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Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts

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When Richard Sauvé walked into a Port Hope, Ontario, bar on October 18, 1978, he could not have anticipated that the events of that night would lead him to prison for 15 years, to Queen's University to obtain an B.A. in psychology and criminology while in prison, and to the center of a political and legal battle that one commentator has said "reflects a controversy about what kind of state Canada is" (Hampton 1998: 23). On October 31, 2002, the Supreme Court of Canada brought 20 years of litigation by Sauvé and other prisoners to a successful end when a majority of the Court decided that denying the vote to prisoners violates the Canadian Charter of Rights and Freedoms 1982. In striking down the prisoner voting ban, the Court explicitly rejected the notion that prisoners are "temporary outcasts from our system of rights and democracy" (*Sauvé v. Canada* [*Chief Electoral Officer*] 2002 at para. 40).

The Canadian government had defended prisoner disenfranchisement in the courts as a symbolic exclusion of people like Richard Sauvé from the law-abiding Canadian citizenry. Yet Sauvé fought for inclusion in society in a number of ways, and the voting rights litigation was just one way. The crime for which he was convicted, first-degree murder, is the most serious one in Canadian law. People convicted of murder are consistently cited by defenders of prisoner disenfranchisement as those least deserving of the

franchise. However, Richard Sauvé's trajectory through the prison system as an activist, scholar, voter, and finally, advocate for prisoners from the outside, is at odds with the experience of most prisoners and with popular ideas about prisoners' relationships with the broader society. The case and its aftermath raise questions about the significance, and limits, of judicial recognition and enforcement of prisoners' rights.

This chapter suggests that the emerging opposition in the United States to postincarceration legal, social, and economic consequences of criminal conviction would benefit from attention to the way the continued construction of prisoners as temporary outcasts resonates positively in society, assisting to legitimate the myriad penalties and consequences imposed on prisoners' release. This chapter is divided into five sections; the first introduces contemporary Canadian penal policy and popular perceptions of crime and punishment, noting that Canada both reflects and departs from some of the attributes of modern "crime control cultures" (Garland 2001). The second section briefly describes the recent Canadian litigation over the constitutionality of prisoner disenfranchisement. This part discusses the court's rejection of the government's symbolic and expressive justifications for the voting ban, as well as the court's affirmation of prisoners' status as rights holders and members of broader communities. Even though positive, the *Sauvé* decision represents a departure from the usual judicial approach to prisoners' rights claims, an approach that gives those rights little meaningful content. The third section examines the often negative reaction to the decision by legislators and the popular media, paying attention to the strong popular appeal of the notion of prisoners as temporary outcasts and the dissonance between that popular conception and the one adopted by the court. The fourth section considers the vanishing concept of prisoners' rights and community membership in the United States, as exemplified by a recent U.S. Supreme Court decision upholding severe limits on, and even permanent denial of, prisoners' family visits. Finally, the fifth part makes the case that efforts to reform or repeal the civil penalties faced by ex-prisoners should begin by recognizing the link between those penalties and a conception of prisoners as temporary outcasts from society. The chapter concludes with some thoughts on promoting a culture of rights and citizenship that includes prisoners.

The Canadian Context: A Kindler, Gentler "Tough on Crime" Stance?

Canada's incarceration rate of 102 prisoners per 100,000 population seems low when compared with the United States's world-leading rate of 686 per 100,000 (Walmsley 2003). However, this simple comparison masks the degree to which Canada has adopted "tough on crime" policies, such as mandatory minimum sentences (Doob and Cesaroni 2001) and incarcerated

more of its people than comparable Western European countries (Walmsley 2003).[1] While it is tempting to dismiss American mass incarceration as another example of American exceptionalism, David Downes (2001) has argued that the modern American "macho penal economy" is influencing Europe, rather than remaining exceptional. Downes cites Canada as an example of a country that has resisted this influence (Downes 2001: 63). However, a closer look calls that conclusion into question. Canada's adult prison population rose in the early to mid-1990s (CCJS 1997) before declining somewhat from 1997 to 2001 (Canadian Centre for Justice Statistics 2001). Aboriginal people are increasingly overrepresented in the country's prisons and jails, a trend admittedly on a smaller scale, but with systemic characteristics similar to the mass incarceration of young black men in the United States. In 2001, 19% of Canada's provincial prisoners and 17% of federal prisoners were Aboriginal, compared to only 2% of the general population in Canada (CCJS 2001). The overrepresentation is even more pronounced in provinces such as Saskatchewan, where 76% of prisoners are Aboriginal, whereas Aboriginal people make up only 8% of the province's population (CCJS 2001). Various commissions of inquiry have found systemic racism against Aboriginal and other people of color within Canada's federal and provincial criminal justice systems (e.g., Commission on Systemic Racism in the Ontario Criminal Justice System 1995; Hamilton and Sinclair 1991). Although the incarceration rate has increased, Canada's crime rate has been declining or remaining steady since the early 1990s and, in 2002, stood at the same level it had in 1979. Nevertheless, the Canadian public mistakenly perceives that crime is on the rise (Environics 1998), making "tough on crime" laws and policies politically expedient (Doob and Cesaroni 2001).

David Garland (2001) has characterized late twentieth century "tough on crime" trends in the United States and the United Kingdom as part of a shift toward a "crime control culture" arising from anxieties about economic and social change, risks, and social order in the period he calls "late modernity." Garland argues that political, social, and economic restructuring associated with the neo-liberalism, social conservatism, and "post-welfarism" of the Reagan/Thatcher era gave rise to new social attitudes, fears, and resentments that had an outlet in increasingly harsh crime control policies. In addition to strict sentencing laws and rapidly increasing prison populations, Americans (and to a lesser degree, Britons) embraced the privatization of security and crime control in the form of gated communities, surveillance, and private policing.

While the analogy to Canada is not perfect, significant aspects of this crime control culture, present in the United States and the United

Kingdom, are also present in Canada. In popular discourse and policy making, a strategy of "punitive segregation" or expressive punishment has tended to replace the liberal "penal welfare" focus on due process rights, proportionate punishment, and rehabilitation. Like the United States and United Kingdom, Canada's penal law and policy have increasingly raised the profile of crime victims (Roach 1999), both actual and symbolic, as players in a zero-sum game in which any attention to the rights or welfare of people accused or convicted of crime amounts to disrespect for victims. Finally, the idea that "prison works" resonates with the Canadian public in a manner not unlike that in the United States and United Kingdom. Prisons are symbols of public order as places of incapacitation and punishment, meeting demands for public safety and harsh retribution. Canadian media stories often refer to federal prisons as "Club Fed" (Pemberton 2003; Rodriguez 2002), reflecting public acceptance of the view put forward by opposition politicians, "victims' rights" lobby groups, and police associations that prisoners live a coddled existence in cushy, resortlike surroundings. Prisoners are neither people in need nor products of disadvantaged social and economic circumstances. They are rational, responsible, dangerous, and undeserving of our collective concern.

One must be careful not to overstate the point. Many of the harsher measures of America's crime control culture (e.g., "three strikes" sentencing laws, chain gangs, and the death penalty) have not made their way into Canadian law. In fact, a considerable amount of the law and policy governing sentencing and imprisonment remains consistent with liberal, penal welfare concepts. For example, the Criminal Code requires sentencing judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances . . . for all offenders, with particular attention to the circumstances of aboriginal offenders," an effort to address Aboriginal overrepresentation in Canada's prisons and jails, as well as overincarceration more generally. The Federal Corrections and Conditional Release Act of 1992 has as one of its guiding principles that prisoners retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of sentence. Canada's penal law has also been developed by legislators and interpreted by courts over the past two decades in the shadow of the Canadian Charter of Rights and Freedoms, entrenched in the Constitution in 1982, which has given rise to a new, normative human rights framework that is increasingly at odds with public calls for more expressive and symbolic punitive responses to crime. Yet the Charter remains very popular among Canadians (Centre for Research and Information on Canada 2002). Canada's crime control culture and nascent "Charter culture" collided in the *Sauvé* case and its aftermath.

Sauvé v. Canada: Rejecting Prisoner Disenfranchisement

Prisoner disenfranchisement has been part of Canadian law since the country's colonial beginnings. Federal law disqualified all prisoners and jail inmates from voting until 1993, when Richard Sauvé, a prisoner serving a life sentence for murder, successfully challenged the law as an infringement of his right to vote guaranteed in the Charter: *Sauvé v. Canada (Attorney General)* 1993.[2] Section three of the Charter guarantees that "every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

Having lost the battle to uphold a wholesale prisoner voting ban, the federal government quickly enacted a new, narrower law that disenfranchised only prisoners who were serving sentences of two years or more.[3] Richard Sauvé was soon back in court, challenging the new law that continued to deny him the right to vote. His claim was joined by a group of Aboriginal prisoners who argued that prisoner disenfranchisement violated not only their right to vote, but also their right to equality, due to systemic racism and chronic overrepresentation of Aboriginal people in Canada's prisons (Aboriginal Legal Services of Toronto 2001). In October 2002, a majority of the Supreme Court of Canada held that prisoner disenfranchisement laws, even those limited to longer-serving prisoners, unjustifiably infringed prisoners' right to vote, a right that is "fundamental to our democracy and the rule of law and cannot be lightly set aside." The decision was not unanimous. Four members of the court dissented, taking the view that the government's objectives were valid and that the Court should defer to legislative policy choices "based on reasonable social or political philosophy" and uphold the prisoner voting ban (*Sauvé* 2002 at paras. 79–121). These four judges also rejected the arguments made by the Aboriginal plaintiffs and prisoners' advocacy groups that the voting ban violated prisoners' equality rights.[4] However, the majority decision written by Chief Justice Beverly McLachlin meant that the prisoner disenfranchisement law was struck down.

The practical impact of *Sauvé* in Canada will extend beyond the federal law found unconstitutional. The fact that this was the second time the Supreme Court of Canada had rejected a prisoner voting ban, combined with the strong language used to denounce the government's purported objectives, makes it unlikely that any prisoner voting ban will pass constitutional muster, including a number of provincial disenfranchisement laws. The decision has also proved to be a persuasive precedent internationally. It was cited with approval in a recent South African Constitutional Court decision declaring that country's prisoner disenfranchisement law unconstitutional (*Minister of Home Affairs v. NICRO* 2004) and in an opinion of the European Court of Human Rights finding the United Kingdom's prisoner voting ban inconsistent with the right to vote (*Hirst v. United Kingdom (No. 2)* 2004).

The Supreme Court's interpretive framework for Charter claims requires the government to articulate clearly its objectives for infringing a right and to prove that the infringement is rationally connected to the objective and is the least-restrictive means for achieving that objective.[5] As a result, courts have subjected the normative arguments for prisoner disenfranchisement to close scrutiny. The Canadian government had defended the ban on prisoner voting by asserting that disenfranchisement (1) enhances the general purposes of the criminal sanction and (2) promotes civic responsibility and respect for the rule of law (*Sauvé* 2002 at para. 21). Neither of these goals appeared in the legislative history of the voting ban and even though the Chief Justice was prepared to accept the stated objectives, she pointedly observed that "[t]he record leaves in doubt how much these goals actually motivated Parliament; the Parliamentary debates offer more fulmination than illumination" (para. 21). In any event, the government's position had changed from the one it had adopted in the earlier *Sauvé* 1993 case, having argued there that excluding prisoners promoted a "decent and responsible electorate." Such an argument, based as it was on the moral character of voters, had been rejected as anachronistic and inconsistent with the values enshrined in the Charter (*Sauvé* 1993 at 650–51).

The majority in *Sauvé* 2002 viewed the new objectives of enhancing punishment and promoting civic responsibility as too symbolic and abstract to justify overriding a right as important as voting. Chief Justice McLachlin stated, "the government has failed to identify particular problems that require denying the right to vote" (para. 26) and expressed concern that judicial review would be rendered meaningless if the government could simply assert that it had symbolic objectives for any rights-infringing law (para. 23).

The government's defense of the prisoner voting ban relied heavily on the purported expressive power of disenfranchisement to educate prisoners about civic responsibility. One of the government's key witnesses, moral philosopher Jean Hampton, testified that through the imposition of disenfranchisement as additional punishment, crime victims and the community symbolically express that they will not tolerate the violation of trust and values that the criminal conduct represents (Hampton 1995: 11–15). Therefore, as part of the individual's punishment, he or she will not be entitled to participate in the decision-making process that is committed to those values. Hampton suggested that this process "morally educates" prisoners (Hampton 1998: 15). The majority in *Sauvé* agreed that disenfranchisement sent a message, but not a positive one:

> Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order (para. 40).

In describing disenfranchisement's second purported objective, promoting civic responsibility and respect for the rule of law, another government witness advanced the theory that criminal behavior indicated disrespect for the welfare of fellow members of society, for the rule of law, and for the electoral process (Pangle 1995). He then reasoned back from that proposition to conclude that denying the vote to people who have committed serious crimes makes the franchise seem more valuable both to those prisoners and to the general public, thereby promoting the virtues of responsible citizenship (Pangle 1995: 41).

Again, the Supreme Court majority disagreed, saying that the government gets the connection between obeying the law and having a voice in making the law "exactly backwards" (*Sauvé* 2002 at para. 21). The right of all citizens to vote is the basis of democratic legitimacy. Therefore, when the state disenfranchises a group of citizens, it undermines its ability to function as the legitimate representative of those citizens. In doing, so, it "erodes the basis of its right to convict and punish law-breakers" (*Sauvé* 2002, para. 32–34).

Two things are noteworthy about the way the majority opinion conceives of prisoners. First, prisoners are unequivocally full rights holders under the Charter. They do not hold attenuated, weaker versions of the rights enjoyed by other Canadians. Whereas certain rights, such as liberty, are necessarily limited by the fact of incarceration, prisoners' rights claims are not subject to a lower standard of justification when the government infringes them. In addition, prisoners are members of communities and societies, sharing common interests with members of their communities outside prison. The decision takes it for granted that prisoners, and particularly the disproportionately high number of Aboriginal prisoners, should be encouraged to maintain stakes in their communities.

A clear conception of prisoners as rights holders animates the majority decision. Chief Justice McLachlin says that denying prisoners the right to vote "runs counter to our constitutional commitment to the inherent worth and dignity of every individual" (para. 35), and cites the South African Constitutional Court for the principle that the franchise is a "badge of dignity and of personhood" (para. 35; August 1999 at para. 17) belonging to all citizens, including prisoners. On the question of whether disenfranchisement is a constitutionally permissible form of punishment, the Chief Justice said,

> The argument, stripped of its rhetoric, proposes that it is open to Parliament to add a new tool to its arsenal of punitive implements—denial of constitutional rights. I find this notion problematic. I do not

> doubt that Parliament may limit constitutional rights in the name of punishment, provided it can justify that limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. That is tantamount to saying that the affected class is outside the full protection of the Charter (para. 46).

The decision is significant as a strong pronouncement that prisoners are full and equal rights-holders under the Charter.

Few prisoners' rights cases have made it to the Supreme Court of Canada since the Charter became part of the Constitution in 1982, due to unavailability of legal aid, mootness, or other barriers. Prisoners continue to have few meaningful avenues for redress, prompting Justice Louise Arbour (1996) to conclude in an inquiry into the strip-searching of women prisoners by a male emergency response team that "[t]he Rule of Law is absent, although rules are everywhere" (Id. at 181). A leading advocate has reported that most women prisoners either did not know they had Charter rights or thought the rights could be removed by prison officials as "discipline" (Pate 1998). When prisoners' cases have gone to court, judges have tended to continue a pre-Charter tradition of deference, meaning that the rigorous standard of government justification for infringing rights is effectively lowered in prison cases (Manson 1994). For example, a prisoner's challenge to a random urinalysis policy (compulsory, nonprivate urination without individualized suspicion) was prematurely rejected without requiring correctional authorities to demonstrate that the policy was, in the language of the Charter, "a reasonable limit demonstrably justified in a free and democratic society" (Manson 1994: 364). It remains to be seen whether the Supreme Court decision in *Sauvé* signals a shift from deference to a more rigorous review of prisoners' rights claims outside the relatively limited context of the political rights at issue in *Sauvé* where the government trump card of "public safety and security" was not in play.

Another potentially significant aspect of *Sauvé* is the affirmation of prisoners' membership in society and in particular communities, as well as the need for social inclusion and reintegration. The Chief Justice approved of the trial judge's finding that the voting ban adds to the alienation prisoners feel from the communities where their families live and to which they will one day return (para. 59). She pointed to the "need to bolster, rather than undermine, the feeling of connection between prisoners and society as a whole" (para. 38), noting that depriving marginalized individuals of their sense of community identity through voting is not likely to promote the government's stated objective of civic responsibility (para. 38).

The majority in *Sauvé* expressed particular concern about the negative and disproportionate impact of disenfranchisement on Aboriginal prisoners, and the communities to which they belong. The Chief Justice recalled the Court's holding in a previous case that the overrepresentation of Aboriginal people in Canada's prisons is a crisis that must be addressed (*Gladue* 1999 at para. 64; *Sauvé* at para. 60). The Court went further in *Sauvé*, noting that the overrepresentation is linked to high rates of poverty and "institutionalized alienation from mainstream society" and may not accurately reflect individual culpability (para. 60). In light of the reality that Aboriginal people in prison have "unique perspectives and needs" (para. 60), the majority found their exclusion from the ballot box unjustified.

Reaction to *Sauvé*: Prisoners and Public Opinion

Sauvé garnered considerable popular and media attention. Most news stories reported that the decision was historic and significant for prisoners' rights (e.g., Friscolanti 2002; MacCharles 2002; Makin 2002), but many also reported that "victims' rights" groups were angered by the ruling (e.g., Czekaj 2002; Mahoney 2002). A number of the news stories were accompanied by sensational headlines such as "Killers Win Vote Rights" (e.g., Gamble 2002b). A few editorials and opinion articles lauded the decision as positive step for rights and democracy (*Globe and Mail* 2002; Pruden 2002; Parkes 2003), but many more decried the decision as an example of undemocratic, liberal "judicial activism" (e.g., Morton 2002; Simpson 2002; Gibbons 2002) and radically out of step with public opinion (Harris 2002). Some characterized the right to vote as a privilege (*Hamilton Spectator* 2002; Toews 2003). Others raised the specter of notorious serial murderers running for elected office (Gibbons 2002; *London Free Press* 2002). Letters to the editor were also largely opposed to idea of prisoners voting, with many writers taking the view that recognizing prisoner voting rights was an affront to victims (Mills 2002; Woodford 2002).

In a similar vein, during the course of the *Sauvé* litigation, opposition politicians used the prisoners' success at trial as an opportunity to take the government to task for being "soft on crime." For example, on April 22, 1997, the government was criticized in the House of Commons by a member of the opposition for allowing prisoners to vote:

> Mr. Speaker, you see, it is election time again and enumeration has taken place in my riding, in particular at Matsqui Prison. A judge said prisoners should have the right to vote because "preventing prisoners serving more than two years from voting is too sweeping an infringement." This government must be really hard up for votes these days.... This is about the rights of criminals versus the rights

> of victims and law-abiding citizens. That is what this is about. (Hansard; House of Commons 1997)

Eager to shed the "soft on crime" label and in an attempt to prevent prisoners from voting in the 1997 election, the governing Liberal party immediately filed an application to stay the judge's order pending appeal. The application was unsuccessful, and on May 17, 1997, Reform Party leader Preston Manning held a press conference to announce that serial rapist and murderer, Paul Bernardo, the most notorious offender in Canada, was still on the voters' list at the infamous residence in St. Catherines where he had committed his crimes (Canadian Press 1997). On the day the Supreme Court decision came down in 2002, government House Leader Don Boudria told the House he was reviewing the decision with a mind to finding a way to continue the prisoner voting ban (J. Brown 2002).

The public backlash against the *Sauvé* ruling, like the government's approach in the *Sauvé* litigation, defended the prisoner voting ban as valid expressive punishment in a manner consistent with the values of Garland's crime control culture. The popular discourse surrounding prisoner-voting rights in Canada rejects the key premises of the majority decision in *Sauvé*—that prisoners are rights holders and members of our communities. It is likely that, over time, this issue will fade from public view as prisoner voting bans are repealed across the country (see e.g., Canadian Press 2003). However, advocates of penal reform and the reintegration of former prisoners into communities should not ignore public opposition to prisoner voting rights as simply ill-informed opinion. Arie Freiberg has described how Australian crime prevention strategies aimed at addressing the root causes of crime, such as poverty and inadequate education, tend not to resonate with the public in the emotive way that "law and order" policies do (Freiberg 2001: 265). He argues that crime prevention initiatives and reform efforts must "recognize and deal with the roles of emotions, symbols, irrationalism, expressionism, nonutilitarianism, faith, belief, and religion in the criminal justice system" (Freiberg 2001: 266).[6] Unlike most prisoners' rights cases, there was no utilitarian, public safety, or security basis on which the denial of voting rights could be defended. Instead, the insistence on denying prisoners the vote seemed rooted in a public need to create "deeper and longer lasting divisions between 'us' and 'them'" in the form of punitive, "no-frills" imprisonment and a marked, monitored existence upon release (Travis 2002: 33). Canada's prisoner voting ban was pure, expressive punishment.

The Supreme Court of Canada pronounced a limit on popular punitiveness in *Sauvé*, finding this particular form of expressive punishment inconsistent with Canada's normative human rights commitments and its

growing "Charter culture." There is considerable dissonance between the Supreme Court's conception of prisoners and the one portrayed daily in the popular media. Despite early indications that the Canadian government might attempt to "legislate around" the *Sauvé* decision (J. Brown 2002), and despite calls by the opposition in Parliament for a constitutional amendment to permit prisoner disenfranchisement (Gamble 2002a), the government appears to have quietly accepted the decision and the reality of prisoner voting rights (Hansard; House of Commons 2003). The *Sauvé* decision and its aftermath reveal both the significance, and limits, of judicially enforced human rights norms.

The Case of the Vanishing Rights: Prisoners at the U.S. Supreme Court

It is safe to assume that the Canadian Supreme Court's decision to reject prisoner disenfranchisement will have little, if any, practical impact in the United States. Advocates and activists are concentrating their lobbying and litigation efforts on regaining the vote for the millions of Americans who are disenfranchised *after* being released from prison (Coyle 2003). However, as part of that struggle, and the struggle against the myriad penalties that follow former prisoners back to their communities, the official "truths" told by courts about prisoners' and ex-prisoners' rights and (non-) membership in communities become significant. There is a danger that in attempting to bring an end to the "invisible punishment" of postincarceration collateral punishment on the basis that ex-felons have "paid their debt to society" and are therefore entitled to full citizenship and rights, we may inadvertently strengthen the case for increasingly harsh treatment of prisoners. In a recent editorial advocating the repeal of ex-felon disenfranchisement laws, the editorial board made the point that "[m]ost states block felons from voting while they are in prison or on parole. That approach recognizes that those who commit felonies can be deprived legitimately of many of society's privileges" (*USA Today* 2003). In light of the mass incarceration Loïc Wacquant (2001) has compellingly described as "black hyperincarceration" and "the first genuine prison society of history" (Wacquant 2001: 121); we must interrogate our assumptions about the legal status and societal participation of prisoners.

A recent decision by the United States Supreme Court demonstrates the degree to which the concept of prisoners as rights holders has fallen out of favor, in the popular realm but also among judges charged with protecting constitutional rights. *Overton v. Bazzetta* 2003 is the most recent in a long line of U.S. Supreme Court decisions holding that any constitutional rights retained by prisoners may be infringed as long as the limitation is "rationally related to a legitimate penological objective" (*Turner v. Safely* 1987).

Michelle Bazzetta and a number of other prisoners in Michigan challenged state regulations that severely limited family and other visits by prisoners. In the case of prisoners with two or more drug infractions, the regulations permanently denied *all* visits except those from lawyers or members of the clergy. The challenge concerned the limit and denial of noncontact visits (where prisoners and visitors are separated by glass), which clearly raise fewer security concerns than do contact visits. At the time of trial, over 1,000 Michigan prisoners were subject to a permanent ban on prison visits. The Court of Appeals for the Sixth Circuit found the regulations unconstitutional for falling "below minimum standards of decency owed by a civilized society to those it has incarcerated," (*Bazzetta v. McGinnis* 2002). However, the U.S. Supreme Court unanimously upheld the regulations.

It is worth recalling that in *Turner* (1987), a case dealing with correspondence between prisoners and with prisoners' right to marry, Justice O'Connor had commented that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" (*Turner*, at 84), a pronouncement that sounds similar to the rejection of a concept of prisoners as "temporary outcasts" in *Sauvé*. However, the notion that prisoners are rights holders rings hollow in *Overton* where the Court fails to recognize that prisoners have any right to, or legitimate interest in, family contact. In addition, the links between prisoners and their communities are minimized, and their reintegration is not contemplated.

Taking the harshest view against the prisoners' claim is Justice Thomas, with Justice Scalia concurring, who states that the only right retained by prisoners is the Eighth Amendment right to be free from cruel and unusual punishment. As long as the punishment or prison conditions imposed by states do not amount to "deliberate indifference" to the prisoners' health or safety (*Hudson v. McMillian* 1992), prisoners have no constitutional claim. In fact, Justice Thomas would have the Court revisit, and sharply limit, its key precedents on prisoners' rights, even putting the word "rights" in quotation marks to emphasize his point that prisoners are not legitimate rights holders.

Rather than starting from the assumption that prisoners, like other Americans, have rights to intimate association and familial relationships, the majority opinion of Justice Kennedy went directly to the justification stage, noting that "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner." He cited the now familiar *Turner* test that any deprivation of prisoners' rights is constitutional so long as it bears a "rational relation to legitimate penological objectives," in this case, combating the illicit drug trade. His conceptual move shifted the focus away from the premise that prisoners are rights holders at all.

Instead, prisoners "rights" are any interests that are "left over" after considering legitimate penological objectives and according broad deference to legislators and prison officials to meet those objectives. *Overton* revealed the complete inadequacy of the *Turner* test to limit harsh treatment of prisoners. Given the tone and scope of the decision, it seems plausible that the court would uphold a rule that banned all family visits for all prisoners at all times.

Justice Stevens wrote for himself and the three other "liberals," Souter, Ginsburg, and Breyer, yet his decision does not depart in any meaningful way from the restrictive view of prisoners' rights articulated by Justice Kennedy. Shortly after the decision was released, Georgetown Law Professor Mark Tushnet was quoted in the *New York Times* as lamenting the "absence of a liberal articulation" of rights in framing the issue before the Court (Greenhouse 2003). The view that prisoners' rights are but pale reflections of constitutional rights, and in any event, can be cast aside with little justification appears to have become commonsensical, even to liberals. Justice Stevens made a point of saying that "nothing in the Court's opinion today signals a resurrection of [the view once held by some state courts that prisoners are mere slaves]." However, that reassurance provided little comfort to the more than 2 million U.S. prisoners or the estimated 1.5 million children with at least one parent behind bars (Bureau of Justice Statistics 2000).

A conception of prisoners as members of communities was also absent in *Overton*. The Court's doctrinal analysis allowed it to avoid consideration of the reality that a majority of prisoners will return to a relatively small number of economically disadvantaged, often racialized, urban communities (Travis, Solomon, and Waul 2001: 41), as well as the uncontradicted evidence that family visits during incarceration correlated with reduced recidivism and improved prospects for successful release. One commentator noted the irony of the court's complete disregard for prisoners' family relationships in a culture purportedly committed to "family values" (Mariner 2003).

The opinions in *Overton* lead one to the unhappy conclusion that prisoners are, in fact, "temporary outcasts from our system of rights." As the other chapters herein demonstrate, the status of "outcast" follows prisoners back to their homes and communities upon release. The increased use of collateral penalties in the 1980s and 1990s (Travis 2002: 18) corresponded with longer sentences, prison expansion, an increasingly punitive approach to prisoners and a wholesale assault on any residual rights they may have held, including rights of redress in the courts (Prison Litigation Reform Act [1996]; Herman 1998). The only discernible constraint on the treatment of prisoners is the Eighth Amendment prohibition against cruel and unusual

punishment, which apparently guards against only flagrantly inhumane treatment such as chaining prisoners to hitching posts for hours in admittedly "non-emergency" situations (*Hope v. Pelzer* 2002).

Prisoners' Rights and Citizenship in Crime Control Cultures

Garland has warned that "[a] government that routinely sustains social order by means of mass exclusion begins to look like an apartheid state" (Garland 2001: 204). The increasingly widespread opposition to ex-felon disenfranchisement (Coyle 2003), and awareness of its profound impact on the political participation of racialized groups, demonstrates that the public and policy makers are waking up to this problem. However, that opposition often reifies the distinction between prisoners and ex-prisoners in a way that may legitimate increasingly punitive treatment of prisoners and render their rights claims less significant. The modest goal of this chapter has been to urge consideration of the scope and meaning of public, political, and legal indifference to prisoners' rights claims and to spur debate about the possibility of moving toward meaningful rights, redress, and reintegration of prisoners into our communities.

The successful Canadian litigation over prisoner voting rights points to the importance of a well-functioning, normative human rights framework with rigorous review and meaningful remedies for the violation of rights. As significant as that is, it is not the whole story. Michael Jackson (2002), a leading scholar and advocate of prisoners' rights, has argued that "the principal benefit flowing from a constitutionally entrenched Charter of Rights and Freedoms is not to be found in the litigation it spawns, but rather in the climate and culture of respect it creates amongst both governments and citizens for fundamental human rights and freedoms." Reaction to the *Sauvé* decision reveals that the notion of prisoners as "temporary outcasts," as persons less than full citizens and rights holders, resonates strongly with members of the Canadian public. Perhaps it is time we confronted this reality and addressed some of our political efforts at promoting what David Brown (2002) has called "discursive citizenship." Brown advocates broadening our focus from the formal legal status of prisoners to consider the "necessary conditions under which prisoners might participate fully in a democratic citizenship" (Id. at 323). Discursive citizenship requires safe and healthy living conditions that promote participation in public discourse through access to education and work skills, the media, and the Internet, as well as forging links between prisoners and members of other social justice movements. Richard Sauvé's own story[7] demonstrates some of the possibilities of participation and engagement. Of course, securing these conditions necessarily implicates laws and rights, but it does so in a way that emphasizes participation and process over static, liberal notions of

entitlement, a message that may have more currency in contemporary politics and culture.

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Endnotes

1. Only the United Kingdom, Portugal, and Spain had higher rates (Walmsley 2003).
2. Federal prisoners had previously sought unsuccessfully to have the law declared unconstitutional. The British Columbia court in *Re Jolivet and Barker and the Queen et al.* (1983) based its decision to uphold the section on the ground that, by virtue of their incarceration, prisoners could not exercise a "free" political choice. Another early case, *Canada (Attorney General) v. Gould* (1984) saw the Federal Court of Appeal reverse an interlocutory order, which would have enabled one prisoner to vote in an upcoming federal election on the grounds that the law infringed his right to vote. These decisions were of limited precedential value. However, it is notable that the government justified the law in *Gould* on the basis that allowing prisoners to vote was too difficult for security and administrative reasons. In the Court of Appeal decision in *Sauvé* (1993), Justice Arbour commented that the government "wisely abandoned" that argument before that court. Prisoners have also successfully challenged a number of provincial disenfranchisement laws: *Byatt v. Alberta (Chief Electoral Officer)* (1998) and *Driskell v. Manitoba (Attorney General)* (1999).
3. That section provides, "The following persons are not qualified to vote at an election and shall not vote at an election . . . (a) every person who is imprisoned in a correctional institution serving a sentence of two years or more. . . ."
4. I am grateful to Allan Manson for pointing out that the Chief Justice's majority opinion left open the question of whether prisoner status may constitute an analogous ground of discrimination and, therefore, may provide the basis for a successful prisoners' equality rights case in the future.
5. Section 1 of the *Charter* provides the following: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
6. Freiberg describes the restorative justice movement as somewhat successful at capturing the public imagination and attempting to address what he describes as the "three essential core elements that make up a response to crime: the instrumental, the emotional/affective and the production of social cohesiveness" (Freiberg 2001: 272).
7. During the eighteen years he was in prison, Sauvé started a "Lifers' Group" and a "Ten Plus Group," both of which aimed to represent the interests of long-term prisoners. He obtained his B.A. and did much of the work toward an M.A. in Criminology. He advocated for prisoners' rights and interests to the prison administration and politicians and was the Deputy

Co-ordinator of an annual sporting event that brought together mentally challenged children from across Ontario for a weekend of Special Olympic-style games in the prison yard. A jury of local citizens rewarded Sauvé for his high level of civic engagement by granting his application for an early parole hearing ten years before he would normally have been eligible (Nikolovsky 1994). He is currently employed as an in-reach worker with "Lifeline," a support organization for lifers.

15*

Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience

DIRK VAN ZYL SMIT

Introduction

> As bearer of guaranteed fundamental rights to human dignity the convicted offender must be given the opportunity, after the completion of his sentence, to establish himself in the community again.[1]

One of the salient features of the apartheid legal order was the extent to which it used criminal law to suppress opposition to the government. Opponents were not only prosecuted for political offences but also subjected, after they had served their sentences, to various forms of civil disability, or *collateral civil penalties*, as they are sometimes called. In the most extreme case, this took the form of legislation allowing for their detention after they had served their sentences.[2] More often, the civil disability took the form of *banning orders*, which often included "house arrest".[3] Even those who had served full sentences were effectively removed from civil society. Former prisoners were denied the right to stand for parliament if they had been convicted of an offence involving imprisonment for more

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