



Human Rights Advocates

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**Report on Juvenile Criminal Sentences, the Right to Vote, the Right to
Life on the Border and Freedom of Association in the United States:
A Shadow Report**

**Prepared for the Human Rights Committee
for its review of the Second and Third Reports of the United States of America under
the International Covenant on Civil and Political Rights**

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Executive Summary

Introduction

1. Human Rights Advocates (“HRA”), on its own behalf and on behalf of Minnesota Advocates for Human Rights and the National Employment Law Project, urges the Human Rights Committee to consider the United States’ policies regarding four areas of grave concern when examining the periodic report of the U.S. and its compliance with the ICCPR: juvenile sentencing, voting rights, freedom of association, and the right to life along borders. HRA also recommends that the Human Rights Committee take into account how racism permeates each of these areas of concern.

Violation of Juvenile Offenders Rights (Articles 10, 14, and 24)

2. Article 10 requires that juvenile offenders “be accorded treatment appropriate to their age and legal status.” Article 14 (4) provides that in the case of juvenile persons, the criminal “procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.” Article 24 bestows children with “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” The prohibition on juvenile sentences of life without the possibility of release has risen to the level of a *jus cogens* norm, providing that deprivation of liberty and protection for child offenders be a measure of last resort and that juvenile justice include rehabilitation as its core component. The U.S.’s practice of sentencing juveniles to life without the possibility of release, therefore, is inappropriate to the age or legal status of these juveniles.

3. The number of juveniles serving life without possibility of release sentences began to increase sharply in the 1990’s as states enacted legislation enabling juveniles to be tried as adults. Today at least 2,225 child offenders are sentenced to spend the rest of their lives in prison in the U.S.. Forty-two of the 50 states have laws which allow child offenders to be sentenced to life without possibility of release. Ten states set no minimum age, and thirteen states set a minimum of 10 to 13 years of age. Racial minorities are disproportionately represented among juvenile offenders serving life without possibility of release sentences. The U.S.’s sentencing of juvenile offenders violates Articles 10 and 24 of the ICCPR.

Violation of the Right to Vote (Articles 22, 25)

4. The U.S. policy of denying voting rights to convicted criminal offenders violates Article 25’s right to vote by universal and equal suffrage, without distinction or unreasonable restrictions. An estimated 3.9 million U.S. citizens are denied the right to vote, including over one million who have fully completed their sentences. Seven states of the U.S. deny the right to vote to all criminal offenders after completion of their sentences, and over 30 states prohibit felony offenders from voting while they are on parole or probation. Disenfranchisement laws in the U.S. create an impact that is racially disproportionate. African Americans constitute almost one-third (1.4 million) of those disenfranchised based on a previous criminal conviction, yet the group accounts for only 12.8 percent of the U.S. population.

5. Voting rights are also abridged in the U.S. through fraudulent means. For example, in the state of Ohio, political parties may legally challenge individual voters on their citizenship, age, or residency. During the 2004 presidential elections, Republican Party challengers targeted polling stations in largely African-American communities, leading to massive delays and causing those voters to leave polls without casting a ballot.

6. Voting rights were further abridged through the use of electronic voting machines without adequate security, transparency, and true verifiability. During the 2004 presidential elections, for example, an electronic voting machine in Ohio inexplicably added 4,000 votes for George Bush. In the state of North Carolina, more than 4,500 votes were irretrievably lost due to a storage problem with the system. And across the country, reports emerged of systems incorrectly recording their votes. Almost no electronic voting software provides verifiable paper ballots to permit voters to ensure that their votes are being recorded as intended. Most election workers are under-trained regarding potential problems, and vendor technicians frequently have unsupervised access to voting equipment. Local election officials routinely deny attempts to examine electronic voting audit data. Although voting technology continues to improve, the current system remains a fundamentally closed and hidden process that introduces an unacceptable risk of error and manipulation.

Right to Freedom of Association

Right to Assembly and Association (Articles 21, 22, and 23)

7. The right to assembly and association are protected under Articles 21 and 22, and are to be read broadly. The 2002 U.S. Supreme Court case *Hoffman Plastic* violates Article 22's right to freedom of association, including the right to form and join trade unions.

Hoffman removed the traditional back pay remedy for undocumented workers whose rights have been violated under the National Labor Relations Act, effectively eliminating any association rights for these workers. Without these rights, undocumented migrant workers have little incentive to report workplace abuses, which in turn decreases the accountability of employers who exploit the migrant workforce. Many employers in the United States have attempted to use the *Hoffman* decision as a way to weaken other workplace protections for migrant workers.

8. The Inter-American Court of Human Rights and the ILO's Committee on Freedom of Association have issued opinions stating that the *Hoffman* decision violates the country's international and regional treaty obligations. The General Comments to the ICCPR (VERIFY) have repeatedly stated that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality" including migrant workers, "who may find themselves in the territory or subject to the jurisdiction of the State Party."

9. Additionally, twenty-two states in the U.S. have undermined the right to freedom of association by enacting so-called "right-to-work" laws. These laws prevent unions from collecting fees from nonmember employees, while still guaranteeing those employees the benefits of union membership. The result is weaker unions with inadequate resources to

represent their members. Consequently, workers in states with so-called “right-to-work” laws have lower wages, fewer people with health care, higher poverty and infant mortality rates, lower workers’ compensation benefits for workers injured on the job, and more workplace deaths and injuries.

Right to Life on the U.S. Border

Right to Life (Article 6)

10. The high number of migrant deaths attributed to both the change in U.S. border policy and the violence of vigilante groups violates Article 6’s inherent right to life. After the U.S. changed its border policy in 1994, entry points in major cities closed and migrants were forced to cross the U.S.-Mexico border in remote areas such as the Sonoran desert. During the past year alone, the U.S. Customs and Border Protection agency reported that 464 migrants had died as of September 30, 2005, most of whom perished from the extreme temperatures of the Arizona desert. Following the September 11, 2001 terrorist attacks on the U.S., there was an increase in the number of militia-like groups forming along the U.S.-Mexico border, some of which have gained the support of white supremacists. Vigilante groups formed and started hunting, detaining, beating, and sometimes killing immigrants.

Violation of Juvenile Criminal Justice Rights – Articles 10, 14, and 24

11. HRA commends the United States on its March 2005 Supreme Court decision *Roper v. Simmons*, which declared the juvenile death penalty unconstitutional, and looks forward to the U.S. withdrawing its reservation to Article 6.

12. Article 10 requires that “juvenile offenders be accorded treatment appropriate to their age and legal status.” Article 14 (4) provides that in the case of juvenile persons, the criminal “procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.” Article 24 bestows children with “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” The U.S.’s practice of sentencing juveniles to life without the possibility of release is inappropriate to the age or legal status of these juveniles and does not promote their rehabilitation.

The Prohibition of Life Without Possibility of Release Sentences has Reached the Level of Customary International Law, and Arguably a *Jus Cogens* Norm.

13. The prohibition of this sentence has reached the level of customary international law, and arguably may be of a *jus cogens* norm. Once a rule of customary international law is established, that rule becomes binding on all states, including those which have not formally ratified it themselves. Under domestic U.S. law, customary international law is binding on the government of the United States.¹

14. For a norm to be considered customary international law, the following elements must be met: 1) the norm must be concordantly adhered to by a number of states, 2) the norm must be exercised continuously over an extended period of time, 3) there must be a conception that the norm is required by international law, and 4) there must be general acquiescence with the norm. The International Court of Justice has said that “a very widespread and representative participation in [a] convention might suffice of itself” to evidence the attainment of customary international law, provided it included participation from “States whose interests were specially affected.”²

¹ *The Paquete Habana*, 175 U.S. 677, 699 (1900).

² Amnesty International and Human Rights Watch, “The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,” 2005. Available at <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>, citing International Court of Justice, Judgment, *North Sea Continental Shelf*, paras. 73-4 (Feb. 20, 1969) (finding that “although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”).

15. The prohibition of life without possibility of release fulfills these requisites. First, there are only three known countries with juveniles serving these sentences. These three countries are discussed in the following sections. Outside of the U.S., there are less than twelve (12) juveniles reportedly serving this sentence in the world.

16. Second, there is little evidence that this sentence has been consistently and historically applied to child offenders. Even in the U.S., which represents over 99% of the juveniles serving these sentences, the sentence was not used on a large scale until the 1990's.³

17. Third, the Covenant on the Rights of the Child ("CRC") prohibits life without possibility of release sentences for juveniles. Nearly every country is a party to the CRC and has ended the use of this sentence in accordance with their treaty obligations. This obligation is reinforced in the Riyadh Guidelines and Beijing Rules, which reiterate the notion that the well-being of the child is most important in juvenile justice.⁴ The Beijing Rules and the Riyadh Guidelines have been adopted by the General Assembly. The Commission on Human Rights has emphasized the need for states to comply with their treaty obligations and respect the need to incarcerate child offenders for the shortest period possible for more than a decade. These numerous treaties, guidelines, rules, and resolutions reflect prevailing international law, suggesting prohibition of life without possibility of release for juveniles is customary international law.

18. Lastly, general acquiescence with this norm exists. More than 132 countries outlaw this sentence for child offenders. Indeed, because the sentence has barely been used by nations, it might be considered a general principle of international law and thus, a *jus cogens* norm. The fact there are at most four countries using this sentence is additional evidence that this norm should be considered *jus cogens*, as defined by Article 53 of the Vienna Convention on the Law of Treaties, since the norm is of general international law, accepted by the states as a whole, is immune from derogation, and has not been modified by a norm of the same status.

The Law regarding Life without Possibility of Release Sentences for Child Offenders in South Africa is Unclear.

19. South Africa reported in 1999 that it had four child offenders serving life without possibility of release sentences.⁵ It is unclear why this is the case since the maximum length of time before any offender must be considered for parole is 25 years.⁶ However, there are several possible explanations for why this might be. First, it has been reported that there are several juveniles serving consecutive life sentences. This would be

³ Deborah LaBelle, et al., *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*, at pp.2-3. Available at <http://www.nicic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://nicic.org/Library/020290&ID=020290&TYPE=PDF&URL=http://www.aclumich.org/pubs/juvenilelifefers.pdf>.

⁴ Beijing Rules, G.A. Resolution 40/33, U.N. Doc. A/40/53, 1985, at para. 17.1(b).

⁵ South Africa State Party report to the CRC, CRC/C/51/Add.2, May, 22, 1999 at 514 (reporting four child offenders serving the sentence).

⁶ South Africa Correctional Services Act 111, Ch. XVI, §136(4). Available at www.dcs.gov.za.

contrary to the South African Correctional Services Act which requires life sentences to be served concurrently.⁷ Additionally, it is reported that the determination of concurrent or consecutive is a matter of judicial discretion, rather than statute.

20. South Africa is considering a Child Justice Bill which would address the inherent human rights violation of life without possibility of release sentences for child offenders. In line with the CRC, the Bill would outlaw life imprisonment for child offenders.⁸ The Bill was last reported under discussion in the South African Parliament. However, it is clear that such sentences are not allowed even under current law.

Israel and Tanzania Reportedly have Child Offenders Serving Life without Possibility of Release Sentences.

21. Additionally, Israel reportedly has seven child offenders with life without possibility of release sentences and Tanzania has one.⁹ It is unclear whether these sentences allow for the possibility of release in either country.

There are No Other Countries Where Child Offenders are Serving Life without Possibility of Release Sentences

22. The other countries with life without possibility of release sentences available for child offenders reportedly do not have any child offenders serving this sentence.

23. In conclusion, the prohibition of life without possibility of release should be treated as customary international law and even as a *jus cogens* norm. Because it is prohibited by numerous treaties it has attained the necessary level of general international law. It has been accepted by all but one state and at most four countries are reported to have such sentences. Hence the prohibition is an accepted norm.

The United States is the Most Egregious Abuser of the Life without Possibility of Release Sentence for Child Offenders.

24. Compared to the number of countries sentencing child offenders to life without possibility of release, the U.S. disproportionately sentences child offenders to life without possibility of release. Presently, there are at least 2,225 child offenders sentenced to spend the rest of their lives in prison in the U.S.¹⁰ Forty-two of the fifty states have laws which allow child offenders to be sentenced to life without possibility of release.¹¹ Ten states set no minimum age, and thirteen states set a minimum of 10 to 13 years of age.

⁷ Id. at Ch. IV, §39(2)(a)(ii).

⁸ See Draft Child Justice Bill, Republic of South Africa para. 72 “(1) No sentence of life imprisonment may be imposed on a child.” Available at <http://www.pmg.org.za/bills/020808childjusticebill.htm>.

⁹ Israel State Party report to the CRC, CRC/C/8/Add.44, February 27, 2002 at para. 1372; Amnesty International and Human Rights Watch, “The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,” 2005, p. 106. Available at <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.

¹⁰ Human Rights Watch. World Report 2006, p. 510. Available at <http://hrw.org/wr2k6/wr2006.pdf>.

¹¹ Id.

Virginia and Louisiana send the largest percentage of their child offenders to prison for the rest of their lives.

25. Furthermore, at least “28 states limit or completely eliminate juvenile court hearings for certain crimes” and “at least 14 states have given prosecutors the discretion to bypass the judge and move juvenile cases directly into adult court for particular crimes.”¹² By transferring juveniles to the adult court system, many U.S. states neglect to honor their status as juveniles.

26. Also alarming is the disproportionate number of minorities sentenced to life without possibility of release in the U.S. Although significant racial disparities exist in the overall juvenile justice system, black youth are reportedly serving life without possibility of release sentences at a rate that is ten times higher than white youth.¹³ For example, in Colorado, where African-American children represent 4.4% of the juvenile population, they represent 26% of those serving life without possibility of release sentences.¹⁴ In Michigan, African-American child offenders comprise 69% of the number sentenced to life without parole while they represent only 15% of the general population.¹⁵

Juvenile Justice and Rehabilitation Models

27. The Convention on the Rights of the Child provides that deprivation of liberty for child offenders be a “measure of last resort.” There are several examples of alternative sentencing structures which focus more on rehabilitation and reduction of recidivism which are particularly worthy of discussion. For example, the German Model provides an excellent example of alternative sentencing and focus on juvenile rehabilitation. The Georgia Justice Project developed an innovative and holistic approach to juvenile rehabilitation. The Texas Youth Commission has developed an innovative program at the Giddings State School to rehabilitate child offenders. However, these examples are the exception not the norm.

28. The U.S. is urged to look into these rehabilitation models of juvenile justice for all the state systems.

Recommendations

A. Recognize that juvenile life without possibility of release sentences violate the ICCPR;

¹² Hubner, John. “Discarded Lives, Children Sentenced to Life Without Parole,” Amnesty International magazine, Spring 2006.

¹³ Amnesty International and Human Rights Watch, “The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,” 2005. Available at <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.

¹⁴ Human Rights Watch Report, “Thrown Away Children Sentenced to Life Without Parole in Colorado,” February 2005.

¹⁵ Deborah LaBelle, et al., “Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons,” at p. 6.

- B. Urge the U.S. to abolish life without possibility of release sentences for child offenders;
- C. Urge the U.S. to address the disproportionate number of minorities within the juvenile justice system and sentenced to life without parole and work towards equality within the juvenile justice system;
- D. Urge the U.S. to honor its obligation as a state party to the ICCPR, which requires the shortest deprivation of liberty possible, and minimize its harsh mandatory sentences for child offenders; and
- E. Urge the U.S. to expand their juvenile justice models to focus more extensively on rehabilitation programs, including education, counseling, employment and job training, and social or community service programs to effectuate rehabilitation rather than recidivism, and that these models be evaluated to ensure that the rights of juveniles are being protected.

Violation of the Right to Vote – Articles 22 and 25

29. Article 25 codifies the principles of the right to vote first pronounced in the Universal Declaration of Human Rights, which states that every citizen shall have the right to take part in the conduct of public affairs, directly or through freely chosen representatives; 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 electors; to have access, on general terms of equality, to public service in his country.¹⁶

30. Additionally, the HRC adopted the General Comment 25 to the ICCPR, and elaborates in detail what the right to vote should entail. The right to participate in free and fair elections implicates the right to freedom of expression, the right to freedom of opinion, the right to peaceful assembly, and the right to freedom of association, all of which are basic human rights. The right to vote is also important for other rights, such as the right to participate in one's government, to be free from discrimination on political grounds, and many others. This is protected by Article 22.

31. The right to vote is infringed upon in various ways, in particular, through the operation of law, the widespread use of fraud and violence, the use of new technology such as electronic voting, media bias, and by operation of law.

Derogation of the Right to Vote by Fraud

32. Derogation of the right to vote by *fraud* persists in even the most developed of electoral systems. Frequently when fraud occurs it is in violation of national and international law, and derogates the basic right to vote. The problem usually persists when states fail to install adequate safeguards or even strictly enforce penal laws forbidding such fraud.

33. The HRC General Comment 25 made note of such a potential problem, and obligates states to “take effective measures to ensure that all persons entitled to vote are able to

¹⁶ ICCPR, Art. 25, Dec. 16, 1966, 999 U.N.T.S. 171.

exercise that right...Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced.”¹⁷

34. Improving election monitoring, enhancing voting safeguards, and enforcing election laws is crucial, which can prevent such situations and enhance the legitimacy of the electoral process.

35. In the US State of Ohio in the 2004 presidential elections, it was alleged that Republican Party challengers targeted polling stations where an overwhelming number of African-Americans came to vote.¹⁸ These actions run contrary to Articles 22 and 25, and require that non-partisan poll workers be the ones to determine whether individuals are eligible to vote or not.

Electronic Voting

36. With the advent of new technology, developments in electronic voting have emerged as a new method to provide more access and less discrimination in the electoral process; providing easier access to those with physical disabilities or limited language proficiency. However, since it is a new and undeveloped area, electronic voting poses new challenges to the principle of free, fair and transparent elections, such as the potential for tampering, the lack of uniform security standards, and the lack of a paper record. General Comment 25 states that “[s]tates should take measures to guarantee the requirement of the secrecy of the vote during elections.”¹⁹ In addition, the General Comment obligates states to have “independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.”²⁰

37. Recent tests of electronic voting machines have consistently shown the dangers of delegitimizing the voting process through e-voting. For example, in the U.S. in 2004, nearly twice as many individuals were expected to utilize direct-recording (“DRE”) voting machines as opposed to 2000.²¹ However, there are no U.S. national technical standard or certification requirements for DREs.²² The lack of such requirements overlook the significant security weaknesses in those machines, which have a reprogrammable smart card that can be easily modified, effectively casting multiple ballots without detection.²³ With the lack of a paper record, even if there were no

¹⁷ HRC General Comment 25, para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996) [hereinafter General Comment], para. 11.

¹⁸ *Id.*

¹⁹ HRC General Comment, supra note 17, para. 20.

²⁰ *Id.*

²¹ Ron Schneiderman, *The Ballot is Open on Electronic Voting*, Oct. 18, 2004 [hereinafter Schneiderman] available at www.elecdesign.com/Articles/Print.cfm?AD=1&ArticleID=8879.

²² *Id.*

²³ *Id.*

apparent problems, there is no way of knowing whether machines record votes correctly.²⁴

38. Studies conducted by American researchers and analysts on the risks of e-voting were presented at the Institute of Electrical and Electronics Engineers, Inc.'s ("IEEE") Symposium on Security and Privacy in 2004. Presenters analyzed the security standards of the paperless electronic voting system, and focused on one brand of e-voting machine used in a significant share of the United States' market.²⁵ Their research found that the voting system is far below even the most minimal security standards applicable in other contexts, and thus such systems are unsuitable for use in general elections.²⁶

39. In response to concerns on the risks of electronic voting, the General Accounting Office ("GAO") published a report in September 2005 on the reliability and security of electronic voting. The GAO report recognized that there were e-voting suffers from "instances of weak security controls, system design flaws, inadequate system version control, inadequate security testing, incorrect system configuration, poor security management, and vague or incomplete voting system standards."²⁷

40. However, no real action has been taken to fully address these problems. Many states within the U.S. missed a January 1, 2006 deadline to meet reliability standards. Additionally, there has been no effective movement to harmonize standards. Other problems remain; it was reported recently that while testing the security of e-voting machines in Florida, the machines were easily hacked into and with little effort.²⁸

41. Electronic systems can be effectively tailored to the disabled and those with limited language proficiency that conform to the values of secure, private, and auditable systems, but only if those values are transformed into standard requirements.²⁹ In addition, with the existence of vastly different technologies within States and counties (such as the U.S.), and with each State and even county having its own requirements for voting systems, those must be regulated through effective standards in technology design.³⁰ Such standards must include some form of verified voting, and include the generation of paper copies of votes, some form of optical scanning technology, and very importantly, the usage of voter-verified paper records for manual auditing.³¹

²⁴ *Id* at 3.

²⁵ Tadayoshi Kohno, et al., *Analysis of an Electronic Voting System*, IEEE Symposium on Security and Privacy 2004, (IEEE Computer Press, May 2004), available at <http://avirubin.com/vote.pdf>. The system used in the study is the much utilized Diebold electronic voting machine.

²⁶ *Id.*

²⁷ *Elections: Federal Efforts to Improve Security and Reliability of Electronic Voting Systems Are Under Way, But Key Activities Need to Be Completed*, General Accounting Office, GAO-05-956, Sept. 2005, available at <http://www.gao.gov/new.items/d05956.pdf>.

²⁸ Zachary Goldfarb, *As Elections Near, Officials Challenge Balloting Security*, The Washington Post, January 22, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/21/AR2006012101051.html>.

²⁹ Dierdre Mulligan, *E-Voting: Toward Fair and Accurate Elections*, Boalt Transcript, Vol. 38, No. 3, Fall 2005, at 47.

³⁰ *Id.*

³¹ Schneiderman, *supra* note 21.

Derogation of the Right to Vote as a Result of Criminal Conviction

42. Article 25 of the ICCPR establishes that every citizen shall have the right to participate in public affairs, to vote and hold office, and to have access to public service.³² General Comment 25 of the HRC elaborates on these rights with regards to criminal offenders, stating that “[t]he grounds for ... deprivation [of the right to vote] should be objective and reasonable. If 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.”³³ This statement along with following laws and holdings in other states around the world support the idea that the right to vote is not a privilege, but a basic human right, to be infringed upon only in the most exceptional of cases.

43. This basic requirement is not followed by the United States, where convicted criminal offenders do not have the right to vote. The recent state of the law in the United States can be seen in the United States Supreme Court case *Richardson v. Ramirez*, where the Supreme Court rejected a challenge to California’s disenfranchisement of convicted prisoners, and held that the American Constitution’s 14th Amendment does not require states to provide a “compelling” reason before denying convicted individuals the right to vote.³⁴

44. This stance has resulted in an arbitrary state of the law around the country, with an estimated 4.7 million Americans not eligible to vote.³⁵ In addition, fourteen states permanently disenfranchise convicts and ex-convicts, with six doing so for those convicted of a felony, and eight for certain categories of offenses or for certain time periods.³⁶ Only two states do not participate in any disenfranchisement and permit inmates to vote.³⁷

45. Such a position as held by the U.S. judicial system on the voting rights of convicted prisoners and ex-convicts is a minority around the world, where it is denounced in international law and increasingly abandoned by most States. For example, the European Court of Human Rights recently held that disenfranchisement of criminal offenders is a violation of Article 3 of Protocol 1 of the European Convention on Human Rights,³⁸ which states, that “[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”³⁹

³² *Id.*

³³ HRC General Comment, *supra* note 17, para. 14.

³⁴ 418 U.S. 24 (1974).

³⁵ Marc Mauer and Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*, The Sentencing Project 1 (2005).

³⁶ *Id.*

³⁷ Those two states are Maine and Vermont. *Felony Disenfranchisement Laws in the United States*, Briefing Sheet, The Sentencing Project, available at <http://www.sentencingproject.org/pdfs/1046.pdf>.

³⁸ *Hirst v UK (No.2)*, Eur. Ct. H.R. no. 74025/01 (Oct. 6, 2005).

³⁹ Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Mar. 20, 1952, 213 UNTS 262.

46. In *Hirst v. UK*,⁴⁰ the applicant was a convicted prisoner who challenged the UK's law denying him the right to vote as a result of his status as a convicted prisoner. The Court held that its establishment of individual rights guarantees⁴¹ runs counter to automatic disenfranchisement based on an individual's status as a convicted prisoner, and while the court allows for a wide margin for states to take measures disenfranchising prisoners if such measures are proportional and have legitimate aims,⁴² the Court found that "[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be."

47. Canada has also followed the rationale that barring prisoners from voting runs counter to principles of democratic rule and rule of law. In *Sauvé v. the Attorney General of Canada*, the Canadian Supreme court held that the right to vote was fundamental to democratic rule, with any limits infringing on that right to vote to be subject to careful examination. Therefore it found that the Canada Elections Act of 1985, which denied the right to vote every person imprisoned serving a sentence of two years or more was a violation of Articles 1 and 3 of the Canadian Charter of Rights and Freedoms.⁴³

48. The Constitutional Court of South Africa has held twice that not only the disenfranchisement of prisoners is a violation of South African and international law, but the State has a positive obligation to enable the right to vote for prisoners. First in 1999 the Constitutional Court held in *August v. Electoral Commission* that the unqualified right for every citizen to vote imposed positive obligations upon the legislature and the executive to make reasonable arrangements for prisoners to vote, and that any limitations imposed are allowed provided they were reasonable and justifiable.⁴⁴ Recently in *Minister of Home Affairs v. NICRO*,⁴⁵ the Constitutional Court affirmed the principles held in *August*, and held that the deprivation of the right to vote from prisoners serving a sentence without the option of a fine was not allowed considering the insufficient justifications given by the Ministry.⁴⁶

49. The Human Rights Committee, while having not yet considered criminal disenfranchisement laws in the United States, has found in its considerations of other States' reports of unreasonable and disproportionate laws. For example, in its consideration of the report from Senegal, the HRC found the laws to be excessive that

⁴⁰ *Hirst v UK (No.2)*, Eur. Ct. H.R. no. 74025/01, at 3.

⁴¹ The Court established individual guarantees including the right to vote and to stand for election in *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§46-51. *Id.* at §57.

⁴² *Id.* at §73.

⁴³ *Sauvé v. Attorney General of Canada (No.2)* (cited in *Hirst v UK (No.2)*, Eur. Ct. H.R. no. 74025/01 at 9). The Canadian Supreme court had earlier held struck down a legislative ban prohibiting all prisoners from voting in *Sauvé v. Attorney General of Canada (No.1)*, 2 SCR 438 (1992); legislative amendments limiting the ban to those serving 2 years or more led to the current decision in *Sauvé (No.2)*.

⁴⁴ *August v. Electoral Commission*, 1999 (3) SA 1 (CC) (S.Afr.).

⁴⁵ 2004 (5) SA 1 (CC), available at <http://www.sentencingproject.org/pdfs/southafrica-decision.pdf>.

⁴⁶ *Id.*

deprive individuals of the right to vote who are sentenced to “personal restraint or penal servitude.”⁴⁷ Additionally while reviewing the Hong Kong report, the HRC noted “that laws depriving convicted persons of their voting right for periods of up to ten years may be a disproportionate restriction of the rights protected by Article 25.”⁴⁸

Derogation of the Voting Rights of District of Columbia Citizens

50. District of Columbia (“D.C.”) citizens constitute a sector of the United States’ population without the ability to exercise the right to vote. Specifically, this derogation of their right to vote is caused by their inability to vote for representatives in the United States’ House of Representatives and Senate, unlike all other United States citizens.⁴⁹ This is in violation of the ICCPR’s provisions and stands contrary to General Comment 25.

51. Additionally, the Inter-American Commission (“IAC”) recently found that the denial of the opportunity to participate in the federal legislature is in violation of Articles II and XX of the American Declaration of the Rights and Duties of Man.⁵⁰ This derogation of their right to vote has also been claimed to have a discriminatory effect, since a majority of D.C. citizens are African-Americans. All of this stands in violation of the HRC General Comment, which states that “[n]o distinctions are permitted between citizens...on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵¹

Recommendations

- A. The U.S. should investigate all irregularities and allegations of fraud in the electoral process and take all measures possible, including election monitoring, to ensure that such discrepancies do not occur again.
- B. The U.S. should investigate meaningful parameters of election-relation norms, commitments, principles, good practices, and the discriminatory effects of laws on the right to vote.

⁴⁷ The Sentencing Project, *U.S. Criminal Disenfranchisement under International Human Rights Law – Losing the Vote*, available at <http://www.hrw.org/reports98/vote/usvot98o-06.htm>. See Consideration of Report by Senegal to the Human Rights Committee, CCPR/C/79/Add.11, Dec. 28, 1992, D (10).

⁴⁸ *Id.* See Human Rights Committee, Comments on United Kingdom of Great Britain and Northern Ireland (Hong Kong), U.N. Doc. CCPR/C/79/Add.57 (1995), para. 19.

⁴⁹ This has been argued to be the result of the interpretation of Article 1, section 2, clause 1 of the U.S. Constitution, which provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” It has been judicially determined that D.C. is not a state within the meaning of the provision.

⁵⁰ Inter-American Commission on Human Rights, Organization of American States, Report No. 98/03, Case 11.204, Dec. 29, 2003, available at <http://www.dcvote.org/pdfs/oas1203w.pdf>.

⁵¹ HRC General Comment, *supra* note 17, para. 3.

Violation of the Right to Freedom of Association – Articles 21, 22 and 23

52. Article 22 states that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”⁵² Moreover, “[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”⁵³

53. The growth of international migration is linked to globalization.⁵⁴ The International Labour Organization (ILO) estimates there are 86 million migrant workers worldwide⁵⁵, earning more than US\$100 billion annually.⁵⁶ A “migrant worker” is a person who is, or has been, “engaged in a remunerated activity in a State of which he or she is not a national.”⁵⁷

54. Migrant workers are often denied access to legal services, health care, social security, and other health and safety protections.⁵⁸ Such human rights abuses include: abusive working conditions under conditions similar to slavery or forced labor, withholding of passports, nonpayment of wages, restrictions on freedom of movement, verbal and physical abuse, denial of the right to association and assembly, and abused by recruitment agencies resulting from inadequate regulation of the sector.⁵⁹

55. Freedom of association is a fundamental human right.⁶⁰ In his annual report, the Special Rapporteur on the Human Rights of Migrants explained that “[i]n situations of

⁵² International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, at art. 22, § 1 (1966) [hereinafter ICCPR].

⁵³ *Id.* at art. 22, § 2.

⁵⁴ *Human Rights of Migrants: Note by the Secretary-General*, U.N. GAOR, 60th Sess., Agenda Item 73(b), at ¶ 5, U.N. Doc. A/60/357 (2005).

⁵⁵ Amnesty International, *Protecting Migrant Workers' Rights*, THE WIRE, http://web.amnesty.org/wire/December2004/migrant_workers (Dec. 2004).

⁵⁶ Press Release, International Organization for Migration, Valuing Migration, http://www.iom.int/EN/archive/pr873_en.shtml (Dec. 18, 2004).

⁵⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *entered into force* July 1, 2003, G.A. Res. 45/158, U.N. GAOR, 69th plenary mtg., U.N. Doc. A/RES/45/158, art. 2, § 1 (1990) [hereinafter Migrant Convention].

⁵⁸ Press Release, December 18, Worldwide Respect for Migrants' Rights, <http://www.december18.net/web/docpapers/doc2155.doc> (Dec. 18, 2004).

⁵⁹ *Report on the Human Rights of Migrants Submitted by the Special Rapporteur of the Commission on Human Rights: Note by the Secretary-General*, U.N. GAOR, 59th Sess., Agenda Item 105(b), at ¶ 16, U.N. Doc. A/59/377 (2004).

⁶⁰ Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS: ESSAYS IN HONOR OF JOAN FITZPATRICK AND ARTHUR HELTON, CH. 21 (Anne F. Bayefsky, ed., 2005), *reprinted in* 3 Hastings Race & Poverty L.J. 35 (Fall 2005).

both regular and irregular migration, legal or practical restrictions on migrants' participation in unions are a key factor in abuses suffered in the labour market."⁶¹ The previous Special Rapporteur "strenuously promoted the idea that the only way to halt the continuing deterioration in immigrants' situation, particularly that of illegal immigrants, is to recognize the human rights of this group and apply the principle of non-discrimination."⁶² The Secretary-General has noted, "It is of little use for a State to say that it agrees with the text of the human rights conventions when its legislation on aliens allows for discrimination in the application of those rights."⁶³

56. The special rapporteurs, independent experts and chairpersons of the working groups of the special procedures of the Commission on Human Rights, have jointly expressed "their strong concern regarding the continued deterioration in the situation and the denial of human rights of migrants."⁶⁴ This group was particularly concerned about attempts to "institutionalize discrimination against and exclusion of migrants."⁶⁵ In order to promote the human rights of migrant workers, the principle of non-discrimination in the rights and remedies provided in national labor legislation must be applied to all workers irrespective of immigration status.

The Impact of U.S. Federal Labor Laws on Undocumented Migrant Workers

57. Despite international treaty obligations, discriminatory national labor legislation is having a detrimental effect worldwide on undocumented workers. Migrant workers are particularly vulnerable in the post-*Hoffman* United States, illustrating the critical need to prohibit discrimination on the basis of immigration status with respect to national labor legislation irrespective of national immigration policy.

58. In the 2002 case *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, the United States Supreme Court eliminated the traditional back pay remedy for undocumented workers whose rights have been violated under the National Labor

⁶¹ *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*, U.N. Commission on Human Rights, 62d Sess., Agenda Item 14(a), at ¶ 61, U.N. Doc. E/CN.4/2006/73 (2005).

⁶² *Report of the Special Rapporteur, Ms. Gabrihela Rodriguez Pizarro, Submitted Pursuant to Commission on Human Rights Resolution 2004/53*, U.N. Commission on Human Rights, 61st Sess., Agenda Item 14, at ¶ 75, U.N. Doc. E/CN.4/2005/85 (2004).

⁶³ *Report on the Human Rights of Migrants Submitted by the Special Rapporteur of the Commission on Human Rights: Note by the Secretary-General*, U.N. GAOR, 59th Sess., Agenda Item 105(b), at ¶ 32, U.N. Doc. A/59/377 (2004).

⁶⁴ *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms, Note by the United Nations High Commissioner for Human Rights*, U.N. Commission on Human Rights, 61st Sess., Agenda Items 4 & 18, at annex I, § C, U.N. Doc. E/CN.4/2005/5 (2004).

⁶⁵ *Id.* The group stated, "We recognize the sovereign right of States to promulgate laws and regulations concerning the entry of aliens and terms and conditions of their stay. Such actions by States must, however, be consistent with their obligations under international . . . human rights law. In this regard, we wish in particular to express our concern about the current attempts to institutionalize discrimination against and exclusion of migrants as well as the increasing tendency to restrict the human rights of migrants, including the treatment that migrants, especially women and unaccompanied minors, deemed to be irregular receive."

Relations Act (NLRA).⁶⁶ The Court reasoned that awarding back pay to undocumented workers was “foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986.”⁶⁷ The Court claimed that undocumented workers’ rights would still be protected under the NLRA through “cease and desist” orders requiring the employer to “post a notice to employees setting forth their rights under the NLRA.”⁶⁸ However, without financial incentive for employers not to violate the NLRA or for workers to report NLRA violations, *Hoffman* effectively eliminated any legal bargaining rights for undocumented workers while rewarding employers for violating both immigration and labor policy.⁶⁹ In his dissenting opinion, Justice Breyer reasoned, “in the absence of the back pay weapon, employers could conclude that they can violate the labor laws at least once with impunity. . . . Hence the back pay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.”⁷⁰

59. *Hoffman* potentially affects approximately 5.5 million undocumented workers.⁷¹ The cease and desist order, the only remedy left to undocumented workers, does not cure past violations, amounting to “one free pass” for employers.⁷² Some employers have attempted to use *Hoffman* to deter migrants from asserting their rights.⁷³ Employers have argued that employees’ immigration status should be discoverable before a finding of an unfair labor practice.⁷⁴ Other employers have attempted to use *Hoffman* to prevent undocumented migrants from voting in union elections.⁷⁵ The result has been an increase in labor rights violations of migrant workers. For example, in the meatpacking industry, where workers are in danger of losing a limb, employers frequently deny workers’ compensation to employees injured on the job, intimidate and fire workers who try to organize, and exploit workers’ immigrant status in order to keep them quiet about abuses.⁷⁶

60. The chilling effect of *Hoffman* has extended beyond the scope of the NLRA. The federal Equal Employment Opportunity Commission rescinded its enforcement guidelines that allowed for the back pay remedy for undocumented workers.⁷⁷

⁶⁶ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002).

⁶⁷ *Id.* at 140.

⁶⁸ *Id.* at 152.

⁶⁹ De la Vega & Lozano-Batista, *supra* note 60.

⁷⁰ *Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting).

⁷¹ De la Vega & Lozano-Batista, *supra* note 60.

⁷² Jennifer Berman, *The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What to Do About It*, 13 KAN. J.L. & PUB. POL’Y 585, 602 (Summer, 2004). Garment factory owners, for example, could close upon issuance of a cease and desist order, terminate all workers, and reopen under a new name in a new facility.

⁷³ De la Vega & Lozano-Batista, *supra* note 60.

⁷⁴ *Tuv Taam Corp.*, 340 NLRB No. 86 (2003).

⁷⁵ *Chicago Future, Inc.*, 2003 NLRB LEXIS 93 (2003).

⁷⁶ Human Rights Watch, *Abuses Against Workers Taint U.S. Meat and Poultry*, <http://hrw.org/english/docs/2005/01/25/usdom10052.htm> (Jan. 25, 2005).

⁷⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FED. EMPLOYMENT DISCRIMINATION LAWS, Directives Transmittal No. 915.002 (2002).

Employers have attempted to expand *Hoffman* to dismiss claims under Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act, and common-law tort law.⁷⁸ 60. Agricultural workers, not covered under the NLRA, have been victims of trafficking. Four New York farm labor contractors pled guilty to trafficking-related criminal charges for transporting migrant farm workers in crowded vans from Arizona to New York, demanding smuggling fees, rent payments, transportation costs, and money for food.⁷⁹ With threats of deportation and no protection under the NLRA, migrant workers have no effective rights to freedom of association, organizing, or collective bargaining in the United States and U.S. territories, leading to further exploitation.⁸⁰

61. The U.S. is also responsible for violations of the rights of migrants working for U.S. contractors abroad. This year it was uncovered that thousands of undocumented workers have been trafficked from Asia to work on U.S. military bases in Iraq for private U.S. corporations with government contracts.⁸¹ Kellogg, Brown, and Root (KBR), a subsidiary of U.S.-based company Halliburton, is the U.S. military's largest private contractor in Iraq.⁸² KBR has partnered with subcontractors that hire laborers from Nepal that explicitly prohibits its citizens from working in Iraq.⁸³ These workers are then subject to human rights abuses, including huge brokers' fees, forced confinement, and abusive working conditions.⁸⁴ Twelve Nepalese men were kidnapped and murdered in Iraq last year.⁸⁵ An estimated 10,000 undocumented Nepalese are working in Iraq without labor protection.⁸⁶

Impact of State Right-To-Work Laws on Freedom of Association Rights

62. International law and national legislations protect the right of workers of freedom of association and organization of Unions. Yet, in the United States there is a special case where even though workers have the right to associate, they also have the right to not associate or "pay dues" to their Unions.

63. The National Labor Relations Act establishes (29 U.S.C. §§ 151-169) in its section 7 that Employees shall have the right to self-organization, to form, join, or assist labor

⁷⁸ De la Vega & Lozano-Batista, *supra* note 60.

⁷⁹ Brennan Center's Legal Services, *After Farm Contractors Plead Guilty on Trafficking Charges, Ten Migrant Farmworkers Aided by New York Legal Services Groups Proceed with Suit for Unpaid Wages*, <http://www.brennancenter.org/programs/lse/pages/> (Dec. 16, 2004). *See also*, Javier H. v. Garcia-Botello, 218 F.R.D. 72 (W.D.N.Y. 2003) (court ordered a stay of discovery until the conclusion of evidence in the related criminal case, United States v. Maria Garcia, No. 02-CR-110-S, slip op., 2006 WL 266558 (2d Cir. 2006)).

⁸⁰ *Id.*

⁸¹ Cam Simpson, *U.S. to Probe Claims of Human Trafficking: Tribune Series on Iraq Abuses Sparked Action*, CHICAGO TRIBUNE (Jan. 19, 2006).

⁸² Cam Simpson & Amer Madhani, *U.S. Cash Fuels Human Trade*, CHICAGO TRIBUNE (Oct. 9, 2005).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. However, later acts granted some states the power to enact laws to protect the employees' Right-To-Work, meaning that an employee is not compelled to join a union or pay fees or dues as a requirement of the job.

64. These Right-to-Work-Laws have been analyzed from their economic impact, but not from the human rights perspective. They are used by some employers to weaken unions by pushing the employees to withdraw their support from the union on the basis of economic reasons or their freedom to select the union of their choice. An employee can argue that the union does not represent his or her interests and therefore does not want to continue paying dues or even be part of the union. The United States Supreme Court has held that Right-To-Work laws are constitutional. The right to freely associate nonetheless is being violated by granting a right to freely work.

65. International law protects the right of free association in numerous treaties, including the Conventions 87 and 98 of the International Labor Organization, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights which contemplate the freedom of association right. The United States signed and ratified the ICCPR but made a declaration affirming that the provision contained in several articles, including the one about freedom of association, are not self executing, meaning that the Covenant is law but the Congress needs to enact a statute to make it binding. With this, the intent of the Treaty is not accomplished and remedies cannot be sought under the Treaty because a cause of action cannot be found in the Treaty but only in a statute.

66. The right to enact Right-To-Work-Laws (RTW) is assured by Section 14(b) of the Federal Labor-Management Relations Act (also called the Taft-Hartley Act) of 1947. The Taft-Hartley Act⁸⁷ affirms that membership in any labor organization cannot be a condition of employment; meaning that a worker does not have to be part of a union nor pay any economic contributions in order to be employed.

67. Under this Act, 22 states have passed Right to Work Laws: Alabama, Arizona, Arkansas, Kansas, Florida, Georgia, Idaho, Iowa, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.⁸⁸

68. This Act came in response against the Warner Act of 1935 which gave too much power to unions including exclusive representation and union security clauses⁸⁹. The

⁸⁷ UCC § 164. Construction of provisions b) Agreements requiring union membership in violation of State law Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

⁸⁸ See the National Right to Work Committee for a complete overview of state legislation. <http://www.nrtwc.org/rtws.php3>

⁸⁹ These clauses could come in three different forms:

most used union security provision is the “closed shop” in which the employer agrees to hire only union members; the union finds jobs for its members and employees for the employers in need of them. The Taft-Harley Act outlaws such agreements and takes away a lot of power from the unions because now a worker may not, if he or she decides, join the union or pay fees or dues and still get the benefits from the collective bargaining.

69. Florida passed the first Work Law in 1944 as a constitutional amendment establishing that: *The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike*⁹⁰.

70. Right-To-Work laws bring up the important issue of who should pay for union services. The simplest answer is that those who use union services should pay for them. However, right to work, under the pretense of protecting the right to work and the right not to join a union, is no help to workers. Unions are obligated, under the duty of fair representation, to serve those in the bargaining unit who chose not to join the union or even voted against the union. States can, if they so choose, prohibit contracts that order employees to pay a share of the collective bargaining agreement, yet fortunately most states have not done this. After all, it is only fair that those that benefit from the agreement should pay for it.

71. These “free riders” enjoy the benefits but are not allowed to vote or participate in the negotiations. The unions leverage is thus lowered; the strength of the union based on the possibility of going on a strike is weakened because not all the workers would go on a strike and the union does not have enough economical resources to maintain a strike or a judicial process. The laws also weaken unions with inadequate resources to represent members.⁹¹

72. Pro Right-to-Work-Laws affirm that no one should be forced to pay tribute to a union to get or keep a job. The objectors say that those laws not only hurt the unions but also wages, health and education issues because the collective bargaining is weakened.

73. Opponents of Right-To-Work-Laws argue, conversely, that compulsory unionism is necessary to offset the power of big business in a market economy. In this view, big businesses and free markets are responsible for a slowdown in real earnings for workers and for greater income inequality during the past quarter century.⁹² In its

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- Agency Shop: The union’s contract does not mandate that all employees join the union, but it does mandate that the employees pay union dues.
 - Union Shop: The union’s contract requires that all employees join the union within a specified amount of time of becoming employed.
 - Closed Shop: The union’s contract mandates that the employer only hire union members.

⁹⁰ Article II sec. 6, Constitution of the State of Florida.

⁹¹ Right to Work States Are Really Restricted Rights States. 1 Jan. 2004. AFL-CIO. 1 Mar. 2004. (visited on June 29, 2005) <<http://www.aflcio.org/issuespolitics/stateissues/righttowork.cfm?RenderForPrint=1>>.

⁹² See A Mackinac Center Report. William T. Wilson, Ph.D. The Effect of Right-to-Work Laws on

pamphlet entitled “Right to Work States Are Really Restricted Rights States” from 1 January 2004, the AFL-CIO reports that:

1. The average worker in a right to work state makes about \$5,333 a year less than workers in other states (\$35,500 compared with \$30,167).
2. Weekly wages are \$72 greater in free-bargaining states than in right to work states (\$621 versus \$549).
3. 21 percent more people lack health insurance in right to work states compared to free-bargaining states.
4. Right to work states have a poverty rate of 12.5 percent, compared with 10.2 percent in other states.
5. Moreover, the infant mortality rate is 16 percent higher in right to work states.
6. Maximum weekly worker compensation benefits are \$30 higher in free bargaining states than in right to work states (\$609 versus \$579).
7. According to the federal Bureau of Labor Statistics, the rate of workplace deaths is 51 percent higher in states with right to work, where unions can't speak up on behalf of workers.
8. The average worker in a right to work state makes about \$5,333 a year less than workers in other states (\$35,500 compared with \$30,167).
9. Weekly wages are \$72 greater in free-bargaining states than in right to work states (\$621 versus \$549).
10. Working families in states without right to work laws have higher wages and benefit from healthier tax bases that improve their quality of life.
11. Supporters claim right to work laws protect employees from being forced to join unions. Don't be fooled—federal law already does this, as well as protecting nonmembers from paying for union activities that violate their religious or political beliefs. This individual freedom argument is a sham.
12. According to the federal Bureau of Labor Statistics, the rate of workplace deaths is 51 percent higher in states with right to work, where unions can't speak up on behalf of workers.
13. If a nonunion worker is fired illegally, the union must use its time and money to defend him or her, even if that requires going through a costly legal process. Everyone benefits, so all should share in the process. Nonmembers can even sue the union if they think it has not represented them well enough.

74. The main issue with the Right-to-Work-Laws is that employers are using them to weaken Unions by encouraging their employees not to join the Union affirming that it will engage political or other activities that did not bring any benefit to them and instead, they will have to be paying a fee to support these activities. Since 1979 the percentage of union workers in the United States has declined from 24% to 14%. For example, in Oklahoma, it's less than 8%.

75. The Supreme Court has held in *Railway Employees, Department v. Hanson*, 351 U.S. 225, that union or closed shop provisions in collective bargaining contracts do not violate the constitutional rights of an individual. It also declared in the *Whitaker* case (*Whitaker v. North Carolina* 335 U.S. 525), that a RTW law banning compulsory unionism was not a violation of the “right of association”. In *Railway Employers Dept. v. Hanson* 351 U.S. 225, the Supreme Court held that in the absence of conflicting federal legislation there can be no doubt that it is within the police power of a state to prohibit the union or closed shop. Neither the open shop nor the closed shop comes under constitutional protection.

76. In *Hoffman Plastics Compound v. NLRB*, supra, the U.S. Supreme Court took the unprecedented step of denying an undocumented immigrant worker lost wages after he was illegally fired for exercising his rights under the National Labor Relations Act to form a union.

77. In sum, the idea of an “open shop” that is protected by right-to-work laws is a lie that is been used to weaken the unions by taking away their strength and support and must not be recognized in the international sphere. If the these right-to-work principle is accepted and recognized in the international sphere, employers and governments might use this legal principle to “encourage” employees to work without being part of a union attempting against their own right to collective bargain. At first glance it might appear attractive not to pay dues or not be part of a union but in the long run, individual bargaining is not as effective as collective bargaining.

78. It is a common democratic practice in social groups that the majority rules and the minority will participate in the decision making and will attempt to become a majority. Unions are not different. Even though an employee disagrees with his or her union, as long as the majority has elected it, he or she must pay fees and dues just like Democrats pay taxes even when the government is Republican. There are democratic processes to improve or change a union but only the union’s members should decide how and when to do it. Employers and governments must not intervene in such decisions. Just like in any democratic society, to gain all their union rights, employees must be members in their full capacity with all the obligations therein.

Recommendations

A. The U.S. should initiate a process of harmonizing their national legislation and domestic laws with Article 22 by guaranteeing protection and full remedies in their labour laws to all workers, regardless of immigration or employment status, to comply with the decisions of intergovernmental organizations and regional bodies regarding migrant workers, and firmly to prosecute violations of labour law with regard to migrant workers’ conditions of work, inter alia those related to their remuneration and conditions of health, safety at work and the right to freedom of association, including the right to form and join trade unions;

- B. U.S. government officials should carry out impartial investigations into reports of human rights violations made by migrant workers, and that migrants who claim to have been abused have access to reporting mechanisms;
- C. U.S. government officials should take more decisive action be taken against employers that hire migrants under false pretenses and subject them to conditions of slavery;
- D. U.S. government authorities pursue trade negotiations so that the human rights of migrants become a priority; and
- E. U.S. policy makers should withdraw their reservations to the ICCPR, pass federal laws prohibiting right to work laws and encourage individual states to abandon their right to work states.

Violation of the Right to Life – Article 6

79. The ICCPR acknowledges that human beings can only be truly free to enjoy their civil and political freedom if conditions exist where everyone may exercise their civil, political, economic, social, and cultural rights.⁹³ ICCPR recognizes the right to life and security of all people without discrimination.⁹⁴ While the U.S. has the right to control its borders from immigration, by signing the ICCPR, the U.S. must undertake to respect the rights of all individuals within their territories and to ensure that persons whose rights have been violated have an effective remedy.⁹⁵

80. Violence along state borders, whether it originates with state or private actors, endangers migrants' health, safety, and right to life. Article 6 guarantees the inherent right to life for all human beings, that this right shall be protected by law, and that no person shall be arbitrarily deprived of his or her life.⁹⁶

Government Border Policy Causes Migrant Deaths

81. During the period between 1990 and 2002, more than 3000 migrants were killed or presumed missing along the United States-Mexico border.⁹⁷ U.S. Customs and Border Protection reported that, during the past year, 464 migrants died as of September 30, 2005.⁹⁸ The extremely high number of deaths is the result of both the 1994 change in the border policy and the activities of vigilante groups. When the border enforcement strategy changed in 1994, increased numbers of officials at points like San Diego and El Paso forced immigrants to cross in areas with far fewer Border Patrol agents, namely the

⁹³ International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

⁹⁴ International Covenant on Civil and Political Rights, *supra* note 8, at art. 6 & 9.

⁹⁵ International Covenant on Civil and Political Rights, *supra* note 8, at art. 2.

⁹⁶ International Covenant on Civil and Political Rights, *supra* note 8, at art. 6(1).

⁹⁷ Dr. Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003).

⁹⁸ Ginger Thompson, *World Briefing Americas: Mexico: Migrant Deaths At Record On U.S. Border*, N.Y. TIMES, October 5, 2005, at A6.

deserts of the American southwest. Elevated temperatures and little available water make this a deadly journey for migrants.⁹⁹

82. Mexican immigration authorities provide warnings about the hazards of the 75-mile border crossing, but even these do not deter the thousands of migrants who risk their lives each month to come to the United States.¹⁰⁰ A Mexican government-funded humanitarian organization called Grupo Beta, formed in the early 1990s, protects migrants along the border by distributing fliers warning them about the vigilante volunteers for the Minuteman Project, maintaining aid stations, and passing out over a million copies of a handbook advising migrants about the dangers of crossing into the United States.¹⁰¹ Despite Mexico's efforts to prevent the unnecessary deaths of some of its poorest citizens, hundreds of migrants perish in the desert heat each year.

83. Immigrant rights activists assert that the current United States border policy forces migrants to take increasingly isolated routes across the Arizona-Mexico border, needlessly endangering the lives of many people.¹⁰² Some of these migrants come from economically depressed states in Mexico such as Chiapas or Oaxaca.¹⁰³ People from these states may be at greater risk than other migrants because they are indigenous peoples who do not speak Spanish and who may not have connections to more widely used, and perhaps safer, smuggling networks.¹⁰⁴

84. Finally, the United States House of Representatives voted in December 2005 to require the Department of Homeland Security to build fences along 698 miles of the United States-Mexico border in order to prevent illegal immigrants and drugs from entering the United States.¹⁰⁵ If this bill were to become the law it may result in additional deaths if migrants are forced to cross in even more remote areas to avoid the border fences. The potential consequences should be studied before construction begins.

Private Persons and Groups Violate Migrants' Right to Life

85. The U.S. violates ICCPR Article 6 by authorizing vigilante groups to operate outside the law, murder Mexican immigrants and escape punishment. In an incident that took place in October 2002, police investigated whether vigilantes were responsible for shooting and killing at least two migrants in the Arizona desert who had crossed the

⁹⁹ Evelyn Nieves, *Illegal Immigrant Death Rate Rises Sharply in Barren Areas*, N.Y. TIMES, August 6, 2002, at A1

¹⁰⁰ Maria Elena Salinas, Op-Ed., *No More Deaths: Compassion in Action*, ARIZONA DAILY STAR, June 8, 2004.

¹⁰¹ Jerry Seper, *Mexico Funds Staging Areas for Illegals: Stations Supply Water, Other Aid*, WASHINGTON TIMES, August 18, 2005, at A01.

¹⁰² Richard Marosi, *Border Crossing Deaths Set a 12-Month Record*, LOS ANGELES TIMES, October 1, 2005, at A1.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Rachel L. Swarns, *House Votes for 698 Miles of Fences on Mexico Border*, N.Y. TIMES, December 16, 2005, at A37.

United States-Mexico border illegally.¹⁰⁶ A man who was part of the same group of migrants crossing the border reported that two men wearing camouflage fatigues were the perpetrators.¹⁰⁷ While investigating the murders, the Pinal County Sheriff's Department indicated that the shootings may have resulted from an argument between rival smugglers, but migrants' rights activists in Arizona believe that vigilantes are to blame, since smugglers usually dress to blend in with the migrants they are guiding.¹⁰⁸ A more impartial investigation into the migrants' murders should be conducted in order to hold accountable the people responsible.

86. Every year, human rights organizations field hundreds of accusations against violent Arizona ranchers like Roger Barnett who hunt down immigrants.¹⁰⁹ Though the organizations send letters protesting the abuse to Cochise County Sheriff Larry Dever, the county prosecutor Chris Roll, and Arizona Attorney General Terry Goddard, the officials reply that these are only isolated incidents.¹¹⁰ This type of attitude gives the impression that local officials do not care about the human rights violations occurring almost daily in Arizona.

87. United States authorities have continuously failed to take responsibility for the deaths of immigrants on U.S. territory.¹¹¹ When non-governmental organizations charge the United States with responsibility, U.S. authorities respond that immigrants die because they knowingly cross the border in dangerous areas, and therefore, they assume the risk.¹¹² The Sheriff's Department in Pinal County, Arizona, quickly ruled out vigilante groups when investigating the shooting deaths of two migrants in October 2002, even though a witness stated that the perpetrators wore camouflage, a type of dress favored by vigilantes in Southern Arizona, and not worn by immigrant smugglers, who prefer to be as inconspicuous as possible.¹¹³

88. Since the tragic events of September 11th, 2001, some Americans fear that the United States is being "overrun by undocumented immigrants."¹¹⁴ A few extremists have recruited hundreds of volunteers to assist them in their efforts to "hunt down" immigrants.¹¹⁵ Unfortunately, the Arizona desert has become a veritable breeding ground for this type of vigilante activity. Migrants frequently suffer grave human rights abuses by the following groups and individuals:

¹⁰⁶ Nick Madigan, *Police Investigate Killings of Illegal Immigrants in Arizona Desert*, N.Y. TIMES, Oct. 23, 2002, at A15.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Sanjuana Martínez, "Stop f__ing Mexicans!", PROCESO, February 6, 2005, at 39, 39.

¹¹⁰ *Id.*

¹¹¹ Nieves, *supra* note 99.

¹¹² Dr. Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003), at 278.

¹¹³ Bob Moser, *Open Season: As extremists peddle their anti-immigrant rhetoric along the troubled Arizona border, a storm gathers*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, Spring 2003, <http://www.splcenter.org/intel/intelreport/article.jsp?pid=50>.

¹¹⁴ *Bubba Patrol; The Minutemen are ready to patrol Texas' border. Are we ready for them?*, DALLAS OBSERVER, August 18, 2005, available at 2005 WLNR 14741076.

¹¹⁵ Sanjuana Martínez, "La Cacería [*The Hunt*]", PROCESO, February 6, 2005, at 36, 36.

89. **Ranch Rescue** – This organization’s slogan is “Private property first, foremost, and always.” Ranch Rescue values the rights of property owners far above the basic human rights of immigrants. It is a volunteer organization made up of people who believe that when government fails to act, citizens must act on their own. Ranch Rescue’s website claims that in Arizona, California, New Mexico, and Texas, “private property landowners are threatened, harassed, intimidated, burglarized, and assaulted by thousands of criminal trespassers every year.”¹¹⁶ However, the organization fails to provide actual evidence of these burglaries and assaults.¹¹⁷

90. Ranch Rescue’s website also claims that it helps “private landowners with the repair of private property destroyed by these mass numbers of criminal trespassers” and provides “volunteer security for these landowners, their homes, and their private property.”¹¹⁸ Perhaps most alarming among numerous bold statements Ranch Rescue makes is the following:

We are *not*, however, obligated in *any* way to other private Citizens or groups, nor to any foreign national, government, entity, or representative. Specifically, we are not obligated in any way to cater to the wishes of any foreign nation, nor the wishes of anyone from the United Nations. Neither is any other Citizen within these United States.¹¹⁹

91. **Roger Barnett** – Roger Barnett is a businessman and ranch owner in Arizona who patrols his ranch in search of undocumented immigrants crossing the Arizona-Mexico border.¹²⁰ Mr. Barnett claims that he has turned over 10,000 migrants to authorities.¹²¹ His ranch is so large that it is practically a required crossing for those immigrants trying to get to Tucson or Phoenix.¹²² In March 2005, the Mexican American Legal Defense and Educational Fund (MALDEF) filed a lawsuit in federal court against Roger Barnett, his wife, his brother, Cochise County Sheriff Larry Dever, and unknown co-conspirators on behalf of 16 Mexican plaintiffs who alleged that they were violently assaulted, battered, detained, and threatened with death.¹²³

92. **American Border Patrol** – The man behind the American Border Patrol is Glenn Spencer, who is the president and founder of the anti-immigrant organization Voices of Citizens Together / American Patrol. In 2002, Mr. Spencer moved from California to Cochise County, Arizona, and founded the American Border Patrol.¹²⁴ Mr. Spencer’s

¹¹⁶ Ranch Rescue, <http://www.ranchrescue.com/index.htm> (last visited Nov. 30, 2005).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ JENNIFER ALLEN & ZOE HAMMER-TOMIZUKA, BORDER ACTION NETWORK, HATE OR HEROISM: VIGILANTES ON THE ARIZONA-MEXICO BORDER 13 (2002), available at <http://www.borderaction.org/PDFs/BAN-Vigilante%20Report.pdf>, at 3.

¹²¹ *Border brouhaha; Barnett – family vigilantism*, COLORADO SPRINGS INDEPENDENT, May 5, 2005, available at 2005 WLNR 10109583.

¹²² Sanjuana Martínez, *La cacería [The Hunt]*, PROCESO, February 6, 2005, *supra* note 115 at 37.

¹²³ *Vicente v. Barnett*, No. 05-157 (D. Ariz. filed March 4, 2005).

¹²⁴ ALLEN & HAMMER-TOMIZUKA, *supra* note 120, at 4.

racist and anti-government sentiments resonate with those Americans who harbor fears about post-9/11 immigration, and who wish to “take the law into their own hands.”¹²⁵ According to the American Border Patrol’s website, the non-profit organization uses high-tech equipment to “detect, locate and report illegal immigration as it occurs.”¹²⁶ The American Border Patrol claims that, unlike other vigilante groups, it observes and reports instances of illegal immigration, but does not detain immigrants.¹²⁷

93. **Civil Homeland Defense** – Chris Simcox, who moved to Tombstone, Arizona in late 2001 after working as an elementary school teacher in California, founded this organization in response to the devastation he felt after the terrorist attacks of September 11,¹²⁸ despite the fact that there is no evidence that the terrorists entered through the United States-Mexico border. Cochise County ranchers volunteer for the Civil Homeland Defense militia group, and they are encouraged by Mr. Simcox to “arm themselves for ‘patrol’ operations.”¹²⁹ Like Glenn Spencer, Mr. Simcox uses the terrorist attacks of September 11, 2001 to advance hatred toward migrants: he describes illegal immigration as “an ‘invasion’ and part of a larger conspiracy against American security.”¹³⁰

94. **The Minuteman Project**¹³¹ – Founded by Jim Gilchrist and Chris Simcox, this organization seeks to bring attention to “the decades-long careless disregard of effective U.S. immigration law enforcement.”¹³² Its website claims to have no affiliation with racist or supremacy groups.¹³³ However, the Minuteman Project has gained the support of white supremacist groups such as Aryan Nations.¹³⁴ U.S. President George W. Bush and Mexico’s President Vicente Fox have criticized the Minuteman Project, as has Ray Borane, the mayor of Douglas, Arizona.¹³⁵ Mayor Borane expressed concern that volunteers for the Minuteman Project “have a lynch mob attitude.”¹³⁶

95. One of the problems common among all of these vigilante groups is that they do not have the training, procedures or the authority to determine who should and should not be

¹²⁵ GLEN A. TOBIAS & ABRAHAM H. FOXMAN, ANTI-DEFAMATION LEAGUE, BORDER DISPUTES: ARMED VIGILANTES IN ARIZONA 3 (2003), available at <http://www.adl.org/extremism/arizona/arizonaborder.pdf>.

¹²⁶ American Border Patrol, <http://www.americanborderpatrol.com/abpstory.html> (last visited Nov. 30, 2005).

¹²⁷ *Id.*

¹²⁸ ALLEN & HAMMER-TOMIZUKA, *supra* note 120, at 6.

¹²⁹ GLEN A. TOBIAS & ABRAHAM H. FOXMAN, ANTI-DEFAMATION LEAGUE, BORDER DISPUTES: ARMED VIGILANTES IN ARIZONA 3 (2003), available at <http://www.adl.org/extremism/arizona/arizonaborder.pdf>, at 10.

¹³⁰ *Id.* at 11.

¹³¹ The Minuteman Project is also referred to as The Minuteman Civil Defense Corps and is affiliated with MinutemanHQ.com, the new National Organization for the original Minuteman border project, <http://www.minutemanhq.com> (last visited Dec. 4, 2005).

¹³² The Minuteman Project, <http://www.minutemanhq.com/project/AboutMMP.html> (last visited Dec. 4, 2005).

¹³³ *Id.*

¹³⁴ Timothy Egan, *Wanted: Border Hoppers. And Some Excitement, Too.*, N.Y. TIMES, April 1, 2005, at A14.

¹³⁵ *Id.*

¹³⁶ *Id.*

allowed to enter the United States.¹³⁷ Another feature shared by each of these groups is their distorted beliefs about the causes and results of immigration today. These include: the belief that illegal immigrants from Mexico are using social services in the United States without paying into the system; the belief that Mexican immigrants spread violent crime and drugs through U.S. communities; the belief that migrant workers from Mexico are taking jobs away from Americans; and even the conspiracy theory that claims immigrants coming from Mexico harbor a secret plan to reclaim the American southwest for the Mexican government.¹³⁸

96. Despite documentation of violent attacks on migrants by vigilante groups along the Arizona-Mexico border, U.S. authorities have done little to stop the violence.¹³⁹ Arizona Governor Janet Napolitano and New Mexico Governor Bill Richardson both declared states of emergency due to increased instances of smuggling and violence along the United States-Mexico border in each of their states.¹⁴⁰ Governor Napolitano claims that “Both federal governments let us down,” referring to the United States and Mexican governments, and both she and Governor Richardson said that by declaring a state of emergency, “their actions would make available \$1.75 million in New Mexico and \$1.5 million in Arizona for extra sheriff’s deputies and other officers, and for overtime costs and more equipment.”¹⁴¹

97. Perhaps one reason for the United States government’s lack of immediate response to the human rights abuse of migrants is that U. S. Customs and Border Protection is “exploring ways to involve citizen volunteers in creating ‘something akin to a Border Patrol auxiliary.’”¹⁴² Should U.S. Customs and Border Protection move forward with this plan, top border enforcement officials will lend the legitimacy of the United States government to vigilante groups. It is unclear whether the volunteers would be allowed to make arrests or carry weapons.¹⁴³ The kind of training volunteers would receive should be examined, too. In its report “Hate or Heroism: Vigilantes on the Arizona-Mexico Border,” the Border Action Network, a group that works to protect the human rights of Latino immigrants and border residents, concludes that the Immigration and Naturalization Service and the Border Patrol support the activities of the vigilantes because the vigilantes, however questionable their methods and results, are doing the Border Patrol’s job.¹⁴⁴

Recommendations

A. The U.S. must alter their border control policies to ensure that migrants’ rights are protected.

¹³⁷ ALLEN & HAMMER-TOMIZUKA, *supra* note 120, at 6.

¹³⁸ ALLEN & HAMMER-TOMIZUKA, *supra* note 120, at 12.

¹³⁹ Ralph Blumenthal & Ginger Thompson, *Citing Border Violence, 2 States Declare a Crisis*, N.Y. TIMES, August 17, 2005, at A14.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Border Patrol Considering Use of Volunteers, Official Says*, N.Y. TIMES, July 21, 2005, at A16.

¹⁴³ *Id.*

¹⁴⁴ ALLEN & HAMMER-TOMIZUKA, *supra* note 120, at 22.

B. The U.S. must investigate, prosecute, and punish violators of migrants' right to life by private actors.