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Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws

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**ARTICLE: BALLOT BOXES BEHIND BARS: TOWARD THE REPEAL OF PRISONER
DISENFRANCHISEMENT LAWS**

by Debra Parkes*

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SUMMARY:

... In the six years since Human Rights Watch and The Sentencing Project jointly released a report on felon disenfranchisement in the United States, some public and legislative attention has been focussed on the issue. ... Part III discusses a recent Canadian decision which found that country's prisoner disenfranchisement law unconstitutional. ... 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. ... When the Supreme Court of Canada struck down a prisoner disenfranchisement law in *Sauve*, it paid particular attention to the constitutive function of voting, citing with approval the words of the South African Constitutional Court that "the vote of each and every citizen is a badge of dignity and of personhood. ... "Getting Out the (Prison) Vote": Implementing Prisoner Voting Rights A theme in the debate over prisoner voting rights in Canada is how to administer and facilitate prison votes so that the franchise might have some instrumental effect. Even where prisoners are permitted by law to vote, voter turnout remains low, as it is in those U.S. states allowing some prisoners to vote. ...

TEXT:

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I. Introduction

In the six years since Human Rights Watch and The Sentencing Project jointly released a reportⁿ¹ on felon disenfranchisementⁿ² in the United States, some public and legislative attention has been focussed on the issue.ⁿ³ At a time when chronically low voter turnoutⁿ⁴ and racially-polarized votingⁿ⁵ are harsh realities, the fact that state laws bar millions of American citizens from voting - in many cases, for life - is startling. The size and racial composition of the disenfranchised population indicate that these laws should be carefully scrutinized. Felon disenfranchisement laws bar more than 3.9 million people from voting, a disproportionate share of which are African American men.ⁿ⁶

The practice of disenfranchising prisoners is neither limited to the United States, nor universal. Denmark, Israel, South Africa, Sweden and Switzerland are just some of the countries that place no restrictions on prisoners' right to vote.ⁿ⁷ Canada, Australia and the United Kingdom currently practice criminal disenfranchisement in a more limited way than the United States,ⁿ⁸ barring only certain offenders from voting, and only while incarcerated.

Criminal disenfranchisementⁿ⁹ has its roots in the punishment of "civil death," [*74] imposed for criminal offences under Greek, Roman, Germanic and later Anglo-Saxon law. English law developed the related punishment of attainder which resulted in forfeiture of all property, inability to inherit or devise property, and loss of all civil rights.ⁿ¹⁰ These principles were transplanted to the British colonies which later became Canada and the United States.ⁿ¹¹

Calls for reform of disenfranchisement laws in the United States focus primarily on the plight of individuals released from prison who are living in the community n12 as well as on the racial impact of felon disenfranchisement. n13 This paper challenges the dominant view in the United States that disenfranchising any prisoners is still sound public policy. A brief look north of the 49th parallel reveals that Canadian courts have recently confronted this question. In October 2002, the Supreme Court of Canada struck down as unconstitutional a federal ban on prisoner voting. n14 This paper draws on the Canadian experience with a rights-based rejection of prisoner disenfranchisement in making the argument that the ballot box should be opened to all prisoners in the United States.

Opponents of disenfranchisement often highlight the important symbolic or psychic impact of disenfranchising individuals in societies that purport to value universal adult suffrage, arguing that disenfranchisement brands or labels criminals as less than full persons who are unworthy of the franchise. n15 These arguments are [*75] powerful in the context of ex-felon disenfranchisement where the individuals in question have completed their punishment and, as such, have "paid their debt to society." The arguments for extending the vote to ex-felons are compelling and will not be repeated in detail here. n16 However, in taking up the important work of correcting this injustice, scholars and advocates have left largely unchallenged the law and policy that justifies disenfranchising the two million individuals n17 currently incarcerated in the United States. n18 In response to the highly symbolic and expressive arguments made for denying prisoners the vote (such as, for example, the justification that prisoners are morally unfit to exercise the franchise or that disenfranchisement expresses society's disapproval of criminal acts), opponents of disenfranchisement have cited the symbolic and psychic benefits prisoners receive by being included in the electorate. n19

When it comes to considering the potential impact of extending the franchise to prisoners, advocates of prisoner voting rights tend to minimize the practical effect of these votes, stating that prisoner votes are unlikely to be statistically significant n20 and emphasizing that there is no evidence to indicate that prisoners (or [*76] even ex-prisoners) will hold views different from the "mainstream" on criminal justice issues. n21

Yet criminal disenfranchisement affects not only the individuals who are disenfranchised and effectively rendered second-class citizens. It affects us all because voting is not just symbolic. It has an instrumental function; it is the primary means by which individuals and groups express their preferences and alter law and policy.

This instrumental n22 function of voting often figures prominently in the justifications for disenfranchising incarcerated prisoners when it is suggested that prisoners will vote as a bloc for lenient criminal law policies, will vote against the "public interest," n23 and will swamp the votes of law-abiding citizens living near prisons, particularly where prisons are located in small, rural communities.

This paper takes seriously the objection that allowing prisoners to vote may have an impact on the outcome of elections or on the development of law and policy, given the extraordinarily high incarceration rate currently a reality in the United States. The reality that prisoners may have an impact on the outcome of elections is an argument in favour of allowing them to vote rather than against it. A progressive critique or constitutional challenge of prisoner disenfranchisement should call attention to the instrumental, as well as symbolic and constitutive functions of voting, and must defend the importance of having the views and preferences of prisoners voiced at the ballot box. This paper attempts to do that.

Part II briefly surveys felon disenfranchisement laws in the United States. Part III discusses a recent Canadian decision which found that country's prisoner disenfranchisement law unconstitutional. The Canadian experience is instructive for its attention to, and ultimate rejection of, a number of common justifications for maintaining prisoner disenfranchisement laws. To understand the harm of prisoner disenfranchisement, Part IV examines three elements of the right to vote in American law (participation, aggregation and governance), as well as two distinct functions of the right to vote, namely the constitutive function and the instrumental function. Part V provides an analysis of the various constitutive and instrumental reasons for recognizing the right of prisoners to participate in the electoral process. Part VI offers some potential answers to the practical and administrative objections often cited by opponents of prisoner voting, drawing on the Canadian experience, and Part VII concludes with some thoughts on the prospects for change.

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II. Voteless Millions: The State(s) of Disenfranchisement in the United States

The sheer number of individuals who cannot vote due to criminal disenfranchisement laws points to the need to think seriously and critically about the practice. Fellner and Mauer report that approximately 3.9 million American citizens are disenfranchised, 1.4 million of them permanently, as a result of state felon disenfranchisement laws. n24 In forty-

eight states and the District of Columbia, criminal disenfranchisement laws deny the vote to all convicted adult felons in prison. n25 A majority of states extend disenfranchisement to include ex-prisoners on probation, n26 on parole, n27 or even permanently, n28 long past the time when offenders have "paid their debt to society." Department of Justice officials have called the aggregate of felon and ex-felon disenfranchisement laws across the states a national "crazyquilt" of differing standards. n29

The statistics are even more disturbing when one looks at the racial composition of the disenfranchised population. Thirty-six percent of that population consists of African American men; in ten states, at least one in five African American men is disenfranchised, n30 and in seven of those states, n31 at least one in four African American men is disenfranchised for life. n32 There is also increasing attention to the web of other "collateral consequences" of criminal conviction, n33 such as disqualification from welfare benefits, public housing, and employment opportunities, that combine with felon disenfranchisement to relegate poor and racialized individuals, families and communities to a degraded form of citizenship and public participation.

As a matter of constitutional law, the United States Supreme Court has said that felon disenfranchisement laws do not violate the Fourteenth or Fifteenth Amendments, so long as they were not enacted purposefully to deprive racial minorities of the right to vote. n34 In fact, the Supreme Court held in *Richardson v. Ramirez* n35 that felon disenfranchisement is "affirmatively sanctioned" by Section 2 of the Fourteenth Amendment which provides, inter alia:

When the right to vote ... is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. n36

The majority's reasoning is not particularly convincing. In fact, Section 2 of the Fourteenth Amendment was rendered largely superfluous by the Fifteenth Amendment and the Supreme Court noted as much in *Reynolds v. Sims*, n37 when it essentially "read out" the section from the Fifteenth Amendment, relying only on the Equal Protection Clause in Section 1. In any event, as Justice Thurgood Marshall observed in dissent in *Richardson*:

By providing a special remedy for disenfranchisement of a particular class of voters in 2, Congress did not approve of all election discrimination to which the 2 remedy was applicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny. n38

Regaining the vote for former prisoners, let alone prisoners currently serving sentences, is sure to be an uphill battle - whether fought in the courts or legislatures - given the state of popular opinion and political discourse on criminal [*79] justice issues n39 and in light of the sheer number of different state laws. Nevertheless, the moderate publicity associated with the *Losing the Vote* study in 1998 led to a flurry of reform initiatives in state legislatures, in Congress and in the courts. n40 However, none of these reforms aims to abolish disenfranchisement for incarcerated prisoners. n41

III. A Look North: The Rejection of Prisoner Disenfranchisement in Canada

The United States and Canada share a common law heritage, a liberal democratic political culture, and a commitment to universal adult suffrage, all of which make the comparison of criminal disenfranchisement laws potentially useful. n42 In addition, while Canada incarcerates 102 adults per 100,000, much fewer than the U.S. rate of 686 per 100,000, n43 Canada tends to be more "tough on [*80] crime" than most European countries. n44

The twenty year-old Charter of Rights and Freedoms n45 has provided grounds for a number of recent, high-profile challenges to prisoner disenfranchisement laws. The interpretive framework for Charter claims adopted by the Supreme Court of Canada 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. n46 As a result, Canadian courts have subjected the normative arguments for prisoner disenfranchisement to close scrutiny in a way that has not occurred in American felon disenfranchisement cases.

Section 3 of the Canadian Charter of Rights and Freedoms provides 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." Claiming a violation of that right, Richard Sauve, a prisoner serving a life sentence for murder, challenged a provision of the Canada Elections Act n47 barring prisoners serving sentences of two years or more from

voting in federal elections. n48 [*81] In a strongly-worded decision, a majority of Canada's highest court held that prisoner disenfranchisement laws, even those limited to longer-serving prisoners, unjustifiably infringe the right to vote, a right that is "fundamental to our democracy and the rule of law and cannot be lightly set aside." n49

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. n50 This position was a change from earlier prisoner voting rights litigation in which the government had unsuccessfully defended a broader, blanket ban on all prisoner voting on the basis that excluding prisoners promoted a "decent and responsible electorate." n51 That argument, based on the moral character of voters, was rejected as anachronistic and inconsistent with the values in the Charter. n52

The majority in the recent *Sauve* decision 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. n53 Chief Justice McLachlin noted that "the government has failed to identify particular problems that require denying the right to vote," n54 expressing concern that, "if Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review becomes vacuously constrained or reduced to a contest of "our symbols are better than your symbols.'" n55

The government's evidence at trial consisted of the testimony of six expert [*82] witnesses, n56 a number of them American, who testified about the moral and philosophical justifications for prisoner disenfranchisement laws. These witnesses sought to relate their evidence to the two objectives of disenfranchisement advanced by the government: promoting civic responsibility and enhancing the criminal sanction.

To support the objective of enhancing the criminal sanction, the government experts testified that the sentencing principles of retribution and moral education were served by disenfranchising prisoners. Under a theory of retribution, punishment is meant to "negate the wrong" committed by the offender. While nothing can literally negate a wrong, the act of punishing is an attempt to express something about the crime and to express society's condemnation of the criminal's act. n57 Jean Hampton - a moral philosopher and the key government witness whose evidence the trial judge, appellate court, and Supreme Court dissent found persuasive - testified that, in committing a serious crime, an offender asserts a feeling of power or mastery over a victim. Therefore, the law must assert something in response.

Through the imposition of disenfranchisement as additional punishment, Hampton imagines the victim of crime and the community to be symbolically expressing to a criminal that they will not tolerate the violation of trust and societal values that the criminal conduct represents. Therefore, as part of the criminal's punishment, he or she will not be entitled to participate in the decision-making process which is committed to those values. n58 Hampton suggests that this process "morally educates" the offender. n59

The arguments for retribution and moral education rely heavily on the expressive power of disenfranchisement. The majority in *Sauve* agreed that disenfranchisement sent a message, but not a positive one:

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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. n60

On the broader 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. n61

In advancing the second purported objective, promoting civic responsibility and respect for the rule of law, two of the government's witnesses advanced theories that criminal behaviour indicated disrespect for the welfare of fellow members of society, for the rule of law, and for the electoral process. n62 They 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, and promotes the virtues of responsible citizenship. n63

Again, the Supreme Court majority disagreed, saying that the government understood the connection between obeying the law and having a voice in making the law "exactly backwards." n64 The right of all citizens to vote is the basis of democratic legitimacy. n65 Therefore, when the state disenfranchises a group of citizens, it undermines its ability to function as the legitimate representative of those citizens. n66 In doing, so, it "erodes the basis of its right to convict and punish law-breakers." n67

[*84] In any event, the government's assumption that civic responsibility is best promoted by excluding prisoners from opportunities for civic engagement was contradicted by Richard Sauve's own experience in prison. While incarcerated, Sauve pursued two university degrees and volunteered with charities and prison organizations n68 that mirror classic "civic associations." n69 A jury of local citizens and the correctional system itself rewarded Sauve for his high level of civic engagement by granting his application for an early parole hearing and then granting him parole ten years before he would normally be eligible, at least in part on the basis of his clean prison record and community involvement. n70 As noted by the majority in Sauve, "to deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility." n71

The impact of Sauve 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's voting rights claim, n72 combined with the strong language used to denounce government's purported objectives, makes it unlikely that any prisoner voting ban will pass constitutional muster, n73 including a number of provincial disenfranchisement laws. n74 The decision could also be persuasive in any future litigation over prisoner voting rights in countries with similar [*85] constitutional guarantees. n75

To assess whether anything can be learned from the Canadian experience, n76 it is necessary to consider how American law defines the "right to vote" and, in particular, whether incarcerated persons are (or should be) included in the class of people who hold that right to vote.

IV. The Right to Vote: Elements and Functions

A. The Elements of Voting: Participation, Aggregation and Governance

The starting point for understanding the right to vote is the United States Constitution. The Constitution does not contain an express "right to vote," n77 nor does it require elections to be held or set qualifications for voters. n78 Instead, it prohibits discrimination in allocation of the franchise based on race n79 sex, n80 and, to a limited degree, age. n81 Therefore, while the right to vote is not expressly guaranteed, once governments decide to hold elections, adult citizens are understood to have a right to participate equally with other adult citizens in those elections. Furthermore, the Supreme Court has repeatedly spoken of a right to [*86] vote, calling it "fundamental" n82 and saying that "no right is more precious in a free country." n83

Pamela Karlan n84 has identified three strands of voting rights jurisprudence which indicate that the right to vote includes three interrelated but distinct elements: n85 participation, aggregation, and governance. n86 "Participation" is another word for enfranchisement and simply entails the right to cast a ballot that is counted in an election. n87 The element of "aggregation" recognizes that voting functions primarily combine individual preferences to reach a collective decision, usually the selection of one or more representatives. n88 Finally, the concept of "governance" understands voting as an integral part of the practice and process of decision-making through elected representatives, seeing voting as part of an ongoing public policy conversation rather than a declaratory event on election day. n89

Over the years, the right to participate has grounded successful challenges to various restrictions on the franchise based on race, sex, literacy, wealth, mental competence, residency or moral character. Since voting was characterized as a fundamental interest by the Supreme Court in the mid 1960s, n90 limitations on voting participation have had to pass strict scrutiny review. n91 Karlan suggests that the Court's jurisprudence on voter participation embodies a value of "civic inclusion," meaning "a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy." n92

The right to participate is understood to be "outcome-independent" in the sense that courts have not usually inquired into whether disenfranchised persons (such as African Americans, short-term residents or illiterate people) are likely to vote differently than the currently enfranchised population or whether broadening [*87] the franchise will affect the outcome of elections. n93 Conversely, the right of aggregation is essentially "outcome-regarding" because it

is based on the idea that groups of voters must have a fair opportunity to elect their representatives of choice. n94 A claim for prisoner voting rights is usually seen as implicating only the participatory element of voting, n95 yet the justifications for denying the vote to prisoners have not been content-neutral or outcome-independent. A prisoner voting rights claim must address the (often unarticulated) concern that prisoners' votes will swamp those of "law-abiding" citizens and must take seriously the possibility that prisoners may have policy preferences different from other groups in society. n96 Given the sheer number of incarcerated people in the United States, n97 their votes are not likely to be without impact. n98

B. The Functions of Voting: Instrumental and Constitutive

Leaving aside the rights of aggregation and governance, the participatory component of the franchise can be understood to have more than one function. At a basic level, participation in the act of voting on election day is the primary means by which individuals express their preferences and views about the way they wish their society to be ordered and governed. It is the means by which individuals (and, through aggregation, groups) express their "political will" and direct governmental institutions. This instrumental concept of voting is generally content-neutral in the sense that it purports not to allow individuals to be disenfranchised because of the presumed content of their votes. n99 Voting is a means to gauge the political will, [*88] whatever the content of that will.

However, recalling Karlan's concept of "civic inclusion," a competing theory emphasizes the constitutive function of voting. Disenfranchisement has been a powerful symbolic, as well as practical, method of excluding many groups such as women and minority racial and religious groups. Therefore, disenfranchised individuals may seek the vote to take part in a "meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity." n100

1. Voting as Instrumental

When the United States Supreme Court describes the right to vote as fundamental and as "preservative of all other rights," n101 it draws on liberal theory which ascribes particular importance to political rights. n102 The franchise serves a gate-keeping function to allow a person to have some influence on the laws that govern him or her. n103 John Rawls' first principle of "justice as fairness" is that each person must have an equal right to the most extensive system of basic liberties. n104 Political liberties are fundamental to ensuring access to the political process which determines other basic liberties. n105

This concept of the franchise figured prominently in the struggle for voting rights for African American people in the civil rights movement of the 1950s, 60s and 70s. While there was an important symbolic effect of including previously disenfranchised individuals in the electorate, the push for voting rights for African Americans was not merely a symbolic matter. Lani Guinier notes the extent to which the African American voting rights movement in the 1950s and 60s was centered on a vision of Black political empowerment and based on a redistributive theory of "representation and the right to participate." n106 Guinier calls the idea that voting rights were the key to African American economic, political and social success the "Black Electoral Success Theory." n107 Under this theory, three reasons were articulated for political participation: (1) to mobilize the African American community; (2) to promote a social and economic agenda; and (3) to elect responsive officials. n108 Martin Luther King, Jr. described voting rights in similar terms when he said,

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Give us the ballot, and we will no longer have to worry the federal government about our basic rights ... Give us the ballot and we will fill our legislative halls with men of goodwill ... Give us the ballot and we will help bring this nation to a new society based on justice and dedicated to peace. n109

Unfortunately, the history of African American voting rights struggles reveals that "Black Electoral Success" was a more elusive goal, one that would not be achieved by a campaign for formal participation in the electoral process alone. Therefore, current minority voting rights litigation and lobbying tends to focus on the rights of aggregation and governance, in the sense of making the votes cast by African Americans "count." However, with forty-five percent of the U.S. prison population being African American n110 and thirteen percent of all African American men being barred from voting due to felon disenfranchisement laws, n111 the loss of participatory rights has significant impact on the instrumental value of African American votes.

Implicit in an instrumental concept of the franchise is the idea that government functions best when the views and preferences of all its constituents are taken into account. However, the way one defines "membership" often justifies barring certain persons from the franchise, even those who may have sufficient interest and capacity to exercise an instrumentally useful vote. American states limit their membership for electoral purposes by using some citizenship, residency, age, and mental capacity requirements for voters.

Residency requirements are perhaps the easiest to justify in the sense that membership in a community usually implies a physical connection to that community. n112 Non-residents can have an interest (such as a property interest) in a political community, but it is usually accepted that some form of residency requirement is necessary to define a political unit (particularly in a federal system where political units are self-governing), n113 although residency requirements must not be too broad. n114

On the surface, age and mental capacity thresholds also seem appropriate, although the precise location of those thresholds is not obvious. It is likely that [*90] many teenagers, and probably some younger children, understand as much about voting as many adults and are considerably more informed than many adult voters. Any line will be arbitrary and it is beyond the scope of this paper to consider whether the age of eighteen is an appropriate line. n115 With respect to mental capacity, it may be that the very few individuals who cannot understand that the act of marking an "X" on a ballot is the act of "voting" for a representative, do not have a strong claim to exercise that right. However, beyond that point, line-drawing will be problematic and potentially over-inclusive. Courts should require that mental competency requirements be minimal. n116

Citizenship requirements, like criminal disenfranchisement laws, are problematic because they are not based on concerns about lack of capacity or interest. n117 At the local level, it is difficult to justify limiting the vote to citizens other than as a means to encourage immigrants to become citizens. The argument for alien suffrage is often made, at least in part, on the ground that equal obligations (i.e., the payment of taxes) should entail equal privileges (i.e., the right to vote for the people who will spend those tax dollars). In cities with large immigrant populations, such as Los Angeles, extending the franchise to non-citizens could have a discernable effect on electoral outcomes and on policy choices. n118 Limiting the franchise to citizens may also contribute to a sense of exclusion among minority [*91] groups. n119

The exclusion experienced by disenfranchised groups - historically in the case of African Americans, other minority groups, and women, and currently in the case of non-citizens, prisoners and ex-prisoners - leads many to the conclusion that voting serves more than just an instrumental function. It also serves a constitutive function.

2. Voting as Constitutive

Something other than a desire to inform the government of their individual policy choices likely motivated Black South Africans to queue for hours and days in order to vote in the first post-Apartheid elections in 1994. When individuals have been disenfranchised, the act of voting takes on significance beyond its instrumental function. In discussing the historical meaning of citizenship in the U.S. context, Judith Shklar n120 suggests that for the disenfranchised and the newly-enfranchised, gaining the right to vote was and is about belonging and standing as a member of society. n121

John Rawls also speaks of the "fundamental importance of self-respect" which is "rooted in our self-confidence as a fully cooperating member of society capable of pursuing a worthwhile conception of the good." n122 That self-confidence arises from our status of equal citizenship which is guaranteed by the fair value of the political liberties. n123 In this way, the right to vote is fundamental not just in the pragmatic sense of enabling citizens to secure other rights, but also for its symbolic value.

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V. Making the Case for Prisoner Voting Rights: Constitutive and Instrumental Reasons

A. The Constitutive Effect of Enfranchising Prisoners

Calls to extend the franchise to ex-felons in the United States and to incarcerated prisoners in Canada have appealed strongly to the constitutive function of the franchise, particularly the notion that disenfranchisement profoundly affects a person's dignity and relegates him or her to the status of second-class citizen or even sub-human. When the Supreme Court of Canada struck down a prisoner disenfranchisement law in *Sauve*, it paid particular attention to the constitutive function of voting, citing with approval the words of the South African Constitutional Court that "the vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that every person counts." n124

In making the case for a Voting Rights Act claim against criminal disenfranchisement laws, Andrew Shapiro notes that "the symbolic worth of enfranchisement should not be underestimated," n125 because it is a marker of citizenship and participation with other members of society. George Fletcher has argued that criminal disenfranchisement should be abandoned because it operates in the United States as a "technique for reinforcing the branding of felons as the untouchable class of American society." n126 Joe Loya, a disenfranchised ex-felon living in California, describes the relationship between the franchise, citizenship and personhood in similar terms:

Without a vote, a voice, I am a ghost inhabiting a citizen's space... I want to walk calmly into a polling place with other citizens, to carry my placid ballot into the booth, check off my choices, then drop my conscience in the common box. n127

To many of its critics, the biggest wound inflicted by criminal disenfranchisement is the symbolic exclusion and branding of offenders as unworthy members of society. The instrumental effect of prisoners' votes is minimized. The suggestion that prisoners might have views and preferences different from other voters is considered unlikely or, at least, not discussed as a factor in favour of extending the franchise to prisoners. n128

Yet concerns about the way that prisoners might vote play a role in the debate over disenfranchisement. One of the commonly-invoked justifications for disenfranchisement laws is some variant of the theme that prisoners will vote [*93] against the public interest, particularly on criminal law issues. In a 1967 felon disenfranchisement case, *Green v. Board of Elections*, n129 Judge Friendly endorsed this view, apparently finding it self-evident:

It can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be. n130

George Fletcher labels these ideas "mystical" and "fanciful" and takes the view that they cannot "withstand a minute of rational argument." n131 Fletcher and the court in *Green* had in mind ex-felons who were living in the community, rather than current prisoners. However, in relation to prisoners' votes, the argument carries considerable force with, for example, the residents of a rural community who live next to one or more large correctional facilities. n132

Even where prisoner voting is allowed, concerns about how prisoners might vote appear to lie behind rules that determine the electoral districts in which inmate votes are counted. n133 For example, in the Canadian jurisdictions where prisoners vote, laws usually deem a prisoner's ordinary residence or domicile to be his or her place of pre-incarceration residence. n134

B. The Instrumental Effect of Enfranchising Prisoners

Upon examination, the argument that prisoners' votes will be "subversive" can be turned on its head in favour of a robust instrumental view of the right to vote. Criminal law, like other aspects of public policy, varies over time and is continually undergoing a process of re-evaluation and revision as public attitudes change and are expressed by the voting public. Examples abound. At various times over the past hundred years, the legal treatment of such practices as abortion, drug use and sale, possession of alcohol, homosexual sex, and certain forms of sexual assault have shifted from being criminal to non-criminal or vice versa as public attitudes change.

While it is not the case that voting is the only way that reformers can advocate [*94] changes to criminal or other laws, our democratic system is built on the premise that change is best effected through the electoral and legislative process, rather than through rebellion, rioting, or back-room influence. John Hart Ely speaks of the problem of the political "ins" excluding and deciding the fate of the political "outs," n135 a process which hinders social and political evolution. Ely goes on to say that we "cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a convincing one." n136

It is for this reason that political rights are often considered "preferred rights" that form the foundation for other rights. For example, in Canada, the right to vote in the Canadian Charter of Rights and Freedoms was deliberately placed outside of the potential application of Section 33, the so-called "legislative override" provision. Section 33

permits the federal or provincial governments to declare that a particular law operates notwithstanding the existence of a Charter right that would normally render the law unconstitutional. n137 Rights such as freedom of expression, freedom of association and equality, are subject to a potential legislative override, n138 but political rights were meant to exist independent of changing public moods. n139

Justice Marshall suggested in dissent in *Richardson v. Ramirez* that the real purpose of ex-felon disenfranchisement was a less than convincing one, namely "to keep former felons from voting because their likely voting pattern might be subversive to the interests of an orderly society." n140 In rejecting that rationale, Justice Marshall emphasized the need to treat the participatory right to vote as content-neutral, and his discussion in this regard is worth quoting at length:

The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by the majority of the voting public, is constantly undergoing reexamination. This Court's holding in *Davis*, *supra*, and *Murphy*, *supra*, that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, [*95] strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal "to prevent persons from being enabled by their votes to defeat the criminal laws of the country." ... Today, presumably those who support the legalization of marijuana could be barred from the ballot box for the same reason. The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. n141

The idea of content-neutrality in allocating the franchise was affirmed by the Court in *Carrington v. Rash* n142 where it struck down as unconstitutional a Texas law barring military personnel from voting in local elections because of an alleged incompatibility of views between military and civilian residents. The Court held that it is unconstitutional for a state to "fence out" a particular class of voters because of suspicions about the way they might vote. n143

A liberal democratic political system functions best when the views and preferences of all its members can be expressed through the franchise. n144 When the views of one group are systematically cut out of the political process, the public debate will be skewed, particularly if the views of members of the excluded group do not reflect the distribution of views in the rest of the population. The disenfranchisement of prisoners removes from the criminal policy debate the electoral influence of individuals who have personal experience with the application of that law, and who arguably have much to contribute to that debate. n145 For example, one might reasonably suspect that prisoners could have different views about extremely punitive criminal laws such as "Three Strikes" policies. Of course, any differences that exist might not be enough to tip the scales in an election, n146 but if the distribution of views about such policies is different among [*96] prisoners than in the general population, it could be a significant factor in some elections or referenda.

Similarly, opponents of increasingly strict sentencing laws for certain drug offences often argue that such laws are political, pointing to the reality that African Americans are convicted and sentenced under such laws at a rate disproportionate to their share of the population. n147 Since many African Americans are locked up under those very laws (or disenfranchised as ex-felons), they cannot contribute to the efforts to change the laws. It is left largely in the hands of people in the jurisdiction who have never experienced the impact of the laws to effect legislative change. If drug laws are at least partially political and the product of a certain social climate, then it seems appropriate that individuals with experience under those laws not be barred from making and altering them.

It might be objected that prisoners have too large a stake in the criminal justice system to be neutral about the issues. However, it is the government that must be neutral about the content of its citizens' votes, not the voters themselves that must be neutral about the issues:

Bias does not disqualify people from voting. Indeed voting is precisely about expressing biases, loyalties, commitments, and personal values. Excluding from the electorate those who have felt the sting of the criminal law obviously skews the politics of criminal justice toward one side of the debate. n148

One might also question the empirical basis for suggesting that the distribution of views and preferences among prisoners will not track the distribution of views and preferences in the relevant political community in which they would vote. n149 [*97] Not surprisingly given their lack of political participation, there appears to have been no

scientific study of prisoner political views in the United States. However, we do know something about the demographics of the prison population that may help us understand the political impact of disenfranchising prisoners. n150

C. The Instrumental Effect in Racialized Communities

One cannot talk about voting rights or prisoners' rights in the United States without talking about race. It is no secret that the population of inmates does not reflect the racial composition of the United States as a whole. Rather, it consists of disproportionately large numbers of African American and Hispanic people. Forty-five percent of prison inmates are African American and eighteen percent are Hispanic, compared to 12.3% and 12.5% of the general population respectively. n151 Similarly, while one in sixty-three White males aged twenty-five to twenty-nine was in prison or jail in 2001, the number is one in eight for African American men and one in twenty-three for Hispanic men. n152

The phenomenon of racial bloc voting in the United States is also well-documented, particularly in the South. n153 The fact that a majority of African Americans vote for Democratic candidates is also well-known. n154 Pamela Karlan [*98] further notes that African Americans tend to be quite politically cohesive:

[African Americans] occupy a position similar to that of many other socially and politically cohesive groups, such as "union-oriented workers, the university community, [and] religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas." To the extent that racially homogeneous social groups share political preferences, a pluralistic political system that seeks to aggregate exogenous preferences cannot categorically exclude such groups without sacrificing legitimacy. n155

On an issue such as affirmative action, African Americans tend to have different views than "White Americans," n156 a fact which may well translate into policy preferences in voting. There is also some indication that African Americans may have different opinions and views with respect to policing than White Americans. n157 While a majority of the Supreme Court has actively resisted, as a normative matter, the notion that African American voters have a distinct political viewpoint, n158 evidence points to a contrary reality, at least with respect to support for the major political parties.

If the content of African American votes is different from that of the wider population, or if the success of African American candidates is dependant on the existence of an African American majority in a given district, the fact that members of this group are disenfranchised in numbers disproportionate to their share of the population has serious implications for the political process. n159

[*99] The National Association for the Advancement of Colored People [NAACP] appears to have recently considered the potential impact that prisoners' votes might have in an election. As part of its 2000 drive to register as many as four million new voters, the NAACP made efforts to register prisoners convicted of misdemeanours or awaiting trial since state laws often disenfranchise only those convicted of felony offences. n160 The drive was aimed at states such as North Carolina in which African Americans comprise approximately half of those convicted of misdemeanours and nearly two-thirds of those convicted of felonies, while representing only twenty-two percent of the state's population. n161

Finally, an inmate in a New York state prison made an instrumental argument for prisoner voting rights in a letter to the editor of the New York Daily News in 1993 by highlighting his perception of the negative effect of disenfranchisement on minority communities' political power:

We believe that the law that takes away a prisoner's right to vote has a crippling effect on so-called minority communities' attempts at political empowerment... . So-called minorities are more likely than whites to be incarcerated when convicted of the same crimes... . Allowing prisoners to vote would be a plus for black and Hispanic ambitions - and maybe that is why it is not allowed. n162

D. Prisoners as Voters and Constituents: Making Politicians Accountable

Even if the distribution of views and preferences of the prison population accurately reflects those of the non-incarcerated population, and even in the absence of proven race discrimination, n163 there may be other salutary effects on the [*100] political process if prisoners are included in the electorate.

Currently, there is little need for politicians to pay attention to criminal justice matters beyond being sensitive to their constituents' concerns about controlling the crime that they perceive as increasing. n164 The conditions of prisons and the effect of harsh sentencing laws on prisoners rarely figure in their strategic calculus. n165 Prisoners are no politician's constituents. n166 In the current climate, there is little to gain, and much to lose, if a politician is seen as being soft on crime. n167 While extending the franchise to prisoners would not likely alter that equation radically, there is reason to believe that some politicians would take seriously their responsibility to visit their constituents in prison, to educate themselves about the issues that face prisoners, and perhaps to take an interest in less punitive criminal law reform. n168

In the Canadian province of Quebec, where provincial law permits all prisoners to vote, anecdotal evidence indicates that at least some candidates have [*101] taken an interest in the prison vote. During the 1998 provincial election campaign, Parti Quebecois candidate Raoul Duguay visited Cowansville Penitentiary, a federal prison which houses many long-term inmates. n169 Under Quebec law which provides that inmates' votes are counted in their place of domicile, n170 ninety-two inmates had designated the prison as their place of domicile. For Duguay, who was running in that district, those ninety-two votes were significant enough to warrant meeting with inmates to discuss their concerns. n171 The potential for this kind of interaction between prisoners and current or aspiring politicians raises other issues that trouble opponents of prisoner enfranchisement, including the location where prisoners votes will be counted and the potential security and administrative concerns associated with facilitating inmates' access to politicians and to political information. These issues will be addressed below.

VI.

"Getting Out the (Prison) Vote": Implementing Prisoner Voting Rights

A theme in the debate over prisoner voting rights in Canada is how to administer and facilitate prison votes so that the franchise might have some instrumental effect. Even where prisoners are permitted by law to vote, voter turnout remains low, as it is in those U.S. states allowing some prisoners to vote. For example, Canada's Chief Electoral Officer reports that only 5,194 (or 22.5%) of the 23,116 incarcerated persons in Canada who were eligible to vote in the November 2000 federal election, n172 actually cast ballots. In the Canadian province of Ontario, only 28.9% of eligible inmates cast ballots in the 1992 national constitutional referendum, compared with a turnout of seventy-two percent across the province. n173 In Utah, where prisoners were permitted to vote until the state constitution was amended in 1998, n174 only ninety-five voters registered in Salt Lake County in 1996 and voter turnout by eligible inmates was estimated at five percent. n175 A notable exception is the Canadian province of Quebec where voting by prisoners in three elections in the early 1990s reached seventy-four percent. n176

[*102] In part, the low numbers might be seen as simply an exaggerated reflection of declining voter turnout trends in the larger electorate in countries such as the United States n177 and Canada, n178 but that is not the only explanation. In many jurisdictions, neither prison nor election officials take any action to facilitate prisoner voting. n179 Some citizen groups in the United States have attempted to fill this void. n180 However, without the involvement and cooperation of public officials, the right to vote will remain illusory for many prisoners. In 1999, South African government officials heard from their Constitutional Court that the "right to vote by its very nature imposes positive obligations upon the legislature and the executive." n181 To make the right a reality, the government was ordered to fulfil its corresponding duty to take all necessary measures to facilitate prisoner voting.

A. Where Should Prisoners Vote?

Whether prisoners' votes should be counted in their place of pre-incarceration residence or in the location of the prison is an important aspect of the debate over prisoner enfranchisement. n182 It is significant because opponents of prisoner enfranchisement cite the potential for large numbers of prisoners to swamp local voters in rural areas if prisoners are permitted to vote in the prison district. n183 [*103] Prisoners also might want to have their votes counted in their home districts if they have children and other family members with interests in schools, taxes, housing, and other local government programs. Long-term prisoners, on the other hand, often have little or no connection to their place of pre-incarceration residence and may intend to settle in the vicinity of the prison following release. n184 Some proposals for addressing these concerns are discussed below.

1. The "Ordinary Residence" Test

The law in most jurisdictions provides that eligible voters may vote only in the place where they are "ordinarily resident." n185 Over the years, disputes have arisen over whether prisoners are "ordinarily resident" or have acquired a "domicile" in the prison when the legislation does not expressly deem them to be resident elsewhere. For example, in *Dane v. Board of Registrar of Voters of Concord* n186 a Massachusetts court was called on to decide the ordinary residence of approximately three hundred inmates living in a prison in Concord, Massachusetts who attempted to register to vote in Concord. n187 In allowing the prisoners to [*104] register on the rolls in Concord, the Registrar of Voters apparently relied on a memorandum from the Deputy State Secretary and Director of Elections which said, "prisoners may register to vote in the community in which the prison is located if they swear in the affidavit of registration that they consider that residence to be their home." n188 This memorandum was meant to amplify the legislation which provided that individuals who otherwise qualified to vote and who "shall have resided within the town or district in which [they] may claim a right to vote, six calendar months preceding any election" were eligible to vote in that district. n189

The court reviewed precedents from Massachusetts and from other states which indicated that, as a general rule, individuals who are involuntarily resident in a particular location do not acquire a new domicile there. n190 However, the court also noted that military personnel are permitted to show a change of domicile even though the move is involuntary. n191 The court ultimately concluded that a person's involuntary residence in a particular place raises a rebuttable presumption that the person retained his or her former domicile. n192 That presumption can be rebutted by evidence presented by a prisoner in an affidavit of registration about the intention to make the prison location the person's home. n193 The Register of Voters can then question the individual generally on the location of bank accounts, past voter registrations, payment of taxes, and "other facts evidencing their attachment to the community" and can conclude that he or she had not successfully acquired a new domicile of choice. n194

It is beyond the scope of this paper to canvas all the ways that different jurisdictions define "ordinary residence" or domicile for voting purposes, or to come up with a definitive approach to domicile that best balances the competing interests associated with voting by prisoners. However, a few options come to mind. One approach might be to establish a default rule that prisoners retain their pre-incarceration domicile unless they have been incarcerated for at least five consecutive years, n195 in which case they could elect to acquire a new domicile in the [*105] prison. n196 If they do not elect, they would retain their prior domicile. An alternative would be to employ a rebuttable presumption like the one adopted in *Dane*. However, this sort of rule would likely require more administration and entail more discretion, leading to uneven results. A further alternative would be simply to deem prisoners to be domiciled in the prison. n197 The appeal of a threshold based on length of time in prison is that it offers consistency and predictability, is easier to administer, and addresses some of the problems associated with allocating all prisoners to either their "home" district or the prison district. Whatever the chosen method, it seems just that at least some long-term inmates be permitted to register and vote in the prison's electoral district. n198

2. Prisoners Housed Out-of-State

An additional problem associated with deeming all prisoners to be residents of their pre-incarceration address arises from the fact that states increasingly contract with each other to house prisoners from out-of-state. Therefore, prisoners from, for example, Michigan, would be eligible to vote in a Michigan election (since Michigan was their place of ordinary residence), yet they may be housed in a prison in Ohio and may have to enlist the Ohio prison officials to assist them in registering to vote in Michigan. Otherwise, if postal voting was available, prisoners could write directly to the election officials in Michigan for voting materials. n199 However, with respect to state and local elections, it is possible that such out-of-state prisoners may be unaware that an election campaign has begun in the home state. If inmates were considered residents in the district (and state) in which they were incarcerated, their voting could be more easily facilitated by officials in that state. Since these transfers appear to be made for administrative convenience and cost-effectiveness, and if prisoners are otherwise considered eligible to vote, it seems perverse to deny them that opportunity simply because the state has entered into such a transfer of services agreement. A possible solution would be to deem all out-of-state prisoners to be residents of the state in which they are incarcerated at the time of registration, a result in keeping with census data.

3. Prisoner Residence for Census Purposes

In assessing the propriety of designating prisoners as residents of their pre-incarceration place of residence, it is useful to inquire into the way their residence is determined for other purposes, such as the national census. In fact, the census [*106] counts inmates as residents of the town or city in which the prison is located. n200 This determination carries

substantial financial consequences for both the "host" and the "home" district of the inmate because federal grant funding is distributed on a per capita basis according to the median income of the various municipalities seeking funding. For example, the population of the town of Coxsackie in rural upstate New York includes 2,100 prisoners living in two prisons (forming 27.5% of the town's population), the majority of whom earn little if any money, a fact which substantially drives down the median income in Coxsackie. n201 In the 1990s, Coxsackie received several grants from the Department of Housing and Urban Development of up to \$ 600,000 each, due in part to the town's prison population. n202 This money did not go to the largely impoverished urban communities from which the majority of Coxsackie's inmates come.

Similarly, electoral boundaries are drawn according to census figures. n203 Prisoners inflate the population of the host community, but are not allowed to vote. n204 Therefore, in a state like New York, a combination of census rules, incarceration patterns, and voting laws increases the voting strength of largely White, rural voters, while diluting the voting power of African American and Latino urban voters. n205

The relationship of census data to federal funding and electoral boundaries is a controversial and changing area of contemporary research. This paper does not seek to weigh into that debate other than to note that the non-prisoner residents of prison towns appear to benefit in a number of ways from the existence of prisoners in their midst. The preferred methods of counting prisoners for census purposes and for voting purposes are at odds and therefore the appropriate policy for allocating prisoners' votes should be considered alongside these other policies. For example, if the franchise was extended to prisoners and concerns about their votes [*107] swamping those of the rural prison district were persuasive, n206 then their votes might appropriately be counted in their home urban districts. However, if such a policy was adopted, the census data should also be adjusted to include those "absentee" voter/residents in the urban districts for purposes of determining electoral districts and federal funding.

B. The Mechanics of Voting: Polling Stations, Proxies, or Postal Votes

Options available for voting by prisoners include polling stations set up in prisons either on the day of the election (if prisoners vote in the prison constituency) or approximately ten days in advance of the election, n207 voting by proxy through a relative or close friend in the home constituency, or absentee voting with the use of postal ballots. After considering the benefits and disadvantages of all three of these options, researchers for both the Australian Law Reform Commission and the Canadian Royal Commission on Electoral Reform favoured voting at polling stations within prisons. n208 The Australian researchers found that,

The presence of a polling booth in the gaol increases the likelihood of elector participation and enables prisoners to feel more a part of the electoral process. It also removes the possibility of any allegations (however unjustified) of interference by prison authorities with postal votes. n209

A problem associated with proxy ballots is the fact that some prisoners do not have a close friend or relative living in the district in which the prisoner is eligible to vote. n210 Consequently, that option was not advocated in the Canadian and Australian reports. The Canadian researchers admit that establishing polling places in prisons is the most administratively complex procedure for electoral officers and prison officials. n211 However, they conclude that it is the only way to encourage and facilitate substantial voter turnout. n212 Given the current low turnout by eligible prisoner voters in the United States, such measures could have significant impact.

C. Ancillary Rights Associated with Voting by Prisoners

A different sort of objection to prisoner voting rights is found in the notion that prisoners cannot exercise a free and informed vote by virtue of their [*108] incarceration. In the first action brought by Richard Sauve to federal prisoner disenfranchisement in Canada, the government sought to defend the law in part on the basis "that the integrity of the voting process requires participation in, or at least exposure to, the interplay of ideas which exist in society at large" and that "the conditions that prevail in penal institutions are inimical to public discussion and debate." n213 Canadian courts have held that existing limits on prisoners' access to political campaign material, candidates, and other information relevant to elections do not justify disenfranchisement. n214 In *Belczowski v. Canada*, n215 for example, Justice Strayer stated that being informed about the particular issues in a campaign is not a prerequisite to exercising the franchise. n216 In another case, Justice Arbour took note of the fact that the vast majority of federal and provincial prisoners in Canada have at least some access to newspaper and television, including cable television which provides coverage of Parliamentary debates. n217 She further noted that many Canadians "have chosen to live in a universe

figuratively not much larger than a prison cell" and that for most people, the media is their primary means of accessing information about politics. n218

While Canadian and American law respecting prisoners' constitutional rights and judicial review of prison conditions differ, n219 it appears that most prisoners in the United States have at least limited access to radio or television, n220 although [*109] there is no right to have any particular level of access to the media. Under the minimal level of scrutiny applied to prison administrative decisions, courts would likely uphold restrictions (or even outright prohibitions) on the ability of prisoners to meet to discuss politics if they were convinced that legitimate security interests were raised by such meetings. n221 U.S. courts are highly deferential to the judgment of prison officials in this regard. Prison rules prohibiting prisoners from holding union meetings, prohibiting inmate solicitation of other inmates to join the union, and banning mailings concerning the union from outside sources were upheld by the Supreme Court as reasonable responses to legitimate security concerns. n222

Following the Canadian approach, the fact of limited access to news media, campaign materials and candidates should not be seen as a justification to disenfranchise prisoners. However, it is appropriate to inquire into the minimal level of access to political information and communication that should be available to prisoners in order to facilitate meaningful access to the ballot box.

Election and prison officials in other jurisdictions have taken concrete steps to educate prisoners about their voting rights and to facilitate the exercise of those rights. In Canada, a Royal Commission on Electoral Reform heard detailed testimony about the procedures that were adopted by Quebec election and prison officials to disseminate voting information to prisoners and to regulate the voting process. n223 These officials had cooperated to produce a forty-two page manual for inmate voting that included provisions for disseminating publications from political parties, as well as registration and voting details. They reported that the only contentious issue was whether to permit candidates access to penal institutions. Since publication of the Royal Commission's report, Quebec now permits candidates to meet with inmates when advance notice is given. n224 The Commission researchers concluded that elected representatives had met with prison inmates on a number of occasions and that it was likely that security concerns associated with candidate visits could be addressed with advance notice and planning. They concluded, however, that such meetings "are not absolutely necessary to ensure that the inmates are well informed and able to exercise their voting rights in a knowledgeable manner - few Canadian voters actually meet candidates." n225

In short, while liberal access to candidates, media, fora for discussion, and written information about candidates and policies would likely encourage more prisoners to vote, only a minimal level of access to information is truly necessary [*110] for prisoners to exercise that right. The experience in other jurisdictions reveals that when measures are taken to educate prisoners about their rights, to disseminate information to them, to operate polls in prisons, or to assist prisoners with postal ballots, voter turnout by prisoners will rise. n226

VII. Conclusion

On one level, voting is a symbolic, expressive act that demonstrates membership in a community. On another, it is the centrepiece of the democratic political process and the primary way in which citizens participate in changing the governing rules of that community. The loss of voting rights means the loss of both of these functions. For some prisoners, the loss is keenly felt. n227 For prisoners who come from socially and economically disadvantaged communities and who may not have participated in the electoral system in great numbers on the outside, the lack of voting rights may feel like no great loss. However, the effect of disenfranchising prisoners is felt not just by the few prisoners who seek out the opportunity to vote and are told they are unfit for the franchise. It touches all of us by altering the composition of the electorate in ways that may have an effect on the formation of public policy, and by perpetuating the symbolic and instrumental exclusion of millions of already marginalized members of society.

The repeal of prisoner disenfranchisement laws may seem like a quaint, naive notion with little hope of success in an age when politicians compete for the badge of being "tough on crime." Furthermore, even if enfranchisement is possible, it may be like putting a band-aid on a gaping wound of injustice, both in the criminal law and for the plight of the disadvantaged groups whose members largely make up the prison population. n228

If the thought of treating the prisoners in many of this country's most punitive prisons n229 as citizen-voters with legitimate interests in governance and a right to [*111] express their views through the ballot box seems difficult to accomplish and incongruous with the current approach to prisoners, perhaps we should ask why. Might the difficulties associated with imagining and implementing prisoner voting prompt us to re-think our approach to corrections and to

the treatment of prisoners more generally? n230 Can the United States learn something from jurisdictions such as Canada with similar legal systems where the idea of prisoners voting has become a reality?

The repeal of prisoner disenfranchisement law will not be the solution to these larger problems, nor will it necessarily affect prisoners' day-to-day lives appreciably. However, our society's professed commitment to liberal democratic principles requires that we repeal the laws that treat prisoners as "temporary outcasts from our system of rights and democracy." n231

FOOTNOTES:

n1. Jamie Fellner & Mark Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), available at <http://www.hrw.org/reports98/vote/>.

n2. The term "felon disenfranchisement" describes the practice in many U.S. states of disenfranchising individuals convicted of felony offences, including where the voting ban extends beyond the prison term. "Prisoner disenfranchisement" refers to the denial of voting rights to incarcerated prisoners, but not to ex-prisoners. Where "criminal disenfranchisement" is used, it includes the removal of voting rights from prisoners or ex-prisoners on account of criminal conviction or sentence, encompassing both prisoner and felon disenfranchisement. The terms "inmate" and "prisoner" will be used interchangeably.

n3. See Patricia Allard & Mark Mauer, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, The Sentencing Project (Jan. 2000), available at <http://www.sentencingproject.org/pdfs/9085.pdf>. (listing legislative initiatives that followed the release of *Losing the Vote*); see also One Person, No Vote, *The Laws of Felon Disenfranchisement*, in *Developments in the Law - The Law of Prisons*, 115 Harv. L. Rev. 1838, 1844-45 (2002) (discussing recent developments in state legislatures and federal courts concerning felon disenfranchisement); Tamar Levin, *Crime Costs Many Black Men the Vote*, *Study Says*, N.Y. Times, Oct. 23, 1998, at A14 (demonstrating the type of news coverage the report created).

n4. In 2000, only 51.3% of the national voting-age population turned out to vote in the presidential election. See Federal Elections Commission, *Voter Registration and Turnout 2000*, available at <http://www.fec.gov/pages/2000turnout/reg&to00.htm>.

n5. See, e.g., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994) (demonstrating through collected empirical data that this phenomenon is particularly pronounced in the South).

n6. African American men make up 36% of the total disenfranchised population and are disenfranchised at a rate 7 times the national average. Fellner & Mauer, *supra* note 1, at 2.

n7. Prison Reform Trust, *Barred From Voting* (2001), available at <http://www.prisonreformtrust.org.uk/file<uscore>25<uscore>5<uscore>2001.html>.

n8. All but two U.S. states have enacted some form of prisoner disenfranchisement law. See *infra* note 25 and accompanying text.

n9. See Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J. L. & Pol. 543, 543-44 (1988) (stating that the same laws that bar prisoners and ex-prisoners from voting also, in many cases, remove their right to hold elected state office); but see *Danielson v. Fitzsimmons*, 44 N.W. 2d 484, 485-86 (Minn. 1950) (holding that the state laws that seek to prevent ex-felons from holding federal office are unconstitutional). See Aristotle, *Politics*, Bk. I., (W.D. Ross trans., 1921) (describing citizenship as taking turns at both ruling and being ruled). See Deborah Sontag, "Second Israel" Hails First Big Election Triumph, *N.Y. Times*, May 21, 1999, at A3, cited in George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 U.C.L.A. L. Rev. 1895, 1898 (1999) (discussing that there may be symbolic importance to allowing prisoners to stand for office and generally, whether a candidate is fit for office is a matter we let the electorate decide). As Fletcher notes, "clearly there is more than one way to think about the significance of being labelled a felon." *Id.* at 1898. But see *Sauve v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 62 [hereinafter *Sauve No. 2*], available at www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol3/html/2002scr0519.htm (stating that although prisoner disenfranchisement is unconstitutional, practical problems may serve to allow some limitations on the exercise of derivative democratic rights like the right to stand for office).

n10. See Note, *The Collateral Consequences of a Criminal Conviction*, 23 *Vand. L. Rev.* 939, 941-50 (1970) (describing the development of attainder in English law).

n11. See Note, *Restoring the Ex-Offenders Right to Vote: Background and Developments*, 11 *Am. Crim. L. Rev.* 781, 781-87 (1973) (discussing the evolution of disenfranchisement in the United States).

n12. For example, a report by the National Commission on Federal Election Reform recommended that "each state should allow for registration of voting rights to otherwise eligible citizens who have been convicted of a felony once they have fully served their sentence, including any term of probation or parole." National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* 45 (2001), available at <http://www.reformelections.org/data/reports/99fullreport.php>.

n13. See, e.g., Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 *U. Pa. L. Rev.* 1145, 1187 (1994); Fletcher, *supra* note 9; Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 *Yale L.J.* 537, 565-66 (1993); Virginia E. Hench, Article, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 *Case W. Res. L. Rev.* 727, 738 (1999).

n14. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 62.

n15. See, e.g., Fletcher, *supra* note 9, at 1907 (discussing the various ways of examining the significance of being labelled a felon).

n16. For example, George Fletcher argues that ex-felon disenfranchisement operates to create a caste system of worthy and unworthy citizens. *Id.* Some of the other compelling arguments - and the ones with the most chance of success in the context of current constitutional jurisprudence - focus on the racial impact of ex-felon disenfranchisement, seeking remedies under the Equal Protection Clause of the Fourteenth Amendment and under 2 of the Voting Rights Act. See also Shapiro, *supra* note 13, at 542, 556-57 (looking at the racial impact of felon disenfranchisement); *infra* note 40 (discussing the ongoing class action brought by ex-felons in Florida).

n17. It is unclear how many of these two million prisoners are serving sentences for misdemeanors, and therefore might already be eligible to vote. However, it should be noted even where misdemeanants and remand prisoners are entitled vote, very few do vote due to administrative and other practical difficulties. See *infra* text accompanying notes 172-81 (stating that the misdemeanants and remand prisoners entitled to vote rarely do). Similarly, the total number of inmates who are aliens and who would therefore be ineligible to vote is unclear. In federal prisons, only 71% of 169,676 inmates are United States citizens, which indicates that the overall number of aliens could be quite high. See Federal Bureau of Prisons, *Quick Facts* (June 2003), available at <http://www.bop.gov/fact0598.html> (showing that a large percentage of inmates are aliens).

n18. A notable exception is the recent article by Alec C. Ewald, "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Laws in the United States, 2002 *Wis. L. Rev.* 1045, in which the author argues that the temporary disenfranchisement of prisoners and the lifetime disenfranchisement of ex-felons are "equally vulnerable to principled challenge." *Id.* at 1050.

n19. See Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 *Harv. L. Rev.* 1300, 1317 (1989) (stating that allowing prisoners to be part of the electorate would demonstrate to them that society has faith that they have been restored and has reaccepted them into the community). "Disenfranchisement is a symbol, and it is the wrong sort of symbol to legitimate in law. It is a symbol of rejection, not reconciliation; a symbol of difference, rather than commonality; a symbol of domination instead of equality." *Id.* at 1317.

n20. In the Canadian context, see John Howard Society, *Inmate Voting Rights* 3 (1999), available at <http://www.johnhoward.ab.ca/docs/voting/vot3.htm> (looking at whether prisoners would be able to make an informed vote and other administrative concerns associated with voting). While arguing forcefully for the full enfranchisement of prisoners, the author states that:

It is unlikely that inmates will have any appreciable effect on election results. There are about 21.7 million persons of majority age in Canada and on any given day, there are 33,785 incarcerated offenders (Correctional Service of Canada, 1997). Therefore, less than 1% of potentially eligible voters are incarcerated offenders, which is not enough to skew an election, particularly since those votes are spread across all the ridings in Canada.

Id.

n21. Note, *The Disenfranchisement of Ex-Felons*, *supra* note 19, at 1303.

n22. I use the word "instrumental" to denote all practical reasons for, and effects of, voting, as contrasted with the symbolic or constitutive significance of voting.

n23. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), Justice Marshall suggested that a fear of "subversive voting" by felons and ex-felons was one of the motivations behind criminal disenfranchisement laws. *Id.* at 56 (Marshall, J., dissenting).

n24. *Fellner & Mauer*, *supra* note 1, at 2.

n25. The number was 46 in 1998 when *Losing the Vote*, *supra* note 1, was published. However, since the release of that report two of the states which formerly had no felon disenfranchisement laws, Utah and

Massachusetts, have taken legislative steps to disenfranchise incarcerated felons. See Allard & Mauer, *supra* note 3 (listing the legislative initiatives which followed the release of Losing the Vote).

n26. Twenty-nine states. Fellner & Mauer, *supra* note 1, at 4.

n27. Thirty-two states. *Id.*

n28. Fifteen states. *Id.* at 4.

n29. United States Department of Justice, Office of the Pardon Attorney (DOJ/OPA), Civil Disabilities of Convicted Felons: A State-by-State Survey (1996), at 1, available at <http://www.usdoj.gov/pardon/forms/state%20survey.pdf>.

n30. Alabama, Delaware, Florida, Iowa, Mississippi, New Mexico, Texas, Virginia, Washington and Wyoming. Fellner & Mauer, *supra* note 1, at 4

n31. Alabama, Florida, Iowa, Mississippi, New Mexico, Virginia and Wyoming. *Id.* at 4.

n32. *Id.* at 2.

n33. See, e.g., *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Marc Mauer & Meda Chesney-Lind eds., 2002); Gabriel J. Chin, Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 *J. Gender, Race & Just.* 253 (2002). For an example of the recent rise of this issue in the popular media, see Fox Butterfield, Freed from Prison but Still Paying a Penalty, *N.Y. Times*, Dec. 29, 2002, 1, at 18.

n34. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court declared an Alabama felon disenfranchisement law unconstitutional because in 1901 the lawmakers had openly stated that their goal was to disenfranchise African Americans by designating certain offenses crimes of "moral turpitude." *Id.* at 227. Not surprisingly, the designated offenses were ones for which African American citizens were convicted more often than Whites. *Id.*

n35. 418 U.S. 24 (1974).

n36. U.S. Const. amend. XIV, 2.

n37. 377 U.S. 533 (1964) (dealing with a state's boundary reapportionment plan). Justice Harlan, in dissent, disagreed with the majority's "utter disregard" for 2. *Id.* at 593-94 (Harlan, J., dissenting).

n38. *Richardson*, 418 U.S. at 75-76 (Marshall, J., dissenting). For further discussion of the Court's reasoning based on the Fourteenth Amendment, see *Fletcher*, *supra* note 9, at 1901. *Fletcher* describes the untenable situation created by the reasoning of the majority in *Ramirez*:

Thus we have the following paradox of disenfranchisement: A constitutional amendment was enacted to support the voting rights of emancipated slaves. The text of this amendment refers to the possibility of disenfranchising people who have committed crimes. Because patterns of law enforcement have changed over the years, because the number of felons has greatly increased, and because a large percent of those convicted are black, the policy of felon disenfranchisement sharply reduces the voting rights of African Americans. Thus, a constitutional provision designed in 1868 to improve political representation of blacks has turned out in the 1990s to have precisely the opposite effect.

Id. See also Note, Disenfranchisement of Former Criminal Offenders, 88 Harv. L. Rev. 101, 104 (1974) (stating that "the history of the Fourteenth Amendment suggested that Section 2 was not intended to pre-empt application of Section 1").

n39. In a September 2000 Gallup Poll Survey, 70% of Americans said that the criminal justice system in the United States was "not tough enough" in its handling of crime. Gallup Poll Social Series: Crime (Sept. 2000), available at www.gallup.com/poll/indicators/indcrime.asp. Meanwhile, the rate of incarceration in the United States surpassed Russia's as the highest in the world in 2000. U.S. Surpasses Russia as World Leader in Rate of Incarceration, The Sentencing Project (Sept. 2000), available at www.sentencingproject.org/pubs/tsppubs/int.data/pdf.

n40. Allard & Mauer, *supra* note 3. Strategic litigation has been launched in many states including Florida, New Hampshire, Washington, Alabama, Nevada and Virginia. One such claim, brought by ex-felons in Florida with the assistance of the Brennan Center for Justice, has so far been unsuccessful. *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002). See also Brennan Center for Justice, available at <http://www.brennancenter.org/programs/programs<uscore>lit<uscore>johnson.html> (last visited Jan. 2004) (providing background and commentary on the Johnson litigation).

n41. Legislative initiatives in Alabama, Florida, Pennsylvania, Nevada, New Mexico, Delaware, and Virginia aim to lessen the restrictions on certain ex-felons, parolees and probationers. For example, on March 15, 2001, New Mexico Governor, Gary Johnson, signed into law Senate Bill 204 which restores the voting rights of citizens convicted of felony offenses who have satisfied all the conditions of their sentences. See Legislative Roundup, Santa Fe New Mexican, Mar. 16, 2001, at A4. However, the rising awareness of prisoner disenfranchisement has also coincided with initiatives to enact felon disenfranchisement laws in at least two of the four states - Utah and Massachusetts - which previously had no such laws. Allard & Mauer, *supra* note 3.

n42. Useful comparisons can also be made with other jurisdictions. Nora Demleitner argues that "while the ultimate abolition of voting restrictions for ex-offenders might be most desirable," the German model of prisoner disenfranchisement imposed on a discretionary basis by the sentencing judge is preferable to the current U.S. regime. Nora Demleitner, Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative, 84 Minn. L. Rev. 753, 804 (2000). For a discussion and critique of prisoner disenfranchisement laws in Australia see Graeme Orr, Ballotless and Behind Bars: The Denial of the Franchise to Prisoners, 26 Fed. L. Rev. 55 (1998). Federal law in Australia bars prisoners serving sentences of five years or more from voting. *Id.* At 58. Since at least as early as 1973, Australian law reform bodies have been calling for the repeal of all prisoner disenfranchisement laws. *Id.* at 61. See Jennifer Fitzgerald & George Zdenkowski, Voting Rights of Convicted Persons, 11 Crim. L.J. 11, 12 (1987) (recommending that prisoner disenfranchisement laws in Australia be repealed).

n43. See Roy Walmsley, World Prison Population List (4th ed.), United Kingdom Home Office Research, Development and Statistics Directorate (2003), available at <http://www.homeoffice.gov.uk/rds/pdfs2/r188.pdf>. However, Canada apparently incarcerates more youth than does the United States. Youth Court Statistics,

Canadian Centre for Justice Statistics (1998-99), available at <http://canada.justice.gc.ca/en/ps/yj/repository/4refrenc/03figres/4030002a.html> (last visited June 2, 2003).

n44. Canada's incarceration rate is higher than the rate in most European countries. Walmsley, *supra* note 43, at 41. For a comparison of some Canadian, American and European differences in approaching crime and punishment, see "To Kill or to Cure," a documentary produced by the Canadian Broadcasting Corporation, available at <http://www.cbc.ca/witness/crime&punishment/index.html> (June 25, & July 2, 2003).

n45. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the "Charter"].

n46. Section 1 of the Charter expressly permits the government, whether federal or provincial, to impose limits on Charter rights. That section reads:

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.

An early Supreme Court Charter decision, *R. v. Oakes*, [1986] 1 S.C.R. 103, laid out a four-step test, which has been expanded in subsequent cases, for determining if a particular limit on rights is justified pursuant to 1. The test requires a court to conclude that: (1) the government's objective in infringing the right is "pressing and substantial;" (2) there exists a rational connection between the objective and the means chosen to achieve it (the infringement itself); (3) the means chosen do not impair the right more than is reasonably necessary to achieve the valid governmental objective; and (4) the salutary effects of the limitation in achieving the government objective outweigh the deleterious effects of the limitation. Consideration of the complicated jurisprudence of 1 of the Charter is beyond the scope of this paper. See, e.g., Leon Trakman, William Cole-Hamilton & Sean Gatien, *R. v. Oakes 1986-1997: Back to the Drawing Board*, 36 *Osgoode Hall L.J.* 83, 88 (1998) (suggesting that the Court has moved from "an overly technical to an unpredictable normative analysis of Section 1," resulting in "a disjointed analysis of Section 1 that appears to lack a clear and principled foundation").

n47. R.S.C. 1985, c. E-2, s. 51(e). 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... ."

n48. *Sauve's* case was joined with a similar complaint brought by a group of Aboriginal prisoners in another federal prison. In addition to alleging a breach of 3 of the Charter, the plaintiffs unsuccessfully argued that the law infringed their 15 equality rights, on the grounds that prisoners represent a historically marginalized and disadvantaged group which is disproportionately comprised of Aboriginal and poor people. Equality jurisprudence under the Charter differs from the equal protection analysis which has evolved under the Fourteenth Amendment. Notable differences include the lack of a requirement to prove intent to discriminate and the use of a single level of scrutiny on which to assess all claims of discrimination, provided they are based on enumerated grounds (such as race, sex, or disability) or one of the few "analogous grounds" recognized by the courts (such as sexual orientation or citizenship status). Brief of Aboriginal Legal Services of Toronto, submitted to the Court in *Sauve*, available at <http://aboriginallegal.ca/docs/sauve.factum.final.htm> (last visited Sept. 30, 2003).

n49. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 9. This was not the first time the constitutionality of prisoner disenfranchisement was disputed in the post-Charter era. In fact, Richard *Sauve* had successfully challenged an earlier, more restrictive federal law which disenfranchised "every person undergoing punishment as an inmate in any penal institution for the commission of any offence." *Sauve v. Can. (Attorney General)* (1992), 89 D.L.R.

(4th) 644, 647 (Ontario Court of Appeal), aff'd [1993] 2 S.C.R. 438 [hereinafter "Sauve No. 1"]. Prisoners have also successfully challenged a number of provincial disenfranchisement laws in *Byatt v. Alberta* (Chief Electoral Officer), [1998] A.J. No. 399 (C.A.) and *Driskell v. Manitoba* (Attorney General), [1999] M.J. No. 352 (Q.B.).

n50. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 21. Neither of these goals appears in the legislative history of 51(e).

n51. *Sauve No. 1*, (1992), 89 D.L.R. (4th) 644 (C.A.).

n52. *Id.* at 650-51. Justice Arbour said,

I doubt that anyone could now be deprived of the vote on the basis, not merely symbolic but actually demonstrated, that he or she was not decent or responsible. By the time the Charter was enacted, exclusions from the franchise were so few in this country that it is fair to assume that we had abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry," previously defined by such attributes as ownership of land or gender, in favour of a pluralistic electorate which could well include enemies of the state.

Id. After that blanket ban on prisoner voting was struck down, the Canadian government enacted the narrower ban which was at issue in *Sauve No. 2*.

n53. However, four Justices 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. *Sauve No. 2*, [2002] 3 S.C.R. 519, paras. 79-121.

n54. *Id.* at para. 26.

n55. *Id.* at para. 23.

n56. Seymour Martin Lipset, Ph.D., Hazel Professor of Public Policy, George Mason University; Ernest van den Haag, Ph.D., retired, former John M. Olin Professor of Jurisprudence and Public Policy, Fordham University; Thomas Pangle, Ph.D., Professor of Political Science, University of Toronto; Jean Hampton, Ph.D., Professor of Philosophy, University of Arizona; Colin Meredith, Ph.D., Statistician for Canadian Department of Justice; and Christopher Manfredi, Ph.D., Associate Professor of Political Science, McGill University.

n57. Report of Jean Hampton, Ph.D., at 4-7 (on file with author).

n58. *Id.* at 12. In an article written shortly after the *Sauve* trial in which she discusses her involvement in it, Hampton talks about how she came to justify advocating the disenfranchisement of prisoners. Of particular importance to her is the fact that 97% of all federally-sentenced inmates are men and that many men are serving federal sentences for crimes of violence. Jean Hampton, *Punishment, Feminism and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 *Can. J.L. & Juris.* 23, 25-27 (1998).

n59. Hampton, *supra* note 57, at 14. Hampton explicitly favours her concept of moral education over conventional notions of "rehabilitation" of criminals. She views imprisonment and disenfranchisement as "a response to crime that should set the criminal thinking - in particular, about what he has done such that a basic

right of a Canadian citizen is now denied him for as long as he remains in prison." Id. The hope is that this thinking will cause the offender to "change his allegiance" and commit himself to the values of a free society. She also thinks that the public can be morally educated by this law and that, in fact, to not deny the right to vote is inconsistent with "the moral commitments of a free and democratic society." Id. at 15.

n60. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 40. The Chief Justice went on to say that the negative message of disenfranchisement was particularly pernicious for Aboriginal peoples "whose over-representation in prisons reflects a "crisis in the Canadian criminal justice system." Id. at para. 60 (citing *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 64).

n61. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 46.

n62. Report of Thomas Pangle, Ph.D., at 36-41; Report of Colin Meredith, Ph.D., at 11-15 (both on file with author).

n63. 3. Report of Thomas Pangle, Ph.D., at 36-41; Report of Colin Meredith, Ph.D., at 11-15 (both on file with author).

n64. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 32.

n65. Id.

n66. Id. at para. 34.

n67. Id. at para. 30-34.

n68. During the 18 years he was in prison, *Sauve* started a "Lifers' Group" and a "Ten Plus Group" at Collins Bay Penitentiary, 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 while in prison. He was involved in advocating for prisoners' rights and interests before prison administration and to 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 Olympic-style games in the Collins Bay prison yard.

n69. I use this term to connote the wide variety of political, religious, social, vocational, service and charitable organizations which are seen by many as the core of civil society. See, e.g., Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* 48-64 (2000).

n70. *Parole for Lifers Stirs Controversy: Killer's Appeal for New Hearing Forces Jurists to Define Rules*, *Toronto Star*, May 29, 1994, at D24. Pursuant to 745 of the Criminal Code of Canada, after serving 15 years of a life sentence, individuals convicted of first degree murder may apply for a review of the mandatory 25 year parole ineligibility period. They appear before a jury and the jury may recommend that they be eligible for parole at the fifteen year mark or at some point less than 25 years. They must then apply for parole and a decision is in the hands of the National Parole Board. The so-called "faint hope clause" is one of the most

controversial provisions in the Criminal Code and has served as a lightning rod for "tough on crime" activists and politicians in the right-of-centre Canadian Alliance Party (formerly the Reform Party).

n71. *Sauve* No. 2, [2002] 3 S.C.R. 519, para. 38.

n72. *Sauve* No. 1, (1992) 89 D.L.R. (4th) 644 (C.A.).

n73. Proponents of prisoner disenfranchisement have recognized this reality and have criticized *Sauve* as a "political decision based on lofty ideals that few Canadians outside of the left-leaning academic elite actually hold." Vic Toews, Letter to the Editor, *Winnipeg Free Press*, Mar. 6, 2003. In that letter, Toews, the Justice Critic for the Official Opposition in Parliament, says he has urged the government to amend the Constitution to permit prisoner disenfranchisement because he sees an amendment as the only remaining means to continue disenfranchising prisoners. *Id.*

n74. For example, a law in the province of Manitoba bans all prisoners serving sentences of five years or more from voting in provincial elections. *Elections Act*, R.S.M. ch. E-30, 31 (1987) (Can). That law was found unconstitutional in *Driskell v. Manitoba*, [1999] M.J. 352. A government appeal of that decision was held in abeyance pending the Supreme Court's decision in *Sauve*, [2002] 3 S.C.R. 519, para. 62. At the time of writing, 31 had not yet been repealed.

n75. I am thinking in particular of South Africa, where the Bill of Rights contains a number of provisions modeled on the Canadian Charter of Rights and Freedoms and where the Constitutional Court regularly cites Supreme Court of Canada opinions. In 1999, the Constitutional Court held that prisoners have the right to vote. See *August & Another v. Electoral Com'n & Others*, [1999] 4 B.C.L.R. 363. However, in that case there was no statute purporting to authorize prisoner disenfranchisement. Rather, the government simply argued that, by virtue of the prisoners' own criminal acts, they had deprived themselves of the opportunity to vote. In rejecting that argument and ordering prison and election officials to make prisoner voting rights a reality, the Constitutional Court said, "the question whether legislation disqualifying prisoners, or categories of prisoners, from voting could be justified under 36 was not raised in these proceedings. This judgment should not be read, however, as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners." *Id.* at para. 31.

n76. For a discussion of the normative arguments in favour of comparative constitutional interpretation, see Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *Ind. L.J.* 819, 827-41 (1999).

n77. In contrast to the United States Constitution, the Canadian constitution explicitly guarantees the right to vote (Section 3), but the right is subject to a general limiting provision (Section 1) which means that any infringement of the right must be justified by the government on judicial review. Can. Const. 1 of the Canadian Charter of Rights and Freedoms is reproduced at note 46.

n78. The United States Constitution leaves it up to the states to set voter qualifications for federal elections. With respect to elections to the House of Representatives, Article I, 2 says that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, 2, cl. 1.

n79. Section 1 of the Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." U.S. Const. amend. XV, 1.

n80. The Nineteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX, 1.

n81. The Twenty-Sixth Amendment provides that "the right of citizens of the United States who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, 1.

n82. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

n83. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

n84. Pamela Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *Tex. L. Rev.* 1705 (1993) [hereinafter *The Rights to Vote*].

n85. Karlan actually calls them three distinct "rights." *Id.* at 1707.

n86. *Id.* at 1707-08.

n87. *Id.*

n88. *Id.* at 1713-14.

n89. *Id.* at 1716. Karlan notes that James Blacksher, a proponent of the governance view of voting, was counsel for the plaintiffs in *Presley v. Etowah County Comm'n*, where he argued unsuccessfully that changes to the powers and responsibilities of county commissioners stripped a newly-elected African American commissioner of his ability to fully represent his constituents. *Presley*, 112 S. Ct. 820 (1992).

n90. *Harper*, 383 U.S. at 670.

n91. This was not always the test applied. See, e.g., *Lassiter v. Northampton Election Bd.*, in which the Supreme Court applied a lower standard and upheld the use of literacy tests for voter eligibility on the basis that they provided a rough gauge of political intelligence and voter awareness. 360 U.S. 45, 54 (1959). *Lassiter* has never been overruled by the Supreme Court. However, a 1970 amendment to the Voting Rights Act imposed a ban on the use of literacy tests in all governmental elections in all states, a provision which was upheld in *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

n92. Pamela Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 *Harv. C.R.-C.L. L. Rev.* 173, 180 (1989). The notion that disenfranchising prisoners undermines

the legitimacy of an elected government can be found in the Supreme Court of Canada decision in *Sauve No. 2.*, [2002] 3 S.C.R. 519, para. 32-34.

n93. Karlan, *supra* note 92, at 182-84.

n94. Before the decision of the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993), the typical re-districting lawsuit under the Voting Rights Act was a classic aggregation claim where a minority group - usually African American voters - claimed its votes had been "diluted" or "debased" by the votes of the White majority, due to at-large elections, the "gerrymandering" of electoral boundaries, or other electoral practices. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 80, 89 (1986) (advocating minority voting power by suggesting several measures, including using proportionality as a guide). However, since *Shaw*, many voting rights claims challenge the use of race as a predominant factor in determining electoral boundaries.

n95. Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 330, 331 (1993).

n96. See discussion *infra* text accompanying notes 182-98.

n97. U.S. Surpasses Russia, *supra* note 39.

n98. We must also seriously address the claim that prisoners have a right to aggregate their votes with other prisoners. In the Australian context, Graeme Orr suggests that prison votes are unfairly diluted when prisoners are permitted to vote in their home districts rather than in the district in which the prison is located:

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.

Orr, *supra* note 42, at 82. This issue is considered *infra* text accompanying notes 182-98.

n99. See *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that the State of Texas could not "fence out" a particular class of voters - in this case, military personnel - who were otherwise qualified voters because of the presumed content of their votes).

n100. Winkler, *supra* note 95, at 331, 370.

n101. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

n102. See *Ewald*, *supra* note 18, at 1072-81, 1096-1109 (discussing liberal arguments for and against criminal disenfranchisement).

n103. Of course, it is not the case that voting is the only way a person can influence the political process. Individuals are capable of exerting influence in political decision-making by, for example, donating money to politicians or writing articles in the newspaper. In fact, the influence of a large campaign donation is likely to be more powerful in real terms than is one vote.

n104. John Rawls, *Political Liberalism* 5 (1993). The second principle is that economic inequalities should be organized for the greatest benefit of the least advantaged.

n105. *Id.* at 329-30.

n106. Lani Guinier, *The Tyranny of the Majority* 44 (1994).

n107. *Id.*

n108. *Id.* at 45-48.

n109. Guinier, *supra* note 106, at 204.

n110. The Sentencing Project, *Facts about Prisons and Prisoners* (July 2003), available at www.sentencingproject.org/pdfs/1035.pdf. A further 18% of prison inmates are Hispanic. *Id.*

n111. Fellner & Mauer, *supra* note 1, at 3. African American men are disenfranchised at a rate 7 times the national average.

n112. However, "residency" should be broadly defined to take into account, for example, homeless people who reside in a given community. See, e.g., material produced by the National Coalition for the Homeless, available at www.nationalhomeless.org, and the National Law Center on Homelessness and Poverty, available at www.nlchp.org (discussing practical ways that homeless people can be registered to vote). Similarly, if prisoners are to be enfranchised, the location of a prisoner's "ordinary residence" for purposes of voting is far from clear. See *infra* text accompanying notes 186-98.

n113. Winkler, *supra* note 95, at 345.

n114. See *Dunn v. Blumstein*, 405 U.S. 330, 333 (1972) (overturning a statute requiring residency in a state for one year before gaining eligibility to vote).

n115. Former South African President Nelson Mandela made headlines in 1993 when he proposed extending the vote to 14 year-olds. David Beresford, *Mandela Insists on Vote for 14 Year-Olds*, *The Guardian* (Manchester), Jul. 16, 1993, at 16; see also Karl Hinrichs, *Enfranchising Children: A Promising Approach to Reduce Child Poverty and Enhance Intergenerational Equity*, paper prepared for the International Sociological Association Conference, "Old and New Social Inequalities: What Challenges for Welfare States?" (Aug. 2001), available at <http://www.uniovi.es/Congresos/2001/RC19/papers/hinrichs%20K.pdf> (arguing that at least some children should be allowed to vote).

n116. The Canadian federal government has abandoned its mental capacity requirement for voting, having recently repealed 51(f) of the Canada Elections Act which had barred from voting "every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease." Court decisions had found the law to be too broad to meet the government's objective in maintaining a very basic level of mental competence. See *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (holding that 51(f) was too broadly framed to withstand a constitutional challenge); Yves Denoncourt, *Reflections on Criteria for Excluding Persons with Mental Disorders from the Right to Vote*, in *Research Studies, Royal Commission on Electoral Reform and Party Financing*, Vol. X (Michael Cassidy ed., 1992) (contending that 51(f) was too broad to meet the government's objective in maintaining a very basic level of mental capacity).

n117. See generally Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 *Law & Ineq.* 271 (2000) (examining the expansion and decline of non-citizen voting and exploring the legal issues implicated in current efforts to reintroduce non-citizen voting in the United States); Gerald Neuman, "We Are the People": Alien Suffrage in German and American Perspective, 13 *Mich. J. Int'l L.* 259 (1992) (exploring the constitutional debate over alien suffrage in Germany and comparing it with the concept of alien suffrage in the United States); Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 *U. Pa. L. Rev.* 1391 (1993) (arguing that the current prohibition of noncitizen voting is neither a constitutional requirement nor a historical standard).

n118. In the late nineteenth century when as many as 22 states permitted alien suffrage, it appears that non-citizen voters may have had a significant effect at the polls. Results in 1894 state elections in Wisconsin and Illinois were blamed on "the weight of a foreign element." Raskin, *supra* note 117, at 1415 (citing Henry A. Chaney, *Alien Suffrage*, 1 *Mich. Pol. Sci. Ass'n.* 130, 136-37 (1894)).

n119. In extreme cases, that sense of exclusion may erupt into violence. See Harper-Ho, *supra* note 117, at 298 (citing the example of riots by members of Latino communities in the District of Columbia which she suggests were "directly precipitated by the sense of exclusion among resident non-citizens").

n120. Judith Shklar, *American Citizenship: The Quest for Inclusion* 30 (1991).

n121. *Id.* Shklar suggests that this meaning of citizenship is one of at least four distinct meanings, including also (1) citizenship as nationality, (2) citizenship as active participation or "good" citizenship, and (3) ideal republican citizenship. She suggests that these other understandings of citizenship are important but that the idea of citizenship as standing must not be forgotten among them. *Id.* at 3. Shklar sees the right to vote and the right to earn a living through work (both of which were denied to slaves) as the two fundamental features of American citizenship. The intent of her paper seems to be to convince Americans that their own history includes the articulation and protection of a right to earn a living. For a different view about the wisdom of linking the right to earn a living to citizenship, see Gerald Neuman's review of *American Citizenship, Speech and Democracy: Rhetorical Slavery, Rhetorical Citizenship*, 90 *Mich. L. Rev.* 1276, 1277 (1992) (arguing that making this link "exhibits a blind spot all too common in political theory - inattention to the presence of aliens in the community"). While Neuman concentrates his critique of Shklar's book on the implications of asserting such a citizenship right to earn, he and others have argued elsewhere for a more expansive conception of the electorate that would, in some cases, include non-citizen residents.

n122. Rawls, *supra* note 104, at 318. For an account of the relationship between Rawls' theory and criminal disenfranchisement, see Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the*

Ambivalence of Rawlsian Justice, 106 Yale L.J. 1197, 1198 (1997) (positing that "Rawls' theory of justice, 'justice as fairness,' is characterized by the same ambivalence as that in the paradox of [criminal] disenfranchisement, between toleration and exclusion").

n123. Furman, *supra* note 122, at 1217 (citing Rawls, *A Theory of Justice* 545 (1971)).

n124. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 35 (citing *August and Another v. Electoral Comm'n and Others*, [1999] 3 S.A.L.R. 1, at para. 17).

n125. Shapiro, *supra* note 13, at 565 n.148.

n126. Fletcher, *supra* note 9, at 1898.

n127. Cited in Fellner & Mauer, *supra* note 1, at 1.

n128. *Infra* text accompanying notes 144-50. I do not mean to imply that opponents of disenfranchisement have never considered the instrumental value of prisoners' votes. The focus on the constitutive function of voting may be a strategic choice.

n129. 380 F.2d 445 (2d Cir. 1967).

n130. *Id.* at 451-52.

n131. Fletcher, *supra* note 9, at 1899.

n132. This concern is addressed *infra* text accompanying notes 182-98.

n133. Pierre Landreville & Lucie Lemonde, *Democratic Rights and Electoral Reform in Canada: Voting Rights for Prison Inmates*, in *Research Studies, Royal Commission on Electoral Reform and Party Financing*, Vol. X, at 86 (Michael Cassidy ed., 1992) at 86.

n134. See *infra* note 185. I will sometimes refer to the pre-incarceration place of residence as the "home district."

n135. John Hart Ely, *Democracy and Distrust* 120 (1980).

n136. *Id.*

n137. Section 33 of the Canadian Charter of Rights and Freedoms provides, *inter alia*, that: (a) Parliament or the legislature of any province may expressly declare in an Act of the Parliament or of the legislature, as the case

may be, that the Act or a provision thereof shall operate notwithstanding a provision included in 2 or 7 to 15 of this Charter.

n138. Section 33 has only been invoked a handful of times since 1982. This fact has led some to conclude that a convention against its developing. See Andrew Heard, *Canadian Constitutional Conventions: the Marriage of Law and Politics* 147 (1991) (stating that "the present reluctance of most governments to utilize the notwithstanding clause of the Canadian Charter of Rights may develop into a binding convention"). However, the fact that the section has been invoked and remains available for legislatures to utilize, may itself operate as a check against a potentially over-zealous judiciary.

n139. *Thomson Newspapers Co. v. Attorney Gen. of Can.*, [1998] 1 S.C.R. 877 at para. 79.

n140. 418 U.S. at 81 (Marshall, J., dissenting).

n141. *Id.* at 82-83.

n142. 380 U.S. at 94.

n143. *Id.* See also *Dunn*, 405 U.S. at 365 (rejecting the idea that short-term residents should be excluded from voting because they might not have sufficient local interests).

n144. In a 1992 Canadian prisoner disenfranchisement decision, Justice Arbour stated that "it is fair to assume that we [have] abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry"... in favour of a pluralistic electorate which could well include enemies of the state." *Sauve No. 1*, [1992], 89 D.L.R. at 650-51.

n145. One might argue that prisoners have other means to influence politics since they have (limited) access to the media and can contribute their views to the marketplace of ideas. Media coverage of prison conditions and of prisoner views can be an important means by which the public becomes informed about the real consequences of criminal justice policy, yet such coverage is limited. *Houchins v. KQED*, 438 U.S. 1, 9 (1978) (holding that the "public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with cameras, and take media and still pictures of inmates for broadcast purposes"). In any event, media coverage is not a substitute for the formal, participatory process of voting for representatives who will create law and policy.

n146. Proposition 184, California's "Three Strikes and You're Out" law, was an initiative that was approved by a large margin, so it is difficult to suggest that including prisoners in the electorate would have changed that particular result. Sandy Harrison, *Voters Opposing Initiative Backed by Tobacco Firms*, *Los Angeles Daily News*, Nov. 3, 1994, at N4.

n147. For example, federal sentencing laws prescribe a 100:1 quantity ratio between the amount of crack and powder cocaine needed to trigger certain mandatory minimum sentences for trafficking, and create a mandatory minimum penalty for simple possession of crack cocaine. Michael Coyle, *Race and Class Penalties in Crack Cocaine Sentencing*, *The Sentencing Project* (2002), available at <http://www.sentencingproject.org/pdfs/5077.pdf>.

n148. Fletcher, *supra* note 9, at 1906. Fletcher does acknowledge, however, that the implicit bias that ex-felons may have with respect to criminal law may be relevant to their eligibility to participate in another civic institution, the criminal jury. *Id.* There, he suggests that it might be reasonable to bar convicted felons from serving on juries since "jury service is about whether other people should be labelled felons or not. *Id.* That one is a felon oneself arguably generates an implicit bias" not unlike other presumed biases (such as being related to the accused) which disqualify some potential jurors. *Id.*

n149. Alec Ewald relies on a 1972 study consisting of interviews with criminal defendants in asserting that "offenders are not out to wreck the criminal law" and "likely support the existence of the laws they've broken, and "accept them as desirable guides to life." Ewald, *supra* note 18, at 1099-1101 (citing Jonathan D. Casper, *American Criminal Justice: The Defendant's Perspective* 146 (1972)). In Australia, members of the Labour Party were apparently surprised to see results of one survey which suggested that some 80% of prisoners would vote against the Labour Party, when it had been assumed that Labour's policies were more amenable to prisoner rights and were less "tough on crime." See Orr, *supra* note 42, at 73. On a larger scale, the immediate political changes that some people expected to come from extending the franchise to women in the United States apparently did not materialize, prompting one commentator to label the change "the biggest non-event in our electoral history." Shklar, *supra* note 120, at 60-61.

n150. A recent study by sociologists Christopher Uggen and Jeff Manza attempts to gauge the political impact of felon disenfranchisement in the United States by correlating data on the demographics of people convicted of felony offences, voter turnout rates, and past political preferences of the disenfranchised population. Uggen and Manza conclude that election results in seven U.S. Senate elections and the 2000 Presidential elections would have been different had felons and ex-felons voted according to historical rates. The study reveals that prisoners make up approximately 27% of the disenfranchised population, but the authors speculate that "disenfranchisement of prisoners alone is therefore unlikely to alter elections." Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *Am. Soc. Rev.* 777, 794 (Dec. 2002).

n151. The Sentencing Project, *Facts about Prisons and Prisoners* (July 2003), available at www.sentencingproject.org/pdfs/1035.pdf. Population numbers are taken from the 2000 U.S. Census figures, available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

n152. *Id.*

n153. See *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, *supra* note 5, at 339 (collecting research which suggests that racial bloc voting is pervasive). African American candidates in the South are almost never elected in districts having less than 50% African American populations. Similarly, at the national level, of 38 African American members of the House in the 103rd Congress, only 2 were elected from majority-White districts and 2 from districts with complex composition. Otherwise, all African American members were elected from majority African American districts. *Id.*

n154. For example, an ABC news poll conducted during the 2000 Presidential election campaign found that 87% of African Americans polled favoured Al Gore, while only 9% supported George Bush. Stephanie Ernst, *Black, Hispanic Voters Could Swing Presidential Election*, Diversity. Inc., November 1, 2000, available at <http://www.diversityinc.com/insidearticlepg.cfm?SubMenuID=180&ArticleID=1900>. In *Easley v. Cromartie*, 523 U.S. 234 (2001), the Supreme Court heard evidence that African Americans were more loyal Democrats than their White counterparts. In the particular North Carolina district at issue, White registered Democrats

"crossed-over" to vote Republican more often than did African Americans, who registered and voted for Democrats between 95% and 97% of the time. Since the Court held in *Shaw v. Reno* that race cannot be the predominant factor in defining electoral boundaries, this evidence was used to convince the Court that politics, not race, was the predominant factor in drawing these North Carolina district lines. *Shaw*, 509 U.S. at 649-51.

n155. Pamela Karlan & Daryl Levinson, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting is Different*, 84 Cal. L. Rev. 1201, 1217-18 (1996).

n156. This is the category used by Gallup in relation to this polling data. Gallup Poll Social Audit, *Black/White Relations in the U.S.* (June 10, 1997), available at <http://www.gallup.com/poll/specialreports/socialaudits/sa970610.asp>. Fifty-three percent of African Americans polled thought that the government should increase affirmative action programs, while only 22% of White respondents thought that such an increase was appropriate.

n157. See Gallup Poll Social Audit, *Black/White Relations in the U.S.* (February 28, 2000), available at <http://www.gallup.com/poll/releases/pr000228.asp>. (reporting that 64% of African Americans felt they were treated less fairly than Whites by the police, while 30% of Whites thought that African Americans were less fairly treated). It is possible that these sorts of views may lead African Americans to favour different policing strategies and different political platforms on the issue of policing. Speculating about the meaning of these statistics is difficult, however, since another study showed that African Americans were 3 times more likely than Whites to state that neighborhood crime was a serious concern. See U.S. Department of Justice, *Concern About Neighborhood Crime Doubles Among Black Households* (1994), cited in Carolyn Wolpert, Note, *Considering Race and Crime: Distilling Non-partisan Policy from Opposing Theories*, 36 Am. Crim. L. Rev. 265, 266 (1999).

n158. Rather, in *Shaw* a majority of the members of the court saw attempts to draw electoral lines based on these supposed political preferences as akin to "political apartheid." 509 U.S. at 647. Justice O'Connor stated for the majority: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Id.*

n159. See Uggem & Manza, *supra* note 150 (concluding that felon and ex-felon disenfranchisement laws have affected the outcome of at least seven U.S. Senate elections and the 2000 Presidential election, based on the demographics of the disenfranchised population, voter turnout rates, and political preferences of the disenfranchised population). Andrew Shapiro has argued that it may be possible to challenge criminal disenfranchisement laws under the Voting Rights Act [VRA], Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended 42 U.S.C. 1973b (2003)). See Shapiro, *supra* note 13, at 566 ("If construed properly, the [VRA] could go a long way toward abolishing criminal disenfranchisement and restoring the right to vote to a class of millions of powerless citizens."). Section 2 of the VRA was amended in response to the Supreme Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required that plaintiffs alleging violations of their voting rights prove discriminatory intent, an obstacle that made it "unacceptably difficult" for plaintiffs to succeed. Shapiro, *supra* note 13, at 550 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982), reprinted in 1982 U.S.C.A.N. 177, 205-08 (1981)); see also Jon E. Yount, *Felon Disenfranchisement: Pennsylvania's Sinister Face of Vote Dilution* (March 1998), at <http://www.prisonworks.com/scans/yount/sinisterface.shtml> (arguing that Pennsylvania's election code disenfranchises African-Americans); but see *Wesley v. Collins*, 605 F. Supp. 802, 810 (M.D. Tenn. 1985) (holding that in order for there to be a violation of Section 2 of the VRA the scheme must unfairly impact the minority group and that the level of culpability must be greater than neutral).

n160. Ned Glascock, NAACP Targets Jail Vote: Civil Rights Group Registers Eligible N.C. Prisoners, *Detroit News*, Oct. 1, 2000, at 15.

n161. *Id.*

n162. Theodore Baker, *Balloting Behind Bars*, *Daily News (New York)*, July 27, 1993, at 32, cited in Shapiro, *supra* note 13, at 566.

n163. Fletcher has noted the extent to which "race provides a lens for perceiving the way our institutions go awry." *Supra* note 9, at 1899-1900. He goes on to say:

We might not quite see the injustice of capital punishment, but we readily grasp the injustice of discriminatory application of the death penalty. We might not sense the injustice of punishing the use of crack cocaine much more severely than the use of powder cocaine, but when it turns out that the burden of the more severe penalties falls on African Americans we sit up and take notice. And so it is with disenfranchisement... . The racial impact of disenfranchisement means that we will finally take cognizance of an unjust institution - one that betrays a primitive conception of punishment and a deficient commitment to democratic voting.

Id. at 1900.

n164. Each year from 1996-1998, Gallup poll studies demonstrated that a majority of Americans believed crime had increased since the previous year when the crime rate had actually decreased during that time. See e.g., Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics (1999)* (compiling public opinion data and crime statistics); see also *Crime Punishment and Public Opinion: A Summary of Recent Studies and their Implications for Sentencing Policy*, The Sentencing Project (2000), available at www.sentencingproject.org/news/opinion.pdf (summarizing public opinion in light of released statistics).

n165. In the United Kingdom, Prison Reform Trust surveyed Members of Parliament (MPs) and found that one quarter of MPs with prisons in their constituencies had not visited the prison in the year leading up to a general election. "Some had never visited a prison. One MP could not remember that he was a member of the Parliamentary All-Party Penal Affairs Group." Prison Reform Trust, *Barred from Voting*, at www.prisonreformtrust.org.uk/file%25%20%202001.html (last visited Jan. 2004).

n166. Furthermore, taking a position in support of prisoner voting rights can earn harsh criticism. For example, when Grant Mitchell, the leader of the moderate Liberal Party in Alberta, Canada criticized the governing Conservative government for enacting a prisoner disenfranchisement law, Premier Ralph Klein attacked Mitchell in the press, saying: "Is he that desperate for votes that he needs to appeal to the 4,000 bad people who are in jail?" *Giving Prisoners the Right to Vote is Morally Wrong*, says Klein, *Canadian Press Newswire*, Feb. 16, 1997, at 1, available at Lexis, *Canadian Publications Database*.

n167. For example, in the 1992 U.S. Presidential race, Bill Clinton left the important New Hampshire primary to return to Arkansas to deny clemency to a mentally disabled man. Michael Kramer, *Frying them Isn't Always the Answer*, *TIME*, March 14, 1994, at 32. The man understood his fate so little that he saved the dessert from his last meal to "eat later." Clinton was reported as saying, "I can be nicked on a lot, but no one can say that I'm soft on crime." *Id.* See generally Marc Mauer, *Why are Tough on Crime Policies so Popular?*, 11 *Stan. L. & Pol'y Rev.* 9, 11-12 (1999) (analyzing the stated and unstated goals of "tough on crime" policy).

n168. In Massachusetts, where prisoners had the franchise until November 2000, aids to several presidential candidates were quoted in a Boston Globe article as "considering their approach to incarcerated offenders" in response to a publicized Voter Awareness Day launched by inmates in a Norfolk prison. Sally Jacobs, Cellblocks Envisioned as Voting Bloc, Boston Globe, Jan. 4, 1998, at 1, available at 1988 WL 4590887.

n169. Dominique Ritter, Election Night in Lock-up: Polling Offenders as the Votes are Tallied, Montreal Mirror, Dec. 3, 1998, available at <http://www.montrealmirror.com/ARCHIVES/1998/120398/news7.html>.

n170. Press Release, Directeur General des Elections de Quebec, Voting by Inmates who are Electors, (Nov. 12, 1998) available at <http://www.dgeq.qc.ca/anglais/communiques/1998/comm<uscore>981112<uscore>01.an.html>.

n171. Ritter, supra note 169. Duguay lost narrowly to the incumbent Liberal, but his party, the separatist Parti Quebecois, formed the government in Quebec. Id.

n172. Until the 2002 Sauve decision, only prisoners serving sentences of less than 2 years were eligible to vote.

n173. Walter Stefaniuk, Absentee Votes from Jail, Toronto Star, Apr. 15, 1997, at A7.

n174. The Felon Voting Restrictions Act amended the Utah Constitution as of March 21, 1998, denying the vote to all prisoners. Tiffany Cox, Legislative Development: Criminal Law and Procedure, 1998 Utah L. Rev. 716 (1998).

n175. Brian Maffly, Utah Cons Lose Their Liberty, Not Their Vote, Salt Lake City Tribune, Apr. 7, 1997, at A1.

n176. Factum of the McCorrister Appellants in Sauve No. 2, submitted to the Supreme Court of Canada, (Feb. 28, 2001) (on file with author). Quebec officials have adopted administrative measures to facilitate inmate voting, including setting up polling stations in prisons and allowing prisoners to designate the prison as their "ordinary residence." Press Release, supra note 170.

n177. Reported voter turnout in the November 1998 U.S. Congressional election was 41.9% of the voting-age population, the lowest number since 1942. U.S. Census Bureau, U.S. Voting and Registration in the Election of November 1998: Population Characteristics (Aug. 2000), available at <http://www.census.gov/prod/2000pubs/p20-523.pdf>.

n178. Reported voter turnout in the 2000 Presidential election was 51.3% of the voting-age population. See supra note 4.

n179. When the NAACP recently embarked on a drive to register remand prisoners and inmates serving sentences for misdemeanors in North Carolina, law enforcement officials were "caught off guard by the request." See NAACP Targets Jail Vote, supra note 160, at 15.

n180. *Id.* In Vermont, where prisoners are enfranchised, Secretary of State Kathy DeWolfe advised me that prisoners in that state vote by early or absentee ballot in accordance with Vt. Stat. Ann. tit.17, 2121 and 2122. Her office does not take any particular action to facilitate prisoner voting, but she indicated that citizen groups engage in drives to get out the vote among prisoners. Alexandra Leonard, Chair of Vermont CURE (Citizens United for Rehabilitation of Errants), reports that her organization is actively involved in efforts to encourage prisoners to vote. She claims that they "have moved mountains" to assist some 400 Vermont inmates housed out-of-state to vote in Vermont by absentee ballot. E-mail from Kathy DeWolfe (April 19, 2001), and from Alexandra Leonard (Apr. 21, 2001) (on file with author).

n181. August, [1999] 4 B.C.L.R. 363.

n182. In the wake of *Sauve No. 2*, I did a number of media interviews in which interviewers expressed concern that prisoners might vote en masse in districts containing prisons. See, e.g., *This Morning* (CBC Radio broadcast, Nov. 1, 2002) (Jennifer Westaway talks with Debra Parkes, law professor at the University of Manitoba, about the decision upholding prisoners' rights to vote), at <http://www.cbc.ca/stories/2002/10/31/inmate<score>votes021031>. However, federal law provides that prisoners vote in their pre-incarceration place of residence. See *infra* note 187.

n183. The Canadian Royal Commission on Electoral Reform heard testimony from individuals and groups expressing this concern as a basis for opposing prisoner enfranchisement. They suggested that allowing prisoners to call the prison their residence for voting purposes would allow inmates to have undue "political weight" in districts where prisoners are concentrated. See Landreville & Lemonde, *supra* note 133, at 86. However, I have not found evidence of non-incarcerated voters being "swamped" in this way. In fact, there appears to be evidence that allowing prisoners to vote in the prison district is feasible, even in jurisdictions which have relatively large numbers of prisoners. For example, in South Africa, a country with a high incarceration rate, the Independent Electoral Commission of South Africa has prescribed that "every eligible prisoner will have to be registered in the prison in which he or she is incarcerated on [the date of registration] as being the place where he or she is ordinarily resident." I could find no reports of any problems associated with this arrangement. As of July 2002, South Africa's prison population was 176,893, amounting to an incarceration rate of 404 per 100,000 compared to the U.S. rate of 686 and the Canadian rate of 102. See Walmsley, *supra* note 43.

n184. Fitzgerald and Zdenkowski have found in the Australian context that "the interests of long-term prisoners become more closely linked with their prison environment and prison conditions and it is arguable that to be able to take part in the election of a representative for the electorate in which the prison is situated is a more effective way, from the prisoner's viewpoint, of exercising her or his right to vote." Jennifer Fitzgerald & George Zdenkowski, *Voting Rights of Convicted Persons*, 11 *crim. L.J.* 11, 43 (1987). They note that when prisoners in one Australian state were given the right to vote in 1975, one prisoner had been in jail so long that his previous home was a vacant plot of land. *Id.*; see also D'Arcy Jenish, *A Lock on the Ballot: Prisoners Fight for the Right to Vote*, *Maclean's*, Sept. 3, 1990, at 20 (reporting that Robert Rowbotham, a prisoner serving a 17-year sentence "says that there should be no doubt about where he lives: in a 65-square-foot cell at the medium-security Collins Bay Institution in Kingston" and that Rowbotham no longer has any ties to his previous place of residence). *Id.*

n185. In jurisdictions where prisoners are not barred from voting, laws may deem prisoners to be "ordinarily resident" somewhere other than the prison. See, e.g., *Canada Elections Act, 2000*, S.C. ch. 9, 251(2) (Can.) The following is a part of a section of the Act prescribing special rules for "incarcerated electors:"

The place of ordinary residence of an elector is the first of the following places for which the elector knows the civic and mailing addresses:

(a) his or her residence before being incarcerated;

(b) the residence of the spouse, the common-law partner, a relative or a dependant of the elector, a relative of his or her spouse or common-law partner or a person with whom the elector would live but for his or her incarceration;

(c) the place of his or her arrest; or

(d) the last court where the elector was convicted and sentenced.

Id.

n186. 371 N.E.2d 1358 (Mass. 1978).

n187. Id. at 1316. The suit was brought by a non-incarcerated citizen of Concord who objected to prisoners voting in his district and alleged that the Registrar of Voters had erroneously registered them on the rolls in Concord.

n188. Id. at 1370.

n189. Id. at 1364.

n190. Id. at 1365.

n191. Id. at 1366 (citing *Mooar v. Harvey*, 128 Mass. 219, 220-21 (1880)); see also *Carrington*, 380 U.S. at 96 (holding that a state cannot deny the ballot to residents merely because they are members of the armed services).

n192. *Dane*, 371 N.E.2d at 1367.

n193. Id.

n194. Id. at 1370. The prisoners had argued that their affidavits should be sufficient to prove a change of domicile. However, the court held that "the Legislature cannot be assumed to have intended that the several thousand prisoners be registered in the cities and towns where they are imprisoned, and that, if the registrars

have any doubts as to the domicils [sic] of the prisoners, the question be settled later [-] possibly after they have voted." *Id.* at 170.

n195. Any threshold number would be somewhat arbitrary. However, it would be necessary to examine all the evidence, such as the length of sentences served by inmates, the incidence of transfer between institutions, and other factors to determine if a threshold is appropriate and, if so at what level it should be set. If a 1 or 2 year threshold were selected, it would include many inmates since federal statistics indicate that approximately 96% of all inmates are sentenced to more than 1 year in prison. U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, *Prison and Jail Inmates at Midyear 1999*, at 4 (Apr. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim99.pdf>.

n196. Proof of this election could be established by the inmate swearing an affidavit made available to inmates who met the five-year threshold. The affidavit would simply provide that the inmate has been incarcerated for at least 5 consecutive years and elects to make the prison his or her new place of residence and domicile.

n197. This approach has reportedly worked well in the Northern Territory of Australia. See Fitzgerald & Zdenkowski, *supra* note 42, at 37.

n198. *Id.* at 38 (making a similar recommendation for some flexibility).

n199. If citizen groups are aware of prisoners being housed out-of-state, they may make efforts to assist them to vote in the home state. However, such efforts will not likely be comprehensive.

n200. Elizabeth D. Mehling, Comment, *Where Do Prisoners Live: Do Taxpayers Have a Valid Legal Claim for Lost Federal Funds Resulting from the Census Bureau's Enumeration Standards Pertaining to Prisoners?*, 32 *U. Tol. L. Rev.* 47, 51 (2000); see also Zachary R. Dowdy, *Prisoners Count Tips Census Scales: Funds Don't Go to Their Home Towns*, *Newsday*, Apr. 3, 2000, at A6 (noting that the census counts prisoners as residents of where the prison is located).

n201. Dowdy, *supra* note 200, at A6.

n202. *Id.* Ronald Roth, Planning Director for Greene County in which Coxsackie is located, was reported as saying that the prisoners made Coxsackie "more competitive" for federal grants.

n203. See Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, *Prison Policy Initiative 4* (Apr. 22, 2002), available at <http://www.prisonpolicy.org/importing/importingbody.pdf> (noting that as of the 2000 census New York incarcerated 71,466 prisoners. Prisoners incarcerated in rural prisons are counted by the census as rural residents, and district lines are proposed based on census counts).

n204. *Id.*

n205. *Id.* Based on the 2002 New York State electoral district amendments, at least 2% of the "residents" in four Senate districts and ten Assembly districts will be prisoners. In one upstate district, the population includes

5,594 African American adults, 82% of whom are disenfranchised. Wagner calculates a net loss of 43,740 residents from New York city districts to upstate New York districts. He argues that the New York state districting patterns violate the Fourteenth Amendment of the United States Constitution, as well as Article 2, Section 4 of the New York State Constitution which provides that "no person shall be deemed to have gained or lost residence, by reason of his presence or absence ... while confined in a public prison." Prison Policy Initiative, 2000 Population By County, at <http://www.prisonpolicy.org/importing/fig7.shtml> (last visited Jan. 21, 2004).

n206. See August [1999] 4 B.C.L.R. 363 (noting the lack of evidence for "vote swamping" concerns).

n207. This latter procedure is followed in Canadian federal elections. Sections 244 to 262 of the Canada Election Act set out the procedure for voting by "incarcerated electors." See, e.g., 2000 S.C. ch. 9, 250(2) (Can.) (providing that "the polling stations shall be open on the 10th day before polling day from 9:00 a.m. and shall be kept open until every elector who is registered under subsection 251(1) has voted, but in no case shall they be kept open later than 8:00 p.m. on that day").

n208. Fitzgerald & Zdenkowski, *supra* note 42, at 38; Landreville & Lemonde, *supra* note 133, at 87.

n209. Fitzgerald & Zdenkowski, *supra* note 42, at 38.

n210. Landreville & Lemonde, *supra* note 133, at 87.

n211. *Id.*

n212. *Id.*

n213. *Sauve No. 1*, (1992), 89 D.L.R. (4th) 644, 651 (C.A.).

n214. *Id.*

n215. [1992] 2 F.C. 440, *aff'd Belczowski v. R.*, [1993] 2 S.C.R. 438.

n216. He noted,

if one were to join this particular crusade advocated by Crown counsel, it would be necessary to disenfranchise the sick and the elderly who are confined to their homes or institutions, those in the hospital prior to an election, probably those out of the country during election campaigns, the illiterate, those who live in remote parts of the country and, most of all, those hundreds of thousands who live in our midst and who, according to regular polls, take no interest whatever in politics.

Belczowski v. R., [1991] 3 F.C. 151, at 172, *aff'd Belczowski v. Canada*, [1992] 2 F.C. 440, *aff'd Belczowski v. R.*, [1993] 2 S.C.R. 438.

n217. *Sauve* No. 1, (1992) 89 D.L.R. (4th) 644, 651 (C.A.).

n218. *Id.*

n219. Canadian law may be more favourable in this regard than American law. Although there is a general lack of post-Charter Canadian authority, the Supreme Court of Canada does not formally apply a different level of scrutiny to prisoners' rights claims than to other rights claims. The common law rule articulated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, that prisoners retain all rights except those expressly or impliedly taken from them by law, has not been altered by the Charter. Security concerns and other penological objectives would be subjected to scrutiny as reasonable limits under Section 1 of the Charter. See *supra* note 46. In the United States, restrictions on prisoners' rights need only be "reasonably related to legitimate penological objectives." *O'Lone v. Estate of Shabazz*, 482, U.S. 342, 349 (1987). This minimal level of scrutiny has served to protect a wide variety of restrictions on inmates' liberties from constitutional attack. For a summary of many of these decisions, see Patrick McClain, Bernard Sheehan & Lauren Butler, *Substantive Rights Retained by Prisoners*, 86 *Geo. L.J.* 1953 (1998). Yet even on the deferential "penological objective" standard, a ban on prisoners marrying other prisoners was found invalid as infringing on the constitutional right to marry because the exercise of that right was not reasonably related to the penological objectives articulated. *Turner v. Safley*, 482 U.S. 78 (1987).

n220. For example, even in the highly restrictive environment of a Virginia Super-Maximum Security Prison, inmates in the general population and in segregation are permitted to have televisions, although television privileges may be removed as punishment. See Human Rights Watch, *Red Onion State Prison: Super-Maximum Security Confinement in Virginia* (Apr. 1999), available at <http://www.hrw.org/reports/1999/redonion/>.

n221. See, e.g., *Mass. Prisoners Association Political Action Comm. v. Cellucci*, 761 N.E. 2d 952 (2002) (holding that the defendant governor and prison officials had articulated a reasonable basis for believing that a political action committee formed by prisoners and non-prisoners represented a threat to institutional security, and that banning it was necessary to avoid this threat). The Massachusetts ACLU has taken an appeal to the Massachusetts Appeals Court on behalf of the Political Action Committee and the individual prisoners.

n222. *Jones v. N. C. Prisoners' Labor Union*, 433 U.S. 119, 136 (1977).

n223. *Landreville & Lemonde*, *supra* note 133, at 85.

n224. *Ritter*, *supra* note 169.

n225. *Landreville & Lemonde*, *supra* note 133, at 85.

n226. Turnout by prisoners in Quebec rose from approximately 40% in 1985 to 72% in 1992 after the Quebec correctional service adopted specific procedures to facilitate inmate voting in cooperation with election officials.

n227. For example, Richard Sauve, a former "Lifer" now on parole and the plaintiff in two voting rights cases in Canada, described disenfranchisement as one indignity he was not willing to suffer quietly. Interview with Richard Sauve (March 28, 2000) (notes on file with author).

n228. Having recently visited a maximum/medium security prison in New Jersey, I admit that the notion of recognizing the humanity and legitimate stake in society of those prisoners seems incongruous with the repressive penal approach exemplified in that "warehouse prison." For a discussion of the trend toward warehouse prisons, see James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 *Hous. L. Rev.* 1003 (1997). See generally Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 *Or. L. Rev.* 1229 (1998) (discussing prisoner's rights in the United States since the Warren Court).

n229. Human Rights Watch reports that, as of February 2000, more than 20,000 prisoners (or 2% of the prison population) were housed in super-maximum security facilities or units where the conditions are often "so extreme - e.g., lack of windows, denial of reading material, a maximum of three hours a week out-of-cell time, lack of outdoor recreation - that they can only be explained as reflecting an unwillingness to acknowledge the inmates' basic humanity." Human Rights Watch, *Out of Sight: Super-Maximum Security Confinement in the United States* (Feb. 2000), available at <http://www.hrw.org/reports/2000/supermax/>.

n230. The U.N. Standard Minimum Rules for the Treatment of Prisoners seem to be largely ignored by courts, legislators and prison officials in the United States, yet they may be a good place to begin the task of envisioning a different approach to incarceration. Some relevant rules include:

Rule 60: (1) "The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."

Rule 61: "The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it... . Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners."

Rule 65: "The treatment of prisoners sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility."

Adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), available at <http://www.hrw.org/advocacy/prisons/un-smrs.htm>.

n231. *Sauve No. 2*, [2002] 3 S.C.R. 519, para. 62 (noting the Supreme Court of Canada's rejection of this assumption).