembly may never impose the forfeiture of the right of suffrage as a punishment for crime.**

B. Proposed Amendment to the Delaware Code

AN ACT TO AMEND TITLE 15 OF THE DELAWARE CODE RELATING TO FELON VOTING RIGHTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE :

Amend Part IV, Title 15, Chapter 61 of the Delaware Code to enfranchise all people who previously lost their right to vote due to a felony conviction.

§6101. Statement of Purpose.

Del. Code Title 15 § 6101 is amended as follows:

Striking the phrase, “whereby such persons may register to vote.” Replacing with phrase in bold to read:

The Constitution of the State provides that certain persons who previously lost voting rights because of a felony conviction shall be permitted to vote. It is the purpose of this chapter to provide a procedure to **restore the voting rights of all people previously disenfranchised due to felony conviction or incarceration status.**

Recognizing the inherent dignity of participating in the political process, any citizen eligible to vote in Delaware prior to a felony conviction and incarceration shall not be disenfranchised as a punishment for a crime.

§6102. Definitions.

Del. Code Title 15 § 6102 is amended as follows:

(a) No change.

(1) Repeal, replace with, “no felony conviction will permanently disenfranchise a person who is otherwise eligible to vote in Delaware.”

(2) [Repealed.]

(3) Repeal, replace with, “A person charged with a felony who is otherwise eligible to vote in Delaware will not lose their right to vote while incarcerated, or for any period after. A person charged with a felony who is otherwise eligible to vote in Delaware may vote

using an absentee ballot for the address that person was last registered to vote at prior to incarceration for the duration of that person’s sentence.”

(4) No change.

(b) Repeal.

§6103. Application for registration: felony conviction reviews.

Del. Code Title 15 § 6103 is amended as follows:

(a) Repeal.

(b) Repeal.

(c) Repeal.

(d) Repeal.

§ 6104. Commissioner’s review of application.

Del. Code Title 15 § 6104 is amended as follows:

(a) Repeal.

(b) [Repealed.]

(c) Repeal.

(d) Repeal.

§ 6105. Cooperation between agencies; waiver of fees.

Del. Code Title 15 § 6105 is amended as follows:

(a) Repeal.

(b) [Repealed.]

(c) Repeal.

(d) Repeal.

§ 6106. Rules and regulations.

Del. Code Title 15 § 6101 is amended as follows:

Repeal.

§ 6107. Appeals.

Del. Code Title 15 § 6101 is amended as follows:

Repeal.