BALLOTLESS AND BEHIND BARS: THE DENIAL OF THE FRANCHISE TO PRISONERS

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INTRODUCTION

This article argues against the disenfranchisement of prisoners and explores the terrain of possible political and legal reform in this area. After a brief introduction defending the importance of the franchise, the article falls into several parts. First, there is an examination of the definition of the franchise by Australian electoral law, in the context of international norms. The second part explores arguments for and against prisoner enfranchisement, and draws on overseas jurisprudence, and historical and political theory. The practical effect of the disenfranchisement is then assessed statistically, and also in terms of *realpolitik*. Finally, the possibility of using anti-discrimination law to challenge these laws is considered.

The centrality of the franchise

It is easy, and not completely without justification, to be sceptical about the franchise. In an era of unbridled global capitalism, and the unravelling of national sovereignty, the ballot can seem like a quaint, first generation, liberal democratic right, whose value is reflected in the cynical appraisal "If voting could change anything, they'd ban it".

But whatever the force of such critiques, and whether you follow or avoid the contours of post-modern political philosophy, it is undeniable that today *we all claim to be democrats*.[1] The great preponderance of players and commentators in most political systems construct their platforms, at a minimum, around ostensibly democratic values. This is so even if their policies and intents are far from egalitarian, inclusive or liberal;[2]

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1 Developments in some parts of the middle east and continental Asia may qualify, but not deny, this statement.

2 A single example may suffice: the Bosnian Serb Prime Minister of the self-styled "Republika Srpska" described indicted war criminal and former Bosnian Serb President Radovan Karadzic as "a democrat in his soul" (*Guardian Weekly* 23 June 1996 at 4). Karadzic's party is the SDS, the "Serbian Democratic Party". This is not to suggest nationalist movements are incapable of being truly democratic, especially in post-communist states (perhaps Karadzic et al are democrats — as long as one is a Bosnian

indeed in some cases, the less democratic the platform, the more likely it is to incorporate rhetorical appeals, or pay lip service, to the term "democratic".[3] This constant, motherhood arrogation of that term suggests both its rhetorical power, and that it is our central, even axiomatic, political value. But what, irreducibly, does the term mean?

If one could find a concrete core to democracy, it would be in the ability of *all the people to have a say that counts*. Outside the sphere of consultation and co-operative decision-making in the workplace, or in public and governmental deliberations,[4] this "say that counts" invariably takes the form of the ballot in representative elections or plebiscites. Whether political democracy is direct and referenda based, or more commonly, indirect and representative, the franchise is fundamental.[5] In contemporary understandings, the franchise is generally conceived as the universal right of all adults to a single, equal vote.

Furthermore the franchise is bound up at the heart of our notions of citizenship: whoever we include in our political community is *prima facie* entitled to the say accorded by the ballot, subject to exceptions based on an assumed inability to understand the importance and process of voting (thus youth[6] and proven mental incapacity are common disqualifications). Whenever certain classes of people living within the territory of a community are excluded from the right to participate in

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Serb). Rather, it is to suggest the power and cachet of the term "democratic" as a brand name.

3 This phenomenon is not uncommon. Compare the tendency, identified by Finer, for French political groups to incorporate words like "Republican" and "Popular" into their titles, in inverse proportion to their actual revolutionary or populist base. Finer explains this in terms of the historical *glissement a gauche* (or drift to the left) in French politics between the war and the 1970s (S Finer, *Comparative Government* (1970) at 276-279). The same logic could be applied to our age: a drift to liberalism, at least as a rhetorical paradigm post-cold war, leads to a situation where new forces either want to align themselves with "democratic" values as a form of sales-pitch, or take on such appellations precisely to mask their absence in the hope of conforming to a discourse which takes them for granted.

4 I do not mean to imply that representative elections and referenda are the apogee of democracy: Hannah Arendt's work on isonomy, political equality and the imperative for genuine, active participation is enough to debunk such a claim. However even Arendt would not doubt the ultimate necessity of some forms of plebiscite, as well as balloting to generate some mix of representative institutions, and perhaps an ultimate representative tribunal, given the nature of mass, specialised society: M Gottsegen, *The Political Thought of Hannah Arendt* (1994).

5 Not even freedom of speech is so valuable, since its power ultimately resides in its ability to sway the opinion of the franchised: whether they be other citizens as voters, or indirectly through representatives who are accountable to voters. Perhaps equality of opportunity, in its formal guise, comes close. Unfortunately, in this age, more substantive notions of equality are far from universally accepted.

6 I am not necessarily endorsing the particular age qualification currently employed (18 years) — some, such as the Greens, suggest it be lowered. At a minimum though, no-one contests the fairness of enforcing some minimum voting age, because of the social and intellectual maturity required to vote.

ballots, they are denied the key indicator of political citizenship.[7] It is important then to question to whom our electoral system grants or denies this cornerstone right.

INCLUSIONS AND EXCLUSIONS: DEFINING THE FRANCHISE IN AUSTRALIA

The definition of the franchise involves both positive and negative qualifications, which serve to include and exclude. Under the Commonwealth Electoral Act 1918 (Cth) (the Act), those 18 years or over are eligible to vote,[8] provided they possess Australian citizenship.[9] From this group is excluded anyone who "by reason of unsound mind, is incapable of understanding the nature and significance of enrolment and voting".[10]

Left there, we might rightly feel our franchise to be as broad, fair and mature as we could hope it to be, subject perhaps to two issues: (i) the minimum voting age, which involves questions of where to set the age of majority, and perceptions of the education and maturity or fickleness of youth; and (ii) the formal citizenship requirement, which raises the question of the fairness of taxing resident non-nationals without allowing them to vote, versus the desirability of keeping the lure of the franchise to encourage migrants to take out citizenship. Those debates aside, however, the franchise in the form described would qualify as full and equal[11] adult suffrage. Indeed our history books often take pride in recording the rapid and ground-breaking extensions of the franchise in this country, especially in the period from the 1890s to the 1920s.[12]

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7 Once women and indigenous people suffered — and still today most resident non-citizens suffer — blanket exclusions. Such exclusions deny *political* citizenship to those they affect.

8 Commonwealth Electoral Act 1918 (Cth), s 93(1)(a). Minors can, federally and in some States, pre-enrol at 17 in order to be eligible to vote if an election is called after their 18th birthday without having to rush through an enrolment prior to the close of the rolls shortly after the issuing of the writs: s 100(1) of the Act.

9 Section 93(1)(b) of the Act. An exception in s 93(1)(b)(ii) preserves the right to vote of British subjects who were enrolled to vote before 26 January 1984. Again, this is a contestable place to drawn the line, yet few would argue that some minimum residency and attachment to the political community in question is a necessary pre-requisite to possessing the right to vote.

10 Section 93(8)(a) of the Act. Typically such voters are disenrolled only if the Australian Electoral Commission (the AEC) is notified by a relative or carer concerned to avoid the potential fine for failure to vote.

11 Where "equal" refers to formal equality — one person, one vote, without any discrimination as to race, gender, or property qualifications, nor plural voting for some — as opposed to more substantive issues of one vote, one value or proportional representation.

12 A Brooks, "A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise" (1993) 12 *U Tas LR* 208, in a lawyerly, historical account of the evolution of the franchise in Australia, argues that this "cherished myth" of Australia as a paragon of electoral democracy is blemished, particularly as regards indigenous Australians, but also more generally in pusillanimous court decisions on voting rights and one-vote one-value, such as *R v Pearson ex parte Sipka* (1983) 152 CLR 254; *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; and *McGinty v Western Australia* (1996) 186 CLR 140.

But our franchise is also presently denied to anyone who "is serving a sentence of five years or longer for an offence against the law of the Commonwealth or of a State or Territory".[13] This very disqualification is ambiguous and suggests the section is ill-conceived. One need not be physically imprisoned to be subject to a sentence (for example those serving suspended sentences or periods of parole). However the generic term "prisoners" will be preferred in this paper to the broader term "convicts", which has pejorative historical overtones, and since in practice it is those incarcerated in prison who are most likely to be actually disenfranchised under the law because the Australian Electoral Commission (AEC) relies on information from the Controllers-General of Prisons to make deletions from the roll.

This restriction, whilst perhaps not affecting more than 6 000 to 9 000 Australians,[14] is a blot on the democratic credentials of our electoral system. The purpose of this paper is to explore, explain and reject the reasoning behind, and historical underpinnings of, this form of disenfranchisement. In an old human rights homily, a society can be judged on how it treats its worst off, who include those who through imprisonment are, quite literally, our society's outcast and outlawed.[15]

This article is written in the wake of a proposal by the Coalition government's majority on the Joint Standing Committee on Electoral Matters, to widen the disenfranchisement to cover *all* people "serving a prison sentence for any offence against the law of the Commonwealth, or of a State or Territory".[16] This recommendation, being harsher than any previous disenfranchisement at Federal level, represents a throwback to the era before the universal adult franchise. No justification for the change was argued, the report merely asserting that denying freedoms might deter crime and that law-breakers should not expect to retain the franchise. This recommendation can perhaps best be understood as a piece of cheap politicking: although unlikely to pass a Senate without a conservative majority in that chamber, a bill to disenfranchise all prisoners would appeal both to tabloid rhetoric and the common conception of prisoners as inhuman others.

BALLOTLESS AND BEHIND BARS: CURRENT ELECTORAL LEGISLATION[17]

Citizens of a lesser Commonwealth

Currently, lists of people sentenced to imprisonment for five years or more have to be forwarded, by the various State Controllers-General of Prisons[18] to the AEC, to enable

13 Section 93(8)(b).

14 See figures in, and immediately following, Table Two, below, text at n 96.

15 We may not technically perpetuate infamy, ostracism, banishment and outlawry (in the old Germanic sense of ousting from the tribe, rather than the common law sense of sentencing in *absentia*). However many features of modern incarceration, social and media stigmatisation, and the denial of certain civil rights, are but contemporary versions of these ancient practices.

16 Commonwealth Parliament, Joint Standing Committee on Electoral Matters, *The 1996 Federal Election* (1997) Recommendation 24 at 48-49.

17 This field was previously surveyed by J Fitzgerald and G Zdenkowski, "Voting Rights of Convicted Persons" (1987) 11 *Crim LJ* 11.

it to disenrol such prisoners.[19] Prior to December 1995, the disenfranchisement was in the even harsher, and administratively unworkable form, of a denial of the ballot to anyone serving a sentence where the *potential* punishment for the offence was five years or more. (Earlier in Australia's electoral history, this prohibition was against anyone voting who was serving a sentence where the potential punishment was one year or more).[20]

In addition, although of negligible practical importance, anyone who has ever been convicted of treason or treachery is also ineligible to vote, unless pardoned.[21] Similarly, any executive or committee member of an "unlawful association" cannot vote for a period of seven years from the association being declared unlawful.[22]

Aside from those whose unsoundness of mind makes them incapable of understanding the nature and significance of enrolment or voting, prisoners are the only significant section of the adult Australian citizenry not entitled to enrol and vote. Yet the two groups are quite distinguishable. People who are mentally incapable to such a degree that they could not comprehend the act of voting as the making of a choice between listed alternatives, would in practice be disenrolled at the request of their carers, usually to avoid the bureaucratic rigmarole involved in justifying their failure to vote, both enrolment and voting being compulsory in Australia.[23] Prisoners have neither a personal nor a guardian's choice in the matter. Further, whilst the intellectually impaired suffer from a disability that denies them the rationality needed to make electoral choices, prisoners do not as a group suffer any such disability.

Consider the irony that after each national election, dozens[24] of those who on libertarian grounds object to paying fines for not voting choose to serve short gaol sentences as a form of quiet, civil protest, yet thousands more are denied the vote precisely because they are serving time in gaol. Even in apathetic and libertarian political times, most Australians see voting as a very basic and important right, which they value no less for the regularity of its exercise. The worth of the franchise is ingrained: even if voluntary voting were introduced, in excess of 80 per cent of Australians would still vote.[25] Disenfranchising prisoners therefore deprives them not just of a nominally valuable right, but one which is recognised to be so by most of their compatriots.

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18 Now in fact known as the Directors of the various State correctional departments.

19 Section 109 of the Act.

20 Commonwealth Franchise Act 1902 (Cth), s 4.

21 Section 93(8)(c) of the Act.

22 Crimes Act 1914 (Cth), s 30FD. This disqualification was introduced in 1932, having not been present in the original Unlawful Associations Act 1916 (Cth).

23 Compulsion is provided by ss 101 (enrolment) and 245 (voting) of the Act. The only significant exception is for Norfolk Islanders, for whom enrolment and hence voting is voluntary under s 101(5A) of the Act.

24 At least 40 were imprisoned after the 1993 election: see sources quoted in M Healy and J Warden, *Compulsory Voting* (Parliamentary Research Service Paper No 24/95) at 18.

25 According to a survey taken prior to the 1996 Federal election: a remarkable finding given that election was notable for a lack of polarisation or enthusiasm in the electorate, and a perception that the major parties' platforms were indistinguishable. Compulsory voting would appear to have reinforced the value of the ballot, rather than encouraging cynicism towards or devaluation of it.

The penal colonies: prisoners' voting rights at State and Territory polls.

Prisoners' voting rights at State and Territory elections and referenda vary, as described in the box below. Generally, such rights vary across a spectrum from more restrictive (especially Tasmania), to less restrictive (South Australia) than the current Federal position, although there is a clear, administratively driven trend for States and Territories to harmonise enrolment procedures with the those of the Commonwealth.

Australian Capital Territory:	Automatically picks up the Commonwealth position (Electoral Act 1992 (ACT), s 72). Whilst the ACT only operates a remand facility,[26] allowance is specifically made for the enrolment of prisoners 'transported' to New South Welsh correctional facilities.[27]
New South Wales:	No prisoner serving an actual sentence of one year or more has the vote (Parliamentary Electorates and Elections Act 1912 (NSW), s 21).
Northern Territory:	In 1979, shortly after self-government, all prisoners were granted the vote in Territorial elections (Electoral Act 1979 (NT), s 27(1)(b)).[28] However as of September 1995, the Commonwealth enrolment qualifications were adopted (Northern Territory Electoral Act 1995 (NT), s 28(1)).[29]
Queensland:	Automatically picks up the Commonwealth position (Electoral Act 1992 (Qld), s 64(1)). This assists in roll maintenance. Under the previous Act, no person who on polling day was "under sentence of imprisonment" could vote (Elections Act 1983 (Qld), s 44) even if on the roll. Further, albeit redundantly, s 23 of the 1983 Act disqualified from voting or enrolment, anyone "in prison" serving a sentence of six months or longer.

26 Remandees are serviced by a mobile polling booth under Electoral Act 1992 (ACT), s 150.

27 Electoral Act 1992 (ACT), s 71(2).

28 Far from being a conservative outpost, the Northern Territory thus followed South Australia in being the second Australian jurisdiction to allow the full prisoner franchise. The NT has Australia's highest incarceration rate: 2.64% of Australia's prisoners were in NT gaols as of 30 June 1994, whereas the NT population at that time accounted for just 0.95% of the nation's population: National Correctional Services Statistics Unit, Australian Bureau of Statistics, *Prisoners in Australia, 1994* (1996) and Australian Bureau of Statistics, *Year Book Australia* (1995) at 93.

29 Mr Perron, then Chief Minister, explained this act of disenfranchisement thus: "While there is always likely to be debate in the community as to what, if any, rights should be retained by those serving prison terms, the priority of my government is to *simplify* the rules surrounding those rights ..." (emphasis added), NT Parl Rec 1995 No 11 at 3813.

South Australia:	All prisoners in South Australia have the vote (Electoral Act 1985 (SA), s 29). This liberal reform came about in 1976, with the removal of the disqualification which then disenfranchised anyone under a sentence of imprisonment for one year or more (Constitution Act 1934 (SA), s 33). The reform had been recommended by the Mitchell Committee three years earlier.[30]
Tasmania:	No person in prison under any conviction has the vote (Constitution Act 1934 (Tas), s 14).
Victoria:	Since 1984, no prisoner under sentence for an offence potentially punishable by imprisonment for five years or more has the vote (Constitution Act 1975 (Vic), s 48(2)(b)). Between 1975 and 1984 Victoria allowed prisoners and convicts (except traitors) full postal voting rights. However this liberal position was restricted in 1984, partly for the administrative, roll-keeping convenience of paralleling what was then the Commonwealth position.
Western Australia:	No person under sentence of imprisonment totalling one year or more has the vote (Electoral Act 1907 (WA), s18).

International human rights and prisoner rehabilitation

Article 25 of the International Covenant of Civil and Political Rights (ICCPR), the treaty which is the inspiration for, and schedule to, the Human Rights and Equal Opportunity Commission Act 1986 (Cth), provides:

> Every citizen shall have the right and opportunity ... without unreasonable restrictions: ... to vote ... at genuine periodic elections which shall be by universal and equal suffrage ...[31]

Concerning prisoners generally, article 10 of the ICCPR provides:

> (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> ...
>
> (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

In short, in international law, the foundational democratic principle is equal and universal suffrage allowing only for restrictions which are reasonable. All citizens[32] should have the right to vote. Prisoners are citizens. Reasonable restrictions are allowed, but such restrictions arguably should only concern enrolment or registration mechanics, or be tailored to restrictions relevant to the ability to understand and take part in the balloting process. Prisoners, in general, must be treated with dignity, and a

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30 Criminal Law and Penal Methods Reform Committee of South Australia, *Sentencing and Corrections* (Report No 1, 1973) at 130.

31 On the development and theoretical context of article 25 see H Steiner, "Political Participation as a Human Right" (1988) 1 *Harv Hum Rts Yrbk* 77.

32 "Citizens" in international human rights law does not encompass children.

primary aim of their incarceration must be rehabilitation with a view to their return, as positive and active members, of the broader society.

How, in contemporary society, could denying prisoners the right to vote — even those convicted of serious crimes — be considered a reasonable restriction on universal suffrage, within article 25? The specific provision on treatment of prisoners suggests, on the contrary, that prisoners should not be discriminated against with respect to such basic civil rights. This interpretation of the ICCPR reflects prevailing opinion in criminological thought.[33] It has been reflected, or adopted, in some Scandinavian countries (Sweden abolished prisoner disenfranchisement in 1936, Denmark in 1951), as well as in India, Israel and the former Soviet Union.[34]

If the social rehabilitation of prisoners is an important human rights issue, then people who have breached serious criminal norms should be encouraged to reform, in part by including them, where possible, within the broader social and political community. The vote, seen as a civic responsibility, as it clearly is in Australia's compulsory voting system, is a marker of reflective engagement with others in the community. Encouraging prisoners to vote would be one small way of encouraging their civic re-absorption. While prisoners may often feel little more than resentment at the politicians and the executive under whose power they are confined, it would be better for that resentment to be channelled into the process of thinking, debating, and forming political opinions that is part of the voting choice, than left to fester. Full voting rights for all prisoners may not be a dramatic step for the average prisoner, but could form part of a constellation of remedial activities, the exercise of which would encourage re-integration, and responsible decision-making.[35]

Because the prison population is confined, there would be few adult sub-communities in Australia which could more easily be the target of AEC enrolment campaigns, or more accessible for civics and contemporary political issues education designed to encourage informed debate. The Act already provides detailed and complex regulations to enable prisoner voting by those still qualified to vote, and the AEC organises mobile voting booths to visit prisons to ensure that those on remand or serving sentences short enough to remain enfranchised can practically exercise their

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33 The Seventh International Congress of Criminal Law 1957's finding that the loss of civil rights is a specific form of "degradation [which] should be abolished" (in Damaska, below n 49 at 354); the Report of the Mitchell Committee in South Australia, above n 30; and Nagle J's recommendation in the *Report of the Royal Commission into New South Wales Prisons* (1978) that "loss of liberty is the essential punishment, with prisoners retaining all other rights except those necessarily limited by the need to maintain security".

34 As reported by Damaska in 1968, below n 49 at 358.

35 Many female prisoners in New South Wales, through the new Parramatta Transitional Centre, can engage in community work, have access to bank accounts, and are allowed to care for their children. It is ironic that some of those prisoners will have access to such practical freedoms in a bid to restore their links with the community, but still be denied the vote. Perhaps even odder is the widespread practice in the United States of disenfranchising prisoners, but allowing them extensive communication and even media access rights, under first amendment free speech principles: A Fowles, *Prisoner's Rights in England and the United States* (1987) at 127-129.

right to vote.[36] The AEC's internal manuals advise officers organising such mobile booths to "anticipate around 60 per cent of the prisoners [at any correctional centre] will vote".[37]

Given the importance of voting rights in international law, it is also remarkable that prisoner voting rights are sometimes curtailed on the basis of administrative convenience or simplicity in roll-keeping. For example, the Northern Territory recently introduced restrictions to its previously liberal prisoner voting regime, justifying this as a measure designed to harmonise its rolls with the Commonwealth rolls.[38] What other group of the population could have the removal of a fundamental right justified on the grounds of administrative convenience?

ATTEMPTS TO JUSTIFY PRISONER DISENFRANCHISEMENT

Electoral purification or punishment?

In United States jurisprudence, "the manifest purpose of [prisoner disenfranchisement] is to preserve the purity of elections, and not to invoke a punishment or penalty".[39] Statements to this effect are commonplace in judgments earlier this century. For example, the Missouri Supreme Court in *State ex rel Barrett v Sartorious* declared that "[disenfranchisement] provisions are for the protection of the public by permitting only those who have lived up to certain minimum moral and legal standards ... to exercise the high privilege of participating in government by voting."[40]

The language of more recent judgments does not emphasise the idea of maintaining the "purity" of elections, preferring the more neutral language of "reasonable electoral regulations" and maintaining the corollary that disenfranchisement is not punishment. For instance, the United States Supreme Court in *Trop v Dulles* stated that "the purpose of [disenfranchisement] is to designate a reasonable ground of eligibility for voting, [such a] law is sustained as a non-penal exercise of the power to regulate the franchise".[41] It is my contention that attempts to deny that disenfranchisement on conviction is a form of punishment is simply technical, lawyerly sophistry.

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36 Section 226A of the Act provides for mobile polling booths at prisons, including procedures for the distribution of candidates' electoral material to prisoners. Under Schedule 2 of the Act, enrolled voters in detention are eligible to apply for either a pre-poll or a postal vote. Section 184A(2)(d) of the Act further entitles those in custody who are entitled to enrolment, to register as general postal voters — so they automatically receive postal vote application forms once an election is called. Prisoners generally are targeted as supplies of postal vote applications are sent to the officer in charge of each prison for distribution: AEC, *Divisional Office Procedures Manual Volume One*, part 14(2) at 8.

37 AEC, *Divisional Office Procedures Manual Volume One*, part 13(4) at 2.

38 Above n 29.

39 25 Am Jur 2d at § 94.

40 149 ALR 1067 (1943) at 1069 per Hyde J for the Court. To similar effect was the North Dakotan Supreme Court in *State ex rel Olson v Langer* 256 NW 377 (1934) at 387 per Burke J ("purpose ... is the protection of the state by denying [the vote] to those whose unfitness is evidenced by conviction of felony. This disqualification is not a penalty"). See also *Application of Marino* 42 A2d 409.

41 356 US 86 (1958) at 96-97, in *obiter* from the plurality opinion. Of course whilst the legislature in a representative democracy can only claim the mandate of the enfranchised

The Supreme Court in *Trop v Dulles* based its statement on a distinction between disabilities imposed to punish (for example, to reprimand or deter) and disabilities imposed to accomplish some other legitimate governmental purpose. Surprisingly, United States constitutional law and principle recognises no such thing as a civil, natural or absolute right to vote; at best voting is a political right or privilege, which can be taken away by the legislative power that conferred it.[42] Although the Court in *Trop* was only giving prisoner disenfranchisement as an illustration of the punishment/legitimate regulation distinction, it was an illustration that was simply asserted, rather than argued.

This assertion was then used to underpin a leading United States case on prisoner disenfranchisement, *Green v Board of Elections of the City of New York*.[43] There, the United States Court of Appeals rejected arguments on behalf of a former prisoner, who had served sentences related to his activities in organising the Communist Party, against a State law which denied the franchise for life to those convicted of felonies, unless they received a pardon or restoration of citizen rights from the President. Green's arguments were based on United States constitutional provisions: the prohibition against bills of attainder (art 1, s 9(3)); the prohibition against cruel and unusual punishment (eighth amendment); and the equal protection provision (fourteenth amendment). Since, as was argued, the loss of voting rights was not seen as a punitive measure, it could not be part of any attainder, nor could its cruelty or unusualness be considered. This reasoning was buttressed by an original intent reading of the eighth amendment — prisoner disenfranchisement being common in the United States in the 19th century, including during Reconstruction — and the presence in the second clause of the fourteenth amendment of an indirect reference to disenfranchisement of criminals in a formula for determining a State's electoral entitlements.

Similarly, the United States Supreme Court in *Richardson v Ramirez*[44] upheld the constitutional right of that country's States to exclude felons and ex-felons from the ballot on the basis of that reference in the second clause of the fourteenth amendment. Yet, as Marshall J convincingly argued in dissent, the purpose of that oblique reference in an equal protection amendment, was to penalise States which practised widespread disenfranchisement by limiting their representation. Such a liberal purpose fits uneasily with a reading that simultaneously treats the amendment as a direct recognition of a right to disenfranchise.[45]

The assertion that prisoner voting affects the "purity" of elections is plainly offensive. It is based on primitive notions that criminality might be infectious or unconfinable, and hardly fits with modern electoral practice, particularly in Australia

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and hence has an incentive to keep the franchise as broad as possible to maximise its mandate, legislators of various political backgrounds may have an incentive to exclude from the franchise particular groups who are unlikely to support them.

42 *American Jurisprudence 2d* at § 53-54. Exceptions to this are instances where State constitutions explicitly enshrine the right to vote.

43 380 F2d 445 (1967). Certiorari application to the United States Supreme Court was denied, with Douglas and Brennan JJ dissenting: 389 US 1048 (1968).

44 418 US 24 (1974).

45 Ibid at 74 per Marshall J. Section 25 of the Australian Constitution is based on the fourteenth amendment.

where mobile polling of prisons is conducted to allow short term prisoners to vote.[46] At best, it might be argued that the maintenance of the integrity of the electoral system requires that those convicted of certain corrupt, or publicly fraudulent offences, particularly any to do with the administration of fair elections, might be denied involvement in or access to certain of the balloting processes, such as scrutineering, or officiating at the polls. It is hard to see, however, why even such offenders should be denied the vote itself, an act which merely involves the completion of a form. To go further and deny all or even a sub-set of serious offenders the vote, is impossible to justify on any arguments internal to electoral law.

Prisoners form such a small minority[47] of the voting population, even in the over incarcerated United States, that arguments about their tainting the process are statistically ludicrous, as well as morally dubious.[48] Electoral law principles, on the other hand, maintain that every vote is important as an expression of each citizen's wishes: a point reinforced both by the general compulsion to vote, and the significant efforts of the AEC to educate and encourage voters and to minimise informal voting.A prisoner's vote is just as valid an expression of preference as that of a used car vendor, a politician, or a business tycoon.

The tendency in the literature on the treatment of prisoners is to label the denial of civil rights as a "collateral consequence"[49] of sentencing, and thereby to sub-ordinate these issues to the consideration of more paradigmatic forms of punishment, such as incarceration. This is understandable, given the tangible, daily, and pressing concerns with the often appalling conditions of prisons.[50] However the very use of the "collateral consequence" terminology and outlook helps to relegate such issues to the margins of criminology, penology and correctional theory and practice. The deprivation of civil rights on imprisonment is not merely an indirect consequence of conviction: it is statutorily mandated and usually automatic. It can only be properly understood in its historical context. It is to this context, which reveals the penal nature of such measures, that this article will now turn.

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46 Above n 36.

47 Currently the number of prisoners and other convicted persons denied the vote under Commonwealth electoral law is, at a rough estimate, between 6 000 and 9 000: Table Two, below, text at n 96. This represents less than 0.07% of total electoral enrolments.

48 Such arguments probably also lay beneath the war-time disenfranchisement of citizens born in an enemy country, as occurred under the Commonwealth Electoral (War-time) Act 1917 (Cth), ss 10-12.

49 Even Damaska used the phrase "collateral consequences" in compiling an extensive and detailed two part article: M Damaska, "Adverse Legal Consequences of Conviction and their Removal: A Comparative Study" (1968) 59 *Journal of Criminal Law, Criminology and Police Science* 347 (Part One) and 542 (Part Two).

50 Thus documents such as the UN Standard Minimum Rules for the Treatment of Prisoners outline minima for conditions of imprisonment, without touching on broader civil rights. In turn, this emphasis leads researchers to focus solely on direct forms of treatment: eg, T Birtles, "Prisoners' Rights in Australia" (1989) *ANZJ Crim* 203. An exception to this is the collection of pieces on "The Status of Prisoners", in L Radzinowicz and M Wolfgang (eds), *Crime and Justice (Vol 3): the Criminal in Confinement* (1971).

Lost honour, infamy, civil death and the denial of civil rights as punishment

Imprisonment is a recent phenomenon. The dramatic movement from public, physical punishments, to institutionalised incarceration, occurred across Europe and the United States between 1750 and 1820.[51] In an ethical sense, imprisonment was a welcome development, in that it represented the possibility of a move away from crueler and more violent and excessive punishments. However in a historical sense, imprisonment, even if it can partly be analogised to traditional punishments such as banishment and ostracism, is secondary to older forms of punishment, which were not just confined to immediate physical exactions (capital or corporal), but which leant heavily towards social penalties. Social penalties included the denial of a wide range of civil rights, the forfeiture of property, and various forms of humiliation and stigmatisation.

Just as capital punishment was the ultimate form of corporal punishment, so civil death, and its analogues, were the ultimate form of social punishment. Within the common law, civil death was the annihilation of the legal person whose physical life was usually to be annihilated by execution. Thus, during the feudal period, persons convicted of treason or felony might be deprived of their property by forfeiture, their right to inherit and transmit property, all rights in court, and rights associated with political and public affairs. Attainder, which ordinarily occurred on judgment of death or outlawry for treason, involved forfeiture of all real estate[52] and extended to "corruption of the blood".[53] Lesser forms of civil death — which accompanied conviction of all felonies — did not extend so far, but still entailed severe loss of civil rights and forfeiture of chattels, analogous to the consequences of attainder.

Whilst forfeiture was abolished by The Forfeiture Act 1870 (Imp),[54] a wide range of civil disabilities and denials of rights were retained in that statute. In an era when the franchise was otherwise being slowly extended, s 2 of that Act prescribed that any person convicted of treason or felony and sentenced to imprisonment with hard labour or exceeding 12 months, would not just lose any public employment, university place and publicly funded pension or superannuation rights, but would automatically became "incapable of exercising any right of suffrage or other parliamentary or municipal franchise".[55] Nor could such a convict sue or alienate property;[56] instead an

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51 M Foucault, *Discipline and Punish: the Birth of the Prison* (1991). Ignatieff notes that before 1775, major crimes were punished with banishment, pillory, corporal or capital punishments, with incarceration a short term measure for minor infringements: M Ignatieff, *A Just Measure of Pain: the Penitentiary in the Industrial Revolution 1780-1850* (1978) at 24-25.

52 Generally, in instances of high treason, all property, both real and personal, was forfeited to the Crown. In cases of petit treason and felony, all personal property was forfeited absolutely, but real property interests were ceded to the Crown for a short period, which became known as "the king's year, day and waste", since the Crown could take control of, and waste, such real estate, for a year and a day, although the right to waste (ie, destroy fixtures, raze the land) became a right to take the profits of such land: Blackstone, *Commentaries on the Laws of England*, ch 29, Book IV at 380 -385.

53 Loss of rights by corruption of blood went as far as to deny issue the right to inherit any property. This doctrine was abolished by 54 Geo III (Imp) c 145.

54 33 & 34 Vict (Imp) c 23.

55 The current UK provision is in some ways harsher. Anyone in prison serving a sentence is legally incapable of voting: Representation of the People Act 1983 (UK), s 3.

administrator was appointed.[57] Such loss of civil rights would extend until the sentence was served.[58]

These forms of civil death are not peculiar to the common law, nor simply manifestations of feudal sub-ordination and control.[59] They were common forms of penalties, which can be traced to Roman and Greek practices. *Infamia* or infamy applied in Roman law to those citizens convicted of serious wrongs, as well as others who automatically suffered loss of status.[60] Besides the general consequences to one's reputation, infamy carried with it the loss of *suffragium* (the right to vote), and *honores* (the right to hold office), together with the loss of the rights to represent another in court, be a witness, present a public indictment, inherit in preference to other siblings and serve in the army.[61]

Whilst classical conceptions of *ius* may differ from modern notions of subjective rights vested in individuals,[62] and the denial of some of these freedoms could be rationalised as protecting others (for example those whose affairs might be mismanaged by someone convicted of an infamous crime), the denial of these civil rights can only be understood by remembering the importance Roman society placed on such capacities as the just and balanced indicia of full citizenship.[63] The retraction of such legal abilities, albeit justified by the failure of the individual to act in accord with the dictates of the balanced relationship demanded by the social order, amounted to a severe humiliation, expressing the strongest condemnation by state and society.

Roman treatment of "infamous" crimes in turn reflected the older Athenian law, rooted in the notion of *time* or honour. *Atimia* was the punishment of the removal of honour, applied to (male) citizens, characteristically for offences against civic duties. Such punishment encompassed the removal of certain core citizenship rights such as the right to speak and vote in the *ekklesia* — the assembly or law making body, which also had some judicial powers to hear and resolve disputes and charges. They also included other rights not necessarily linked to citizenship, such as the right to appear as a litigant or witness. *Atimia* was ordinarily a life-long condition. For a people to

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56 The Forfeiture Act (Imp), s 8.

57 Ibid, s 9.

58 Ibid, s 10.

59 Blackstone noted that in cases analogous to treason, the forfeiture of property to the Crown could be found in Anglo-Saxon law: Blackstone, *Commentaries*, above n 52 at 383.

60 For instance, soldiers who were dishonourably discharged — an example of *infamia immediata* as opposed to *infamia mediata*, which followed as a consequence of a judicial decision. W Burdick, *The Principles of Roman law and their Relationship to Modern Law* (1938) at 209. Technically, once the list of infamous crimes and breaches of obligations became settled, there was little judicial discretion and hence little difference in the types of *infamia*.

61 S Amos, *The History and Principles of the Civil Law of Rome* (1989) at 112-113. Damaska also lists the abridgment of the right to marry: above n 49 at 351.

62 A point developed by the French scholar Michel Villey: B Tierney, "Villey, Ockham and the Origin of Individual Rights" in J Witte and F Alexander (eds), *The Weightier Matters of the Law : Essays on Law and Religion* (1988).

63 Although as one writer observes, by Justinian's time, infamy's consequences regarding public rights and privileges had faded, as *suffragium* and *honores* were by then of little value: Burdick, above n 60 at 210.

whom public rights and duties amounted to having a share in the *polis*, *atimia* was a serious penalty to endure.[64]

Common law terms such as felony (from Old English "fell" meaning seriously and intentionally wicked), corruption of the blood, and attainder (from "attaint" meaning stained or blackened[65]) reflect these classical approaches. Serious acts of criminality were socially condemned by the denial of fundamental civil rights. This was no mere incidental denial, but a central form of punishment intended to act on the civil conscience in the same way that physical pain and deprivation acted on the body of the criminal. The denial of civil rights can be linked to social degradation, which manifested itself more obviously in other forms of public but physical humiliations such as branding, dunking and exposure in the stocks. Modern writers, who classify today's denials of civil rights to prisoners as a form of social degradation,[66] have history on their side.

Modern practices of prisoner disenfranchisement, therefore, have their roots in anachronistic and ancient doctrines of infamy, loss of honour and civil death.[67] It may seem a little ironic that the roots of these undemocratic provisions can be found in the Athenian system, which we often assume to be the seminal model of democratic practice, and which itself dealt with what we would call criminal law and punishment by a system of democratic voting. Questions of guilt and innocence for an array of public and civil wrongs, and hence ultimately punishments such as *atimia* which carried with them the removal of voting rights, were decided in Athens by citizen-jurors casting ballots.[68] An Athenian's democratic rights were thus removable by the directly democratic ballot of his peers.

Contemporary democracy, adjudication and punishment of course do not rest on so neat a model as the Athenian conceptions of citizen participation and honour (which in any event were limited to wealthy, male citizens). Nonetheless it could be argued that convictions in contemporary society represent two forms of dishonour and dishonouring that might justify disenfranchisement.

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64 S Todd, *The Shape of Athenian Law* (1993) at 142-143 and 182.

65 At least in Christian doctrine, it is the convict whose spirit, reputation and legal personality is forever besmirched, rather than the society and people with whom the convict may come into contact who may be "tainted" (allowing that a more magical understanding — that the wrongdoer taints the whole community and even the physical world, well documented in J Frazer, *The Golden Bough: a Study in Magic and Religion* (1922) — obviously lives on in contemporary fears and ostracism).

66 One textbook categorised the loss of civil rights under the heading "social degradation": E Sutherland and D Cressey, *Criminology* (9th ed 1974) at 308-309. Damaska concurred "[there is] little doubt that the motive behind [inflicting a loss of civil rights] is that of degrading the offender": above n 49 at 354.

67 Some legislation retains explicit classical links: for example the Californian Constitution denies electoral rights to those convicted of "infamous" crimes: discussed in *Otsuka v Hite* Cal 2d 596 (1966). A common, classical ancestry helps explain why such practices are so widespread and often similarly framed. As to their frequency, see the survey in Damaska, above n 49. For an overview of the Canadian position in the context of prisoner's civil rights generally, see G Kaiser, "The Inmate as Citizen: Imprisonment and the Loss of Civil Rights in Canada" (1971) 2 *Queen's LJ* 208 at 213-215.

68 They used pebbles known as *psephoi*, whence our term "psephology" for the study of elections.

The first such argument is that serious crimes, such as those which would justify a prison term of five years or longer, carry with them a form of loss of honour which entitles society to strip a prisoner of certain fundamental rights. Not perhaps because society fears the taint of having to mix its exercise of its rights with the criminal's continuing exercise of those rights, but because the deprival of fundamental rights is a symbolic form of punishment which marks the prisoner as someone with degraded honour.

The second related argument is based on the idea of the social contract. If in a liberal democracy we rationalise the exercise of governmental powers with the implicit trading of certain natural liberties for the protection, in particular, of the criminal laws and police of the state, then anyone who breaches any of those laws, at least in a serious manner to be condemned to a significant prison sentence, has dishonoured the contract with society.[69] That is, a conviction is a finding of a deliberate or knowing breach of the social contract, which reflects a rejection by the wrongdoer of the formal rights and responsibilities which are meant to bind us all. In addition to physical punishments and treatment which might offer deterrence, proportionate requital and/or rehabilitation, there is a need for a political penalty which mirrors the criminal's repudiation of the social contract.

These two arguments are not independent: the second is merely a post-enlightenment version of the first, which draws on a more traditional value (honour) than the liberal values of the fictional social contract. Can these arguments be justified by reference to any of the established grounds of punishment?

Clearly, the potential loss of civil rights such as the vote has negligible deterrent value. It is unlikely, given the better understood threat of incarceration with its loss of a host of immediate, quotidian rights and freedoms,[70] that much crime will be deterred by adding the threat of the loss of occasional, albeit symbolically important, citizenship rights such as the vote.[71]

Nor can the loss of civil rights be seen to have any rehabilitative value:[72] if anything, it is dehabilitative. On the contrary, by treating prisoners effectively as non-citizen animals, rather than political animals[73] we can only reinforce a self-fulfilling cycle of disempowerment and civic irresponsibility. For the not insignificant numbers of recidivists, the denial of the vote serves not only as an isolated suppression of the right to vote at forthcoming elections, but a chain or life-time of disentitlement that can only help ensure that the prisoner develops no engaged or continuing sense of social involvement or citizenship. Further, loss of civil rights, such as the vote, tend to occur automatically, without any judicial or administrative discretion being consciously

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69 The United States Court of Appeals explicitly invoked Locke's social contract theory in *Green v Board of Elections of the City of New York* 380 F2d 445 (1967) at 451.

70 Such as freedom of movement, sexual freedom, and the right to work.

71 One can understand the basis on which a Director of the Queensland Corrective Services Commission might claim that "the majority [of prisoners] do not overly concern themselves with this aspect [ie, voting] of civil responsibility": letter to author, 1 July 1996.

72 Unless it be thought that the sense of shame a convict might feel at losing the vote or other civil rights might work in some small way to encourage him to feel, and redemptively work through, his guilt.

73 Aristotle's *zoon politikon*.

exercised: they are not tailored to the circumstances of the offence or the offender, and hence have little rehabilitative purpose.[74] By elimination, then, we can only look to retributive and symbolic theories of punishment for any justification for disenfranchisement.

Retribution and community sentiment in the denial of the vote

Holmes wrote in 1881 that "[I]t has never ceased to be one object of punishment to satisfy the desire for vengeance".[75] That statement remains true today, despite decades of more enlightened criminological debate and attempts at reform. In addition to retribution, deterrence and rehabilitation, he claimed that the "first requirement of a sound body of law" was the need for a correspondence between law and the "actual feelings and demands of the community, whether right or wrong".[76] Holmes did not conceive of this as bald majoritarianism, but a practical precept, of special importance to the criminal law, which helped maintain the state's monopoly over retributive acts by avoiding recourse to private vengeance.[77] However such deference to societal opinion in sentencing practice can only be permissible as a validation of retributive urges that are acceptable or justifiable. Otherwise Holmes's requirement does simply reduce to political pragmatism and deference to mob sentiments. To what degree, then, does the urge for revenge justify disenfranchisement?

Retribution need not be seen merely as a desire for revenge. Feinberg argued, in conformity with common sense, that punishment had a symbolic significance, necessary to express community condemnation.[78] However a penalty such as the loss of civil rights, which has come to be a penalty secondary to and cumulative upon imprisonment, can only represent community reprobation if it can sensibly be seen as symbolically connected with the offences for which it is exacted. Related to this, retributive theory requires a proportionate balance of "harm for wrong", else it generates a cycle of grievance and revenge, and becomes vindictiveness rather than vindication.

In what sense is the denial of a fundamental, birthright marker of citizenship, such as voting, proportionate to any crime short of treason, sedition or those specific electoral offences which involve a rejection of the legitimacy of the current political system? In what sense would ordinary citizens see any symbolic link between disenfranchisement and the harm caused by most criminal acts? To ask these questions is to answer them. Whatever merits retributive theory has in justifying punishment in general, it has little to say for the denial of civil rights to the average offender. Whether or not disenfranchisement leads to festering grievances for many prisoners, it can only be seen as a petty form of degradation, unjustified on either electoral or penal principles.

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74 A point stressed in S Rubin, "The Status of Prisoners: 1 Loss and Curtailment of Rights" in L Radzinowicz and M Wolfgang (eds), above n 50 at 25.

75 O W Holmes Jr, *The Common Law* (1881) at 40.

76 Ibid at 41-42.

77 In recent attempts to enfranchise prisoners in Australia, retributive urges, invoked and fed by self-serving media and political appeals, were central to thwarting reform in this area.

78 J Feinberg, "The Expressive Function of Punishment" (1965) 49 *The Monist* 397.

Canadian courts have ruled that prisoner disenfranchisement, whether drafted in blanket terms to cover all inmates, or only to cover those with longer term sentences, is not proportionate to any rational and legitimate state interests such as encouraging civic responsibility and enhancing criminal sanctions. In cases such as *Sauvé v Canada (Attorney-General)*[79] and *Sauvé v Canada (Chief Electoral Officer)*[80] the Canadian government sought to uphold prisoner disenfranchisement laws which *prima facie* breached s 3 of the Canadian Charter of Rights and Freedoms guaranteeing the right to vote. The courts ruled that such restrictions were not reasonable. In the latter case, for instance, it was held that even a disenfranchisement of only those serving two years or longer satisfied neither a minimal impairment nor a proportionate effects test.[81]

Moral condemnation: the abstractions of legal expressivism

A United States philosopher, who has testified for the Canadian government in defence of prisoner disenfranchisement, has argued that the expressive function of such laws works both at the retributive level, through public condemnation, and at the reformative level, through moral education. Her argument is that prisoner disenfranchisement laws, as with all laws which help define a political community and its core values, should be judged according to what they express or symbolise in the polity. She acknowledges that, whilst it is easy to make retributive and reformatory arguments supporting disenfranchisement, we also have to consider whether the law unduly compromises the democratic commitment to political equality which universal suffrage was designed to realise. Her answer to that objection is to claim that temporary disenfranchisement does not compromise that commitment, because it would not be read as treating prisoners as political inferiors or subordinates, but as a societal response to the offender's choice to breach a basic trust reposed in him by society and the victim:

> A conception of liberalism and democracy that would deny the state the right to fight, using expressive punitive tools, freedom-suppressing attitudinal changes in the name of neutrality is ... a surprisingly damaging thesis ... It is destructive to the victims of the harm wrought by such attitudes, destructive to the community, and harmful to the realisation of freedom and equality for all.[82]

There is some initial appeal in these arguments. The complex nature of the right to vote marks it as an abstract concept, the denial of which may be rich with expressive value, especially to those who cherish it, if not necessarily to all of those who offend.

Perhaps the simplest and most striking retort to this position can be drawn from Hugessen JA, in another Canadian case:

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79 [1993] 2 SCR 438 (Sup Ct).

80 (1996) 132 DLR (4th) 136 (Fed Ct).

81 *Sauvé v Canada (Chief Electoral Officer)* (1996) 132 DLR (4th) 136 at 160-178. Section 1 of the Canadian Charter of Rights and Freedoms allows for reasonable restrictions on some substantive charter rights.

82 J Hampton, "Should Prisoners have the Right to Vote? A Case Study in the Expressive Nature of Law" University of Toronto Faculty of Law, Workshop Series 1995-96 (3) at 42. Professor Hampton's feminism is important to her argument, since she pictures long term prisoners generally as male perpetrators of serious acts of violence, and hence as violators of fundamental community values.

> [T]he most striking point about the alleged objectives [of prisoner disenfranchisement] is that they are all symbolic and abstract ... I have very serious doubts whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are so important and fundamental as to have been enshrined in our constitution.[83]

Whether or not the right to vote is constitutionally entrenched, or simply a fundamental human right recognised in international law and political norms and rhetoric, the same reasoning is compelling. If patriotism is the last refuge of scoundrels, expressivism may be the last refuge of those seeking to uphold laws which have no other substantive justification.

Even accepting that some laws — including, conceivably some criminal sanctions — have chiefly symbolic purposes, the problem of weighing competing symbols and principles always remains: in this case the universality of the franchise in a democracy, and the citizenship and humanity of prisoners, must somehow be weighed against the desire to denote societal condemnation of wrong-doing. There are simply no symbolic scales on which to perform such a comparison.

If Huggesen JA's argument sounds too liberal and rights based, note that it does not exclude a communitarian campaign of education or values condemning crime in general, nor does it exclude the much deeper and inevitable "shaming" that accompanies the public and often reported act of judicial judgment, and the process of incarceration that follows.

POLITICAL DEVELOPMENTS — THE TERRAIN CONFRONTING REFORM IN AUSTRALIA

Australian Labor Party policy has long been to allow *all* prisoners the vote. Twice, in the late 1980s and early 1990s, the ALP dominated Joint Standing Committee on Electoral Matters recommended giving all prisoners the Federal vote. However twice government reform bills failed. The first, the Electoral and Referendum Bill 1989 (Cth), was defeated in the Senate. The most recent, and illustrative, was the Electoral and Referendum Amendment Bill (#2) 1995 (Cth), which did not succeed in either House. It would have given the Federal franchise to all non-traitorous prisoners.

Having introduced the bill at its first reading stage, the then Keating government was faced with a highly successful scare campaign orchestrated by the conservative opposition. Media reaction was negative, and swift. An example from the Sunday press is indicative. Splashed across pages 1 and 2, and supported by a banner headline "Killers to Get the Vote", the meagre text which made up the story was swamped with photographs of mostly female offenders.[84] One does not have to be a feminist semiotician to feel troubled by the use of images of those convicted of killing or manslaughter, especially women (who commit many fewer homicides than men), to bolster a story which was driven more by law and order inspired prisoner bashing than any attempt to discuss the merits of the proposal or the electoral law context.

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83 *Belczowski v Canada* (1992) 90 DLR (4th) 330 at 340-341 per Hugessen JA. The Federal Court of Appeal in that case found a provision suspending voting rights of all prison inmates to contravene the Canadian Charter. *Belczowski* was affirmed in *Sauvé v Canada (Attorney-General)* [1993] 2 SCR 438.

84 *The Sunday-Mail* (Brisbane), 9 July 1995 at 1.

The tenor of the campaign, reflected in Opposition members' contributions in Parliament, was that the legislation was significantly out of step with community standards. This was spiced with claims that the ALP either had a "weak, gutless, spineless approach ... to law and order"[85] or was cynically hoping to win an electoral advantage, on the unstated assumption that prisoners would tend to vote ALP.[86] Oddly, in reply, the minister responsible for the bill claimed that as a former minister in the NSW government, he had prepared legislation to liberalise prisoner voting, out of purely political motives, but withdrew it after he discovered by survey that 80 per cent of inmates would vote against the ALP![87] Needless to say, speculations about partisan bias in prisoner voting trends should be no more relevant to their franchise rights than, for example, are assumptions about the conservatism of elderly voters or radicalism of young people to their voting rights.

Within days of the media blitz, Acting Prime Minister Beazley announced that the government would withdraw the proposal. Instead the bill was amended and passed, under the guise of administrative efficiency,[88] to provide for the disqualification of only those currently serving an actual sentence of five years or more.

The opposition, capitalising on its campaign, and with a State election being fought in Queensland, opposed even this mild liberalisation. It sought to restrict prisoners' voting rights further by disqualifying those serving a sentence of one year or more. This amendment was lost in the House of Representatives. It represented a throwback to 1902, when the original Commonwealth franchise prohibited voting by anyone sentenced to an offence punishable by imprisonment for a year or more.[89] The central rationalisation for this amendment was its apparent parity with the constitutional provision that denies the capacity to be elected or sit as a member of the Commonwealth Parliament to anyone convicted, and under sentence or subject to being sentenced, for an offence punishable by one year or more.[90]

However this analogy is inapt. The right to vote is a fundamental political right, exercised *en masse* by individuals as members of electorates of 80 000 or more, in elections designed to reflect the broad sentiment of the governed. It is exercised, in secret, in a liberal society, without regard to the social or moral standing of the individual voter. In contrast, the privilege of serving in Parliament is, quite literally, limited to a chosen few, and carries with it unique responsibilities and powers which are arguably incompatible with both the physical restrictions of imprisonment and perceptions of political trust. There are, in any event, other constitutional provisions

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85 P Slipper, MHR (Lib), H Reps Deb 1995, No 203 at 694. Mr Slipper also asserted, without pausing to give it, that there was "a very strong argument ... that people who are incarcerated ... ought not to be able to vote at all while they are in prison": ibid.

86 R Katter, MHR (Nat), H Reps Deb 1995, No 203 at 731.

87 Hon. F Walker, MHR (ALP), Minister for Administrative Services, H Reps Deb 1995, No 203 at 737.

88 Correctional departments found it impossible to supply the AEC with accurate information on prisoners by potential sentence, but could easily supply information based on actual sentence.

89 Above n 20.

90 Commonwealth Constitution, s 44(ii).

that further restrict the qualifications of those who wish to be members of Parliament, but which do not apply to electors.[91]

The only obviously principled stand throughout the debate was taken by the Greens in the Senate. Senator Chamarette, herself a former prison psychologist, introduced an amendment to reinstate the proposal to allow the vote to all prisoners. However with the Coalition and Democrats opposing it, this measure was lost.

Instead of a terrain promising reform, in the wake of the 1996 election we have a terrain threatening a retrograde expansion of the disenfranchisement, to cover anyone sentenced to a prison sentence, however short.[92] As an election falls only once every three years or so, the arbitrary effect of this, especially on those sentenced to short sentences around election time, is clear.

THE DISENFRANCHISED BY NUMBERS

Since the AEC does not keep lists or figures of people not on the roll, the only source of recent, comprehensive figures to assess the numbers disenfranchised from the Commonwealth ballot, is the National Prison Census of 1994.[93] These figures do not completely capture the category of disenfranchisement in the Act, since prisoners released on parole or into home detention and community custody, and arguably even people on suspended sentences, since they are technically "serving" a sentence, are subject to disenfranchisement, but not included in prison census data.[94] Prison census figures will, if anything, understate the numbers affected by the Act.[95]

TABLE ONE:
PRISONERS SERVING FIVE YEARS OR MORE (30/6/94)

	AUSTRALIA
Male	4840
Female	112
Total	4952

By way of comparison, had the Coalition amendment to disqualify anyone serving a sentence of one year or more been enacted, the number of prisoners disenfranchised would double to a total of 10 970 (based on 1994 data). More alarmingly, if the recommendation of the Coalition majority on the Joint Standing Committee to

91 For example, a member must be over 21, and a resident of Australia for at least three years: Commonwealth Constitution, ss 16, 34.

92 Above n 16.

93 *Prisoners in Australia*, above n 29.

94 Conversely, there may be a few long term prisoners who are not Australian citizens and hence not eligible to enrol or vote anyway.

95 Prisoners on parole might, if they tried, be able to re-enrol, provided they did not disclose their status to the AEC.

disenfranchise all people serving a prison sentence had been in force in 1994, it would have robbed in the order of 15 000 Australians of their vote.

Table One, however, represents an under-approximation of the number of people who are affected by the Commonwealth disenfranchisement today. First, as already noted, it does not include those in community custody, under home detention, or on parole. Secondly, prison numbers have increased since 1994. As of May/June 1996, the number of prisoners serving five or more years increased by 22 per cent.[96] Extrapolating, this produces:

TABLE TWO:
ESTIMATE OF NUMBER OF AUSTRALIAN PRISONERS SERVING FIVE YEARS OR MORE (MAY/JUNE 1996)

	AUSTRALIA
Male	5905
Female	137
Total	6042

In addition, there is on average one convict still serving a five or more year sentence on parole, home detention or in community custody, for every two such convicts in prison.[97] Thus the potential reach of the current disenfranchisement, as of mid 1996, can be estimated at over 9 000 Australians. The figure would be in excess of double that number if the Joint Standing Committee's recommendation to disenfranchise all people serving a prison sentence were implemented.

IS THE DISENFRANCHISEMENT OF PRISONERS UNLAWFUL UNDER DISCRIMINATION PRINCIPLES?

Indigenous people are grossly over-represented in Australian prisons. As the following table shows, they represent over 12 per cent of the disenfranchised prison population — approximately seven and a half times their proportion in the general community.[98]

96 It is difficult to obtain current and accurate statistics by length of incarceration from all State and Territory correctional authorities. However figures supplied by all States and Territories bar Victoria in May/June 1996 indicate a 22% rise, much of this attributable to growth in Queensland.

97 Based on figures supplied to the author by Queensland and South Australian correctional authorities in May/June 1996.

98 Aboriginal and Torres Strait Islanders form approximately 1.6% of Australia's population.

TABLE THREE:
INDIGENOUS PEOPLE SERVING SENTENCES OF FIVE YEARS OR MORE (30/6/94)

	AUSTRALIA
Indigenous People	623[99]
All People	4952

Even without a constitutional guarantee of the right to vote, there may be grounds for complaint under the Racial Discrimination Act 1975 (Cth) (the RDA) that restrictions on prisoner voting at both Commonwealth and State levels disproportionately impact on indigenous Australians in a way which clearly, although indirectly, discriminates against people of such races.

Since 1990 indirect discriminatory acts have been covered by the RDA, s 9(1A):

> Where:
>
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
>
> (b) the other person does not or cannot comply with the term, condition or requirement; and
>
> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
>
> the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

This feeds back into the prohibition in the RDA, s 9(1) against acts involving racial distinctions which have the purpose *or effect* of nullifying or impairing the equal exercise of certain human rights. Those rights include the right to vote, which is contained in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (scheduled to the RDA). Article 5 includes:

> Political rights, in particular the rights to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage.

Can s 9 of the RDA apply where disenfranchisement is required by statute?

This is a jurisdictional question. Any imprisoned, indigenous complainant would have to show that his or her electoral enrolment was made subject to a "term, condition or

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99 Again, the number affected by the disenfranchisement may be greater since these figures do not include those convicted but on parole or similar community orders. However the purpose of considering these figures — to gauge the relative discrimination against indigenous people — is not affected by this.

requirement" (RDA, s 9(1A)(a)). Is the legislative requirement that the elector, to be eligible to enrol, not be subject to a prison sentence, a "term, condition or requirement"? If so, then its enforcement by the AEC becomes "an act involving a distinction" for the purposes of s 9.

By analogy with the reasoning adopted with respect to s 24(3) of the Anti-Discrimination Act (NSW), a comparable provision, there is no reason why a statutory disenfranchisement, administratively applied by an AEC official, should not be found to be a "condition or requirement".[100] These are words of wide import in a statute which is not just beneficial, but which has attained some quasi-constitutional importance, and there is value in having consistent interpretations of the indirect discrimination provisions between the various discrimination Acts.

A second line of argument is that s 10, which specifically applies to statutory provisions which *directly* discriminate, raises doubts about whether indirect discrimination under statute can be impugned by s 9. This question is an open one: in *Gerhardy v Brown*[101] Gibbs CJ and Mason J explicitly declared s 9 to have no application to legislative enactments, whilst Brennan and Deane JJ accepted that it could operate against statutes.[102] Case law since has tended to suggest that Gibbs CJ's reading, somewhat narrow and formal though it is, may have taken root.[103]

A recent decision under a related Act lends support to the view that, short of a direct power to inquire into statutory discrimination, an anti-discrimination tribunal should not impugn the mere application of a statutory rule by an administrative body. In *Secretary, Department of Defence v Human Rights and Equal Opportunity Commission* (HREOC),[104] the Department of Defence applied to its older employees a statutory rule that required, in ordinary circumstances, public service personnel to retire at 65. It was held that under the Human Rights and Equal Opportunities Act 1986 (Cth), the HREOC could not make compensatory recommendations to complainants who had suffered such statutorily mandated age discrimination. Although the HREOC had quasi-judicial power to inquire into any "act or practice" so as to declare unlawful any discriminatory "distinction, exclusion or preference", its power over legislative

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100 *AIS v Banovic* (1989) 168 CLR 165. Similar words were held to be "plain, clear words of wide import" in the United Kingdom case *Holmes v Home Office* (1984) 1 BEQ 801 at 805. The CCH *Australian and New Zealand Equal Opportunity Law and Practice* states at ¶4-600 that a "requirement or condition may take an infinite variety of forms, but generally includes policies, practices, *rules or stipulations* which on their face appear neutral, but have a discriminatory effect in practice" (emphasis added).

101 (1985) 159 CLR 70.

102 Ibid at 80-81 per Gibbs CJ, at 92-93 per Mason J, at 131 per Brennan J and at 146 per Deane J.

103 *Ellenbogen v FCT* (1988) 19 ATR 736 at 741 per Einfeld J ("respondent agreed that if anything, this was a s 10 and not a s 9 case") suggests a dichotomy under which s 10 is the proper resort where a statutory provision is the subject of the complaint. However *Zhang Fu Qui v Minister for Immigration and Ethnic Affairs* (1995) 37 ALD 443 decided against a s 9 challenge to a migration regulation on the grounds that no relevant human right was involved, without adverting to the question of whether s 9, rather than s 10, could apply to statutory instruments.

104 (1997) 149 ALR 309, a single judge decision of Branson J.

discrimination was limited to examining enactments and reporting to the government.[105]

However *Gerhardy v Brown* pre-dated the extension of the RDA to cover indirect discrimination, and *Secretary, Department of Defence v HREOC* concerned differently worded legislation, so the question in the context of racial discrimination may still be arguable. Further, in a decision after the extension to the RDA, *Siddiqui v Australian Medical Council*,[106] the HREOC explicitly adopted a benevolent construction of the RDA and rejected the claim of the Australian Medical Council (AMC) that it was protected from action because, in administering extra certificate examinations with quotas to migrant doctors, it was following a procedure countenanced by statute. The HREOC (which included then President Sir Ronald Wilson) said that the element in s 9 that there be "an act involving a distinction" was met,[107] and held that the fact that the AMC was merely administering a statutory precondition did not matter: it had "require[d] another ... to comply with a term, condition or requirement" within the meaning of s 9(1A).[108]

Is the condition/requirement discriminatory?

Does the disenfranchising of prisoners, who are disproportionately of indigenous descent, have the "effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of [that race ... descent] of any human right or fundamental freedom in the political ... field of public life" (RDA, s 9(1A)(c))? On any reckoning, the indigenous voting population is considerably disproportionately affected by the disenfranchisement compared to all other races. However, in overall terms, the percentage of the Aboriginal and Islander voting population affected is not huge: perhaps upwards of 1000 people out of a population of over 100 000.

The intractable legal issue here is the meaning of "[has the] effect of nullifying or impairing" an enjoyment of rights. For each imprisoned person, the disenfranchisement has the obvious effect of nullifying their right to vote. Across the whole prison population, indigenous people are disproportionately affected. But as a percentage of the voting population (indigenous or otherwise) prisoners are a small minority: the disenfranchisement does not affect a significant proportion of the potential voting population.

Given its short history, there are many unanswered questions about s 9(1A) of the RDA. As to the general intention of the indirect discrimination test contained in it, Drummond J in *Ebber v HREOC*[109] held in favour of a meaning parallel to that which has developed in sex discrimination jurisprudence and favoured a test that s 9(1A)(c) was satisfied if:

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105 Human Rights and Equal Opportunity Act 1986 (Cth), ss 3 and 31.

106 (1995) EOC ¶92-730. Although the AMC succeeded in an appeal to the Federal Court in *AMC v HREOC* (1996) EOC ¶92-830, nothing in the appeal judgments contradicts the finding that statutory authority does not necessarily preclude a claim.

107 (1995) EOC 78,455. The claim under consideration was that a statutory provision was discriminatory in breach of s 9 read in light of s 9(1A). The provision, in the Medical Practice Act 1994 (Vic), required certain overseas doctors to sit an examination. Note that the statute was a State rather than a Federal one.

108 (1995) EOC 78,456-78,457.

109 (1995) 129 ALR 455 at 480.

> a substantially higher proportion of the members of the complainant's national group are disadvantaged by the requirement in comparison with the proportion of the members of one other national group who are disadvantaged by it ...

Is a substantially higher proportion of indigenous people denied voting rights than people of other races or ethnic backgrounds? Which pools of comparison are to be used? Should it be the proportion of potential indigenous electors disenfranchised versus the proportion of potential non-indigenous electors disenfranchised? If so, the proportions will not vary greatly, since the number of prisoners is always small compared to the total potential voting population. That is, we are dealing with marginal percentages of the voting population being disenfranchised, whatever the racial group concerned.

However, an alternative would be to contrast these two proportions:

(a) the number of the disenfranchised population which is indigenous as a proportion of the disenfranchised non-indigenous population (about 12%); and

(b) the number of the total adult citizen population which is indigenous as a proportion of the total adult citizen non-indigenous population (about 2%).

Clearly, figure (a) is significantly higher than figure (b). It might be objected that this simply reflects the brute reality of the over-incarceration of indigenous people. On the other hand, it also reveals clearly the indirectly disproportionate effect disenfranchisement has in impacting on indigenous people over non-indigenous people.

Is disenfranchisement unreasonable?

The second substantive question is the value laden balancing test of whether disenfranchisement is unreasonable in the circumstances (RDA, s 9(1A)(a)). The circumstances which are relevant include: the purposes of the electoral franchise, correctional theory and practice and political and democratic values.

This article has argued that the disenfranchisement is unreasonable. This is so especially given the fundamental nature of the rights mandated in the ICCPR, but also in light of the requirements of a modern electoral system. The tendency, under modern notions of adult suffrage, is to limit restrictions to those which have some bearing on a person's ability to understand the nature of voting. Further, the requirements of a modern penal system do not justify such discrimination, especially given that the dèprivation of voting rights is an indirect consequence of imprisonment, not subject to judicial discretion, and achieves nothing in correctional terms. On the other hand, especially assuming a return in High Court jurisprudence to deference to parliamentary sovereignty,[110] it is also entirely possible that a court would find prisoner disenfranchisement to be reasonable, if only because of the brute fact of its commonness both geo-politically and historically.

Overseas race challenges

Before leaving the issue of the racially discriminatory impact of prisoner disenfranchisement, North American experience should be noted. A challenge to a Tennessee law permanently disenfranchising ex-felons, based on a "voter dilution"

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110 Which is being demonstrated in recent electoral law cases such as *Langer v Cth* (1996) 186 CLR 302; *Muldowney v SA* (1996) 186 CLR 352 and *McGinty v WA* (1996) 186 CLR 140.

argument,[111] as well as constitutional, equal protection arguments, was rejected for failing to state a claim.[112] However that decision raised more arguments than it resolved, and it has been strongly contended by one author that such laws unlawfully discriminate against black Americans.[113] In any event, it should be noted that such United States challenges are only tangentially relevant to the Australian position, since we have no constitutional equivalent of the reference in the second clause of the fourteenth amendment to the disenfranchisement of criminals, nor an "intent to discriminate" standard parallel to that read into the United States equal protection amendment.[114] Nonetheless, some of the arguments raised under the strict scrutiny test applied in United States constitutional law (is the state interest compelling, are the means employed suitably narrow, and can the state interest be achieved by an alternative method?) may be applicable to the reasonableness question under Australian indirect discrimination law.[115]

A challenge by native Canadians, based on s 15 of the Canadian Charter of Rights and Freedoms also failed.[116] The disenfranchisement there clearly operated in a way that targeted more poor and indigenous people. However the provision was neutral in applying to all inmates serving two years or more, and not, under Canadian principles, a burden unequally applied. Over-representation in the class of disenfranchised people was categorised as the result of general over-representation in prisons: a result of complex social forces and the criminal law generally rather than the electoral disenfranchisement itself.

Sex discrimination?

As the figures in Table One above reveal, the effect of prisoner disenfranchisement falls overwhelmingly on men, who dominate the custodial population, particularly for offences likely to lead to a long prison sentence. Males, by these estimates, make up over 97 per cent of those subject to disenfranchisement, but only about 50 per cent of the potential voting population. On principle, one would expect that a similar challenge to that assayed above with respect to race, could be mounted under the SDA. However the provisions of the SDA cover discrimination only in certain limited areas of life, primarily work, accommodation, education, the provision of goods, facilities

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111 It was argued that given the over-representation of blacks in the prison population in that State, disenfranchisement caused illegitimate dilution of black voting power, in contravention of the United States Constitution and the Voting Rights Amendment Acts 1982 (US) provisions against statutes which denied minorities an equal chance to participate in the political process.

112 *Wesley v Collins* 605 FSupp 802 (1985); affd 791 F2d 1255 (1986).

113 A Harvey, "Ex-Felon Disenfranchisement and its Influence on the Black Vote: the Need for a Second Look" (1994) 142 *Uni of Penn LR* 1145.

114 Oddly, whilst no United States indirect discrimination case has succeeded in this field, a direct discrimination case has. The Supreme Court in *Hunter v Underwood* 471 US 222 (1985) ruled unconstitutional a provision in the Alabama Constitution which disenfranchised those convicted, *inter alia*, of any crime "involving moral turpitude" since as a matter of historical fact the provision was motivated by a discrimatory intent against blacks and poor whites.

115 For such arguments in the United States context, see A Harvey, above n 113 at 1162-1164.

116 *McCorrister v Attorney-General of Canada*, heard and reported with *Sauvé v Canada (Chief Electoral Officer)* (1996) 132 DLR (4th) 136.

and services.[117] A whole host of other areas of activity, including voting rights, are not covered. State laws, such as the Anti-Discrimination Act 1991 (Qld), are equally silent about political rights.

OTHER LEGAL MATTERS

Constitutional issues

The Commonwealth Constitution, in ss 8, 30 and 51 (xxxvi), empowers the Federal Parliament to regulate its own franchise. Whilst s 41 appears to provide some constitutional guarantees ("no adult person who ... acquires the right to vote at elections for ... a State [legislative assembly] shall be prevented by any law of the Commonwealth from voting at elections for ... the Commonwealth"), that section has been read into constitutional and historical obscurity by *Re Pearson, ex parte Sipka*.[118] Consequently, prisoners in South Australia for instance, have the State ballot, but not the Federal. Conversely, many prisoners in Tasmania, and some in New South Wales, Western Australia and Victoria, have the Federal ballot, but not the State.

A second set of constitutional issues, relevant to any reform agenda, were raised by Fitzgerald and Zdenkowski,[119] who called on the Federal government not just to use the Commonwealth's inherent power to regulate its own franchise to give all prisoners the Federal ballot, but to use its external affairs power to override any State restrictions on prisoner voting. This would involve legislating in the name of the political rights guaranteed in the ICCPR.[120] Such legislation would inevitably be challenged in the High Court. Whilst the better argument is that the ICCPR does grant "every citizen" the right to vote, and re-enforces this by requiring that prisoners be treated with dignity for the purposes of rehabilitation, there are no guarantees the present High Court would not construct a narrower reading and defer to parliamentary history by finding that restrictions on prisoner voting rights are reasonable. Such legal speculation may be idle anyway, since the politicised nature of the 1995 debate, and the current conservative hue of the Federal government, suggest that any significant legislative reform, let alone uniform laws, is unlikely to be forthcoming.

The arbitrary effect of temporary disenfranchisement

An incidental argument against any limitation is the arbitrariness of the limitation. Why prisoners serving one year, or five years? Elections are held every three years, but often at unpredictable intervals. Any exclusion is going to arbitrarily deny some prisoners the vote because they happen to be in gaol when enrolments close, and allow others, sentenced for similar terms, the vote because their imprisonment did not straddle an election.

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117 SDA, s 3(b).

118 (1983) 57 ALJR 205 (Murphy J in lone dissent).

119 Above n 17 at 38-39.

120 Similar obligations justified the sexual privacy legislation enacted primarily to override Tasmania's laws criminalising homosexual acts.

Place of enrolment and the dilution of prisoner voting power

A concern often raised, which is essentially only an administrative matter, is in which electorates should prisoners be enrolled? Currently, those who have the right to vote can enrol in one of a number of electorates (linked to their previous abode, or the residence of some family member). In a sense, prisoners do not *live* in prison — certainly not by choice, and not as part of the surrounding community. Therefore having prisoners, in bulk, enrolling in the electorate in which their prison is situated, is neither apposite, nor likely to be politically palatable to many in that community (it would add 100s or 1000s of new votes to those electorates where prisons happen to be). On the other hand, prisoners are geographically united, and do share problems relating to their — the prison — community. If they should have the right to vote, why should that right be artificially diluted? Prisoners, especially long term inmates, share communities of interest. Even assuming that prisoners may tend to vote against the current government, especially at State level where correctional services are maintained, there is no reason to deny them that concentration of political clout. Indeed it may well be one small way of ensuring responsiveness to legitimate grievances about prison conditions.