Lock Them Up and Throw Away the Vote: Civil Death Sentences in New Zealand

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In late 2010, the New Zealand government removed the rights of all prisoners to vote by making them ineligible to register on the electoral roll. Despite being in breach international law, no justifiable objective was provided for the measure. This article advocates the repeal of this law for four reasons. First, universal suffrage is the standard set at international law. Secondly, the justifications for denying prisoners the right to vote do withhold proper scrutiny. Thirdly, the parliamentary process which gave rise to the law was defective. Finally, the law is both arbitrary and disproportionate in its application and therefore inconsistent with the New Zealand Bill of Rights Act 1990. The article concludes that the denial of voting rights to prisoners indicates a fundamental disregard to the most fundamental rights of New Zealand citizens.

I INTRODUCTION

The aim of this article is simple. It intends to show that the statutory removal of the right to vote for all New Zealand prisoners is legally and philosophically indefensible. Specifically, it argues that Parliament was wrong to enact the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010. This Act amended s 80(1)(d) of the Electoral Act 1993 (the Act) to provide that no person sentenced to prison after its passage can register on the electoral roll while incarcerated. Registration on the electoral roll is a prerequisite to voting under s 60 of the Act. Four substantive arguments are made to support this position. The first is a positive argument for universal suffrage based primarily on New Zealand's domestic and international legal commitments. The second is a negative argument that forms the core of this article. It critiques a large number of the justifications for disenfranchisement that have been advanced both domestically and internationally by governments, judges and other lawyers and academics. The third is a positive argument criticising the Parliamentary procedures by which s 80(1)(d) became law. The final argument is a brief analysis of the lawfulness of the section under ss 5 and 6 of the New Zealand Bill of Rights Act 1990 (NZBORA). The article concludes that the substantive and procedural defects in the law reflect a dismissive attitude of the government toward the most fundamental

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rights of New Zealand's most vulnerable citizens. If Parliament wishes to remove a legally protected right from a particular group in society it must provide a compelling justification. The central contention in this article is that it has failed to do so.

II WHY THE DEBATE MATTERS

Before analysing the substantive issues, a prior question warrants attention: namely, "who cares?" There is a public sentiment that prisoner disenfranchisement is a "nonissue because of [the offender's] supposed lack of interest in the franchise".[1] This is an important matter to address because it expresses both a blasé attitude to one of our most fundamental democratic rights and a view that prisoners are apathetic towards the political process. This attitude was epitomised by former National MP Sandra Goudie, who offered that removing the right of prisoners of fewer than three years to vote is "[a]ll this bill does".[2]

This kind of thinking is "extremely serious" and "dangerous" because its logical extension is to deny "the franchise to any group that is perceived as uninterested in exercising its participation rights."[3] It is also hypocritical — consider the 2011 general election in New Zealand, where more than 30 per cent of those eligible to vote did not do so.[4] Citizens can hardly criticise the supposed apathy of prisoners when more than one million of their eligible peers failed to show up at the voting booth. In any case, the apathy level of prisoners is irrelevant to the question of whether prisoners are entitled to the right to vote. Even if it could be shown that prisoners do not value the right to vote, this may indicate their alienation from, or general lack of faith in, the New Zealand political system. And if this is the case, surely it is better to seek ways of encouraging participation in the democratic process, instead of further divorcing prisoners from society.

III UNIVERSAL SUFFRAGE: A LEGALLY PROTECTED RIGHT

Universal suffrage is an international human right.[5] New Zealand has confirmed this principle by signing the International Covenant on Civil and Political Rights (ICCPR), art 25 of which states that every citizen has the

1 Nora V Demleitner "U.S. Felon Disenfranchisement: Parting Ways with Western Europe" in Alec Ewald and Brandon Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press, Cambridge, 2009) 79 at 94.

2 (21 April 2010) 662 NZPD 10345 (emphasis added).

3 Demleitner, above n 1, at 94.

4 Editorial "Law voting turnout a product of many factors" *The New Zealand Herald* (online ed, Auckland, 30 November 2011).

5 Richard J Wilson "The Right to Universal, Equal and Nondiscriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner's Right to Vote" in Alec Ewald and Brandon Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press, Cambridge, 2009) 109 at 112.

right "[t]o vote ... by universal and equal suffrage" without "unreasonable restrictions".[6] The qualification is a reminder that "universal" suffrage is not fully universal, as certain groups of society are excluded from the franchise. Indeed, as Laurence Tribe notes, "completely unlimited voting" could actually prove antithetical to democratic aims.[7] Hence s 80(1) of the Act lists the various grounds of disqualification from voting including: absence from the country for three or more years, detention in a mental health hospital, commission of corrupt practices and incarceration in a penal institution on the day of the election. Those under 18 years of age are also ineligible, falling outside the definition of "adult" in s 3(1)(a). A lack of *capacity* is the common thread those excluded groups. In this respect, prisoner disenfranchisement is "starkly at odds" with the other disqualification grounds and warrants a separate justification.[8]

Because voting is a right, the government bears a heavy onus to show why disqualifying any class of individuals is necessary.[9] Section 12(a) of the NZBORA enshrines the right to vote, therefore any exception to that right must satisfy the "reasonable limits" test under s 5. This position is supported by General Comment 25 from the Human Rights Committee, which states that any exclusionary conditions "should be based on objective and reasonable criteria".[10]

In short, voting is a *right* that, in the absence of statutory exclusion, all New Zealand citizens are presumed to possess. The onus is thus on those who would deny prisoners the vote to justify their position as satisfying the reasonable limits test set out in s 5.

IV JUSTIFICATIONS FOR DISENFRANCHISING PRISONERS

Philosophical Arguments

1 Forfeiture

The forfeiture argument holds that disenfranchisement is a penalty for breaching a duty to obey laws that one was entitled to participate in choosing.[11] It is an old concept rooted in the idea of "civil death".[12] This holds that one forfeits one's rights upon the commission of a crime.[13] Arguments

6 International Covenant on Civil and Political Rights 999 UNTS 117 (opened for signature 16 December 1966, entered into force 23 March 1976), art 25 [ICCPR].

7 Laurence H Tribe *American Constitutional Law* (2nd ed, The Foundation Press, Mineola (New York), 1988) at 1084.

8 Jennifer Fitzgerald and George Zdenkowski "Voting Rights of Convicted Persons" (1987) Crim L J 11 at 32–33.

9 Wilson, above n 5, at 130.

10 United Nations Human Rights Committee *General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)* CCPR/C/21/Rev1/Add7 (1996) at [4].

11 Heather Lardy "Prisoner Disenfranchisement: Constitutional Rights and Wrongs" [2002] PL 524 at 530.

12 Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) at 71; and Fitzgerald and Zdenkowski, above n 8, at 11.

13 At 11–12.

based on the concept are only plausible if voting is viewed as a privilege as opposed to a right.[14] While some support this view or claim the distinction is irrelevant,[15] international human rights law has categorically held that the right to vote is not a privilege.[16] Forfeiture only makes sense if one considers that prisoners do not deserve rights, which is inconsistent with modern concepts of human rights.[17]

2 Social Contract

Philosophers have traditionally used the concept of a "social contract" to explain compliance with the rule of law. In recent times legal commentators and governments have invoked the concept to justify prisoner disenfranchisement.[18] As will be discussed, however, not only does the logic behind the social contract not support disenfranchisement, it indeed supports universal suffrage.

The social contract is a heuristic, hypothetical solution to the problem of how we, as free beings, can move from a state of nature to a society under rule yet still retain our freedom. Jean-Jacques Rousseau's famous answer was that if each individual retains a say in how he is to be ruled, his will is not subordinated to the will of others because "as each gives himself to all, he gives himself to no one".[19] A citizen's obligation to obey the contract then, is dependent on his or her right to have a continuing say over its terms. But, opponents of prisoner enfranchisement consider that a citizen's right to participate in the political process is conditional on his or her continued fulfilment of the obligations it produces.

This latter position manifests itself in two related arguments. The first holds that rights have correlative duties. With respect to the right to vote, the relevant duty is to uphold the social contract or obey the law. Originating with John Locke, the idea is that, "[a] man who breaks the laws he has authorised his agent to make for his own governance" has "abandoned the right to participate in further administering the compact."[20] This was a key justification of the Bill's Parliamentary supporters. For example, former National MP Paul Quinn stated that "[prisoners] have abused the rights that the community values"[21] and "as part of their punishment they should not be

14 This old view held that only people of "substance and standing" should be entitled to the franchise. See *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (December 1986) at [9.17].

15 See Roger Clegg "Who Should Vote?" (2001) 6 Tex Rev L & Pol 159 at 172: "voting is a right, but it is also a privilege".

16 *Hirst v United Kingdom (No 2)* 19 BHRC 546 (Grand Chamber, ECHR) [*Hirst*] at [59]; and see also *Scoppola v Italy (No 3)* (126/05) Grand Chamber, ECHR 22 May 2012 at [82].

17 *Report of the Penal Policy Review Committee 1981* (24 December 1981) at [208].

18 See *Hirst*, above n 16, at [50].

19 Jean-Jacques Rousseau *Du contrat social ou Essai sur la forme de la République (Manuscrit de Genève)* (1762) (translated ed: Judith R Masters (translator) Jean-Jacques Rousseau *On the Social Contract: with Geneva Manuscript and Political Economy* (St Martin's Press, New York, 1978) at 53.

20 *Green v Board of Elections of the City of New York* 380 F 2d 445 (2d Cir 1967) at [8]–[10].

21 NZPD, above n 2, at 10350.

able to vote".[22] Ms Goudie added that a person abdicates his or her rights upon committing crime.[23] It is unclear, however, how serious a citizen's breach must be before he or she loses the right to vote.[24] Presumably minor crimes do not warrant disenfranchisement, or even breach the social contract.[25]

Such arguments focus exclusively on the lawbreaker's obligation to society, while ignoring the correlative question of whether society has fulfilled its obligations to the lawbreaker.[26] Given the contract is "bilateral", a "more pertinent question" might be "whether the government and society have committed a breach of the contract as well".[27] As John Rawls states, "the duty to comply [with laws made by the majority] is problematic for permanent minorities that have suffered injustice for many years".[28] This is because social contract theory is premised on the notion that society is equal, and ignores the reality of socio-economic inequality. One would be naïve to deny that such inequalities play some role in the production of crime.[29] Finally, there is no obvious connection between breaking the law and losing the vote. Breaking the social contract provides good justification for punishment, but it is unclear why punishment must entail the loss of the vote.[30] Just because "serious offenders have shown contempt for the rules of civil society does not establish which of those rules they ought to lose the protections of."[31]

The second variation of the social contract argument for disenfranchising prisoners attempts to bridge this gap by connecting crime to a lack of respect for the law. It proposes that by violating the laws one has participated in creating, one is reneging on the agreement to respect the law and thereby forfeits the right to further assist in creating it.[32] In contrast to the position above that justifies disenfranchisement a citizen having broken the law, this position holds that society may disenfranchise a citizen by drawing an inference about the citizen's *attitude* towards the law, based on the citizen's conduct. This argument rests on the assumption that breaking the law is tantamount to denying its legitimacy.[33] This is like saying that one cannot break a promise and at the same time acknowledge the promise was binding. Consider the case of a protestor seeking law reform who breaks

22 "Prisoner may lose right to vote" (10 February 2010) 3 News <www.3news.co.nz>.

23 NZPD, above n 2, at 10346.

24 Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443 at 456.

25 As per the concurring judgment of Judge Caflisch in *Hirst*, above n 16, at [7]: "It cannot simply be assumed that whoever serves a sentence has breached the social contract."

26 Jeffrey Reiman "Liberal and Republican Arguments Against the Disenfranchisement of Felons" (2005) 24 Crim Just Ethics 3 at 11.

27 Afi S Johnson-Parris "Felon Disenfranchisement: The Unconscionable Social Contract Breached" (2003) 89 Va L Rev 109 at 134.

28 John Rawls *A Theory of Justice: Revised Edition* (Oxford University Press, Oxford, 1999) at 312.

29 Richard L Lippke "The Disenfranchisement of Felons" (2001) 20 L & Phil 553 at 577.

30 *Sauve v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 529 at [47] per McLachlin CJ. [*Sauve*].

31 Lippke, above n 29, at 561.

32 Reiman, above n 26, at 10.

33 At 10; see also Geddis, above n 24, at 456.

a law to support her cause. Can it reasonably be said that this person has no respect for the law? In fact the reverse is true, as Martin Luther King Jr famously said:[34]

> ... an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.

Of course, most instances of crime do not fit this description. But the relevant point remains; your right to participate in deciding how society should be run does not depend on your "preparedness to accept and live by" the current rules society has enacted.[35] The social contract arguments above fail to explain the connection between the commission crime and the loss of the right to vote. Yet this is precisely what the hypothetical contract was supposed to provide.

Contrary to the above propositions, social contract theory supports prisoner *enfranchisement*. The source of legitimate government is the consent of those subject to its rule. Therefore, a government that disenfranchises a select group of its citizens ceases to be the legitimate representative of those citizens.[36] A government that disenfranchises those it punishes therefore erodes the very basis of its right to do so, making the social contract "substantively unconscionable".[37] In the words of Chief Justice McLachlin:[38]

> ... the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.

Prisoner disenfranchisement is therefore "internally self-contradictory".[39]

It is important to acknowledge the limitations of social contracts. In particular, social contracts rely on the existence of consent, but this supposed consent is hypothetical and therefore arguably binds no one.[40] As Robert Nozick quips, "tacit consent [is not] worth the paper it [is not] written on".[41] Whatever the value of the philosophy, it cannot support disenfranchisement. On the contrary, the removal of a citizen's right to vote is arguably the most fundamental breach imaginable.[42]

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34 Martin Luther King Jr *Why We Can't Wait* (Harper and Row, New York, 1963) at 86.

35 Geddis, above n 24, 455.

36 *Sauve*, above n 30, at [34] per McLachlin CJ. With the exception of those who are deemed mentally incapable of voting.

37 Johnson-Parris, above n 27, at 136.

38 *Sauve*, above n 30, at [47].

39 At [32] per McLachlin CJ.

40 Ronald Dworkin "The Original Position" in Norman Daniels (ed) *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (Basil Blackwell, Oxford, 1975) at 17–18.

41 Robert Nozick *Anarchy, State, and Utopia* (Basil Blackwell, Oxford, 1975) at 287.

42 Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 193.

3 Democratic Requirements

The concept of democracy connotes something more than the mere exercise of the franchise. If the vote is to mean anything, "it must be cast by someone who is rational and can be presumed to have at least some level of understanding of the world".[43]

The exclusionary criteria of s 80(1) of the Act, which relate to voter capacity, address these concerns to a certain extent. But many commentators have extended the idea that the right to vote is conditional on a set of characteristics to exclude prisoners. The most common form of this argument is that prisoners lack the necessary "civic virtue" required to vote. Assuming that civic virtue can be easily defined, proponents of this argument must not only show that it is necessary for democratic participants to possess this civic virtue, but also that prisoners do not. Neither of these premises is convincing.

Nevertheless, this argument warrants close analysis, as it is frequently cited by governments seeking to denying prisoners the franchise. The United States and British governments have continually adopted this position,[44] and the Canadian, South African and Australian governments have utilised this argument in domestic litigation.[45] But before assessing the strength of the argument, what does the term civic virtue actually refer to? It is unclear, as proponents of this position rarely express their arguments with any specificity, and instead make general claims about what makes a citizenry decent.[46] In the absence of any attempt at a definition — even by those proponents who base their arguments on the concept[47] — this article adopts Quentin Skinner's definition, which describes civic virtue as "the range of capacities ... that enable[s] us willingly to serve the common good, thereby to uphold the freedom of our community, and in consequence to ensure its rise to greatness".[48] Civic virtue is thus a conception of characteristics considered instrumental to the proper functioning of a democracy.

The first step in this substantive argument is to show that democracy requires some level of civic virtue from its citizens. Manfredi seeks to justify prisoner disenfranchisement on liberal grounds.[49] He contends a liberal community must define its membership according to some metric and accepts that access to citizenship cannot depend on proof of certain

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43 Clegg, above n 15, at 161.

44 Demleitner, above n 1, at 93; see also *Hirst*, above n 16, at [50]; and *Scoppola*, above n 16, at [76].

45 Canada: *Sauve*, above n 30, at [21]; South Africa: *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) [*NICRO*] at [59]; and Australia: *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 233 CLR 162 at [12].

46 Lardy, above n 11, at 531–532.

47 Christopher P Manfredi "In Defence of Prisoner Disenfranchisement" in Alec Ewald and Brandon Rottinhaus (eds) *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press, Cambridge, 2009) 259; and Clegg, above n 15.

48 Quentin Skinner "The Paradoxes of Political Liberty" in Sterling M McMurrin (ed) *The Tanner Lectures on Human Values* (University of Utah Press, Salt Lake City, 1986) 225 at 242.

49 Manfredi, above n 47.

characteristics. But liberal regimes, by definition, depend on a combination of equality and liberty in pursuit of a common good. To this end, they are concerned with civic virtue even if only in a "minimal" way. The community may therefore define its membership requirements so as to exclude those that exhibit the "least ambiguous indication of an absence of liberal democratic virtue" and consequently deny this group the vote.[50] In other words, it can be inferred with reasonable accuracy that the worst offenders in society lack civic virtue and on this basis can be excluded from the community.[51]

Manfredi demonstrates that it is desirable that members of the community are reasonable and empathetic. What Manfredi must go on to show is that democracy requires such traits of its citizens.[52] His comments do not support this further step. For example, he states, "[t]he justification for prisoner disenfranchisement lies in its promotion of a substantively richer notion of liberal citizenship".[53] But nothing in democracy requires this conception of citizenship, even if it would be beneficial. Manfredi thus makes a fallacious inference from the premise that liberal regimes operate better when citizens possess certain characteristics to conclude that liberal regimes can only operate if they possess these characteristics.

Manfredi, however, must go on to demonstrate that prisoners do, in fact, lack civic virtue and therefore deserve to be stripped of the franchise. But if the relevant criterion is a lack of civic virtue, then disenfranchising prisoners only is both under and over-inclusive: the former because many citizens outside prison exhibit gross immorality, the latter because there is no necessary connection between a lack of civic virtue and receiving a custodial sentence.[54] The reality is that "criminals and noncriminals are morally mixed".[55]

In addressing this criticism, Manfredi contends that such problems exist throughout the criminal justice system and are not unique to his argument. While not all criminals are immoral, Manfredi contends that it is "reasonable to assume" that, in general, prisoners are "less empathetic and more impulsive than other citizens."[56] He concludes that this is consistent with modern democracies; it mirrors the justification for the exclusion of teenagers; namely, that they are too impulsive and self-centred.[57]

Manfredi's argument here is too dismissive. One can accept that prisoners may statistically, be more likely to be immoral without accepting that this justifies removing their right to vote. Moreover, the idea that some should lose their rights because others in a similar category deserve to lose theirs conflicts with the modern conception of rights as fundamentally

50 At 277.
51 At 273; and see also Clegg, above n 15, at 161.
52 Reiman, above n 26, at 8.
53 Manfredi, above n 47, at 277.
54 Reiman, above n 26, at 7.
55 At 7.
56 Manfredi, above n 47, at 274 and 276.
57 At 275.

individual.[58] But, even if it could be shown that every single person in the particular group lacked the requisite civil responsibility, what purpose is served by disenfranchising the group? Manfredi contends that disenfranchisement can serve either of two aims.

First, disenfranchisement aims to promote civic responsibility. It is on this basis that governments worldwide have justified the measure. But if the aim is to build character, it is unclear how disenfranchisement achieves this objective. The minority in *Sauve* considered that disenfranchisement enhances responsibility because removing the vote recognises criminals as "rational, autonomous individuals who have made choices".[59] In order to respect a person's autonomy, they must be held accountable for their actions. This was the rationale offered by Ms Goudie, who stated that the Bill reflects the principle "that if people do a crime, they do the time".[60] But the patent irony in this statement reveals the fundamental flaw with this line of reasoning: prisoners already *do* serve their time. The idea that the State makes people take responsibility for their actions is already reflected in the punishment of incarceration. As McLachlin CJ notes, a general justification such as the promotion of civic virtue can be used to justify any criminal law.[61] Removing the vote is likely to impact negatively on civic virtue because disenfranchisement takes away prisoner's primary method of participating in the political system and further alienates an already disaffected group.

Secondly, Manfredi contends that the bounds of citizenship serve "a crucial norm-setting function", demarcating what a community will and will not deem acceptable.[62] This means that certain conduct will either result in a citizen's exclusion from the community, or that the citizen remains a part of the community but society removes his or her right to vote to condemn the conduct. The first alternative encounters the same problem as the social contract arguments discussed above. The second alternative is redundant as the incarceration itself already serves this purpose. Thus, as the Solicitor-General concluded in 1992, no "significant weight" can be given to the objective of promoting civic responsibility.[63]

Practical Arguments

1 Purity of the Ballot Box

The purity of the ballot box argument holds that if criminals are given the franchise, they will create bad law. While the justification arises

58 At 275.

59 *Sauve*, above n 30, at [73] per Gonthier J.

60 NZPD, above n 2, at 10345.

61 *Sauve*, above n 30, at [24].

62 At 277.

63 Letter from JJ McGrath QC (Solicitor-General) to WA Moore regarding consistency between the NZBORA and restrictions on prisoners' voting rights (17 November 1992) at [22].

predominantly in the United States,[64] it has made its way into the New Zealand debating chamber. Ms Goudie declared the imposition of the blanket ban was "about keeping New Zealanders safe".[65] But a law that aims to improve the purity of the franchise "is as unconstitutional as trying to limit the vote to those who 'vote right'".[66] Moreover, such reasoning is out of touch with our modern conception of prisoners as citizens as it "suggests not only that [prisoners] are impure, but also *that their impurity may be contagious*".[67]

Furthermore, even if it is accepted that citizens could be disqualified from voting if they belonged to a class of persons likely to support bad law, it is not obvious that it would be wise to do so. First, as explained above, one should be careful about drawing general conclusions about the character of others merely because they have committed a crime. Secondly, if minority voices in society can be silenced, a tyranny of the majority might prevail, whereby some citizens are subjected to the will of others.[68] Aside from the intrinsic moral arguments against this, a tyranny of the majority is likely to produce bad law. Granting political decision-making power to "anyone other than the entire membership of the body itself" runs the risk that such power will not be exercised for the benefit of that body "but merely [for] the ends of those who have managed to gain control of it".[69]

2 Electorate Concerns

Enfranchising prisoners raises the issue of which electorate prisoners should incorporated within. Prisoners may have links neither with their former electorate nor with the electorate in which their prison is situated. Including prisoners in local electorates creates an apparently undesirable "prison electorate".[70] Some commentators have invoked this dilemma to justify disenfranchising prisoners for two reasons.[71]

The first concerns ties to the community. As Tribe notes, society "should be empowered to exclude from its elections persons with no real nexus to the community as such".[72] In order for this argument to succeed

64 See *Washington v State* 75 Ala 582 (Ala 1884) at 585 and *Trop v Dulles* 356 US 86 (1958) at 96–97.

65 NZPD, above n 2, at 10345.

66 Rosemary Hodson "Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010" at [2.1].

67 "The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box'" (1989) 102 Harv L Rev 1300 at 1313 (emphasis added).

68 Reiman, above n 26, at 12–13.

69 Skinner, above n 48, at 242.

70 Fitzgerald and Zdenkowski, above n 8, at 36.

71 When the National Government introduced disenfranchisement law in 1977, one of their primary justifications was that the electorate question seemed "insurmountable": Robins, above n 42, at 169; and David Farrar's submission on the Bill noted that a blanket ban would be "easy to administer" because there would be no need for "polling facilities or special vote facilities" in prison: David Farrar "Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill" at [19].

72 Tribe, above n 7, at 1084.

it must be shown that incarceration severs one's ties with the community.[73] But it is not obvious that this is the case, as prisoners will usually have family and friends on the outside and can retain an active interest in local affairs through various news media. It would also be strange to apply this justification to prisoners but not to other citizens living in institutions — such as the elderly in long-term residential care — who *do* retain the vote.[74]

The second argument is that enfranchising prisoners might create a "prison electorate" whereby the large number of prisoners in a community might have a significant impact on the outcome of a general election.[75] Before assessing the merits of this argument, it is worth noting that other jurisdictions have allowed prisoners to enrol in the electorate of the prison location without problems.[76] Proponents of this argument consider it deplorable that a high concentration of prisoners in an electorate could sway the outcome of an election. In *Washington v State* the Court held that if prisoners helped decide "close political contests," this might "hazard the welfare of communities, if not that of the State itself".[77] In any election, however, some votes must be determinative. So, the influence of the prisoners' votes is irrelevant.[78] More important, disenfranchising prisoners based on how they might vote is contrary to fundamental democratic principles.[79] As Heather Lardy states:[80]

> It is wrong to withhold the right on the basis of untested suspicions about the possible electoral effects of its exercise by a particular section of the electorate. It would remain equally wrong to deny it were those anxieties to be confirmed by some verifiable means. The award of the right to vote surely cannot constitutionally be made conditional on the legislators' belief that the recipient of the right will use it only to cast ballots which do not upset the existing electoral equilibrium.

This position is philosophically unsound and fundamentally objectionable. Indeed, that prisoners may influence the outcome of an election is an argument in favour of granting prisoners the right to vote rather than against it.[81]

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73 The minority in *Sauve*, above n 30, offered this at [115]–[116] per Gonthier J.

74 Geddis, above n 12, at 71.

75 Lardy, above n 11, at 536.

76 For example, Northern Territory in Australia has used this system without reports of problems. See Fitzgerald and Zdenkowski, above n 8, at 37.

77 *Washington v State*, above n 54, at 585.

78 Lardy, above n 11, at 536–537.

79 For example, the United States Supreme Court in *Carrington v Rash* 380 US 89 (1965) ruled that a state law barring military personnel from exercising the vote violated the equal protection clause of the Fourteenth Amendment.

80 Lardy, above n 11, at 537.

81 Debra Parkes "Ballot Boxes Behind Bars: Towards the Repeal of Prisoner Disenfranchisement Laws" (2003) 13 Temp Pol & Civ Rts L Rev 71 at 76 (emphasis in original).

3 State Burden

Some commentators argue the costs required to implement voting arrangements in prisons are too burdensome for the State to bear. This argument had very little success in Ireland,[82] South Africa,[83] Canada,[84] and the United States.[85] In New Zealand, the former Solicitor-General and a Royal Commission have also rejected this argument.[86] Furthermore, the argument conflicts with international human rights law. The ICCPR and the Convention for the Protection of Human Rights and Fundamental Freedoms expressly require that states must provide resources to protect fundamental rights.[87] In any case, New Zealand already incurs such costs to a certain extent, because those on remand without conviction are entitled to vote.[88] The State also supports those who by reason of illness, pregnancy or religious objection are unable to attend any polling place.[89]

Penal Policy Arguments

1 Punishment

Governments abroad frequently cite punishment as a justification for disenfranchising prisoners,[90] and it was the New Zealand government's primary motivation for the current legislation.[91] It is also the only justification the Solicitor-General accepted as legitimate,[92] and the main ground cited by both submissions in favour of the Bill.[93] It is important to first recognise a distinction between disenfranchisement and incarceration as forms of punishment. During the Parliamentary debates Hon Wayne Mapp MP posited that, "one of the fundamental consequences of imprisonment ... is the loss

82 See *Breathnach v Ireland* [2001] IESC 59, [2001] 3 IR 230, where a prisoner unsuccessfully challenged the failure of the state to provide him with voting facilities. The High Court found the state's failure breached the constitutional right to be held equal before the law under art 40(1) of the Constitution of Ireland. The Supreme Court overturned the High Court decision.

83 See *August v Electoral Commission* 1999 (3) SA 1 (CC) [*August*] at [28], where the Constitutional Court held that administrative and procedural arrangements can be easily made to enable prisoners to vote.

84 See *Sauve*, above n 30.

85 See *O'Brien v Skinner* 414 US 524 (1974), where the Supreme Court of the United States held that New York's absentee voting statutes violated the Equal Protection Clause of the Fourteenth Amendment.

86 McGrath, above n 63, at [18]; and Royal Commission on the Electoral System, above n 14, at [9.19].

87 ICCPR, above n 6, under art 2(1) State parties undertake "to *respect and to ensure to all individuals* ... the rights recognized" in the Convention (emphasis added). Under art 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953) is that States "*shall* secure" the rights contained in the Convention (emphasis added).

88 Royal Commission on the Electoral System, above n 14, at [9.19]; and Penal Policy Review Committee, above n 17, at [208].

89 Electoral Act 1993, s 61.

90 See, for example, the British government's submission in *Hirst*, above n 16, at [50].

91 Paul Quinn "Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill"; and Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (17 March 2010) at [3].

92 McGrath, above n 63, at [20].

93 See Quinn, above n 91, at [8.1]; and Farrar, above n 71, at [17].

of the right to vote".[94] This statement begs the question. Disenfranchisement as a punishment for a criminal offence is a "supplementary"[95] or "extra"[96] punishment that "piggybacks" on the loss of liberty and therefore represents a further step from the basic conditions of incarceration.[97]

Given that the removal of voting rights is an additional form of punishment, it requires additional justification. As disenfranchisement is not a necessary consequence of crime, the suggestion that criminals should lose their right to vote because they must be punished begs the question: why must that punishment constitute the loss of the vote? Mr Quinn relied on this argument as his primary justification for disenfranchisement. He focused almost exclusively on the acceptance by both the Solicitor-General and the Royal Commission that prisoners should lose their right to vote if they have committed a "'serious crime"'.[98] For Mr Quinn, the debate turned on the sole question of whether every offence resulting in imprisonment was necessarily "serious". But the seriousness of offending is not the only factor in imposing a term of imprisonment.[99] An offender who avoids imprisonment is not "necessarily ... guilty of a less serious offence than someone who is imprisoned".[100] Even if it could be shown that every crime resulting in imprisonment is serious (which the Attorney-General doubted), it remains unclear why additional punishment is necessary and why that that punishment should take the form of disenfranchisement.[101]

Some arguments based on punishment are mindful of this oversight and seek to correct it by arguing not that disenfranchisement necessarily attaches to incarceration, but that there is at least some logical connection between the two. For example, Act Party MP David Garrett offered that prisoners are "deprived of liberty, which is a right not much less important than the right to vote".[102] If it is accepted that a citizen loses his or her liberty upon committing an offence and it is also accepted that liberty encompasses the right to vote, it follows that one should lose the right to vote. While suffrage is linked to liberty, this fact alone cannot justify disenfranchisement. Consider, for example, substituting the right to vote with the freedom of religion.[103] Suddenly, the argument is much less compelling. This argument attempts to avoid the need to justify disenfranchisement by categorising the right to vote under the general heading of "liberty". The fallacy here ignores the distinction between physical and political liberty — the latter has

94 (8 December 2010) 669 NZPD 15974.

95 Lardy, above n 11, at 527.

96 New Zealand Law Society "Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill" at [13].

97 Geddis, above n 24, at 454–455.

98 Quinn, above n 91, at [8.1].

99 Geddis, above n 24, at 449.

100 Lardy, above n 11, at 529.

101 Finlayson, above n 91, at [12].

102 NZPD, above n 2, at 10342.

103 Geddis, above n 24, at 455.

"nothing to do with" the former.[104]

The above raises important questions about the extent to which Parliament values fundamental rights. While, it is "a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime",[105] the issue is whether this particular punishment is a legitimate use of state power. It is questionable whether extra punishment is even necessary and we might ask ourselves whether we are sending people to prison *as* a punishment, or *for* punishment.[106]

2 Sentencing Aims

There is near unanimous agreement among judges and academics that prisoner disenfranchisement serves no beneficial penal goals. Nevertheless, the contention that it does so is a common justification by parliaments for the measure. This section assesses prisoner disenfranchisement with respect to three of the sentencing aims in s 7 of the Sentencing Act 2002: denunciation, deterrence and rehabilitation.

(a) Denunciation

Denunciation is the idea that disenfranchisement law sends an "educative message" to lawbreakers about the evil of their actions and the consequences which they entail.[107] Nevertheless, the content of this message is disputed. In *Sauve*, Gonthier J suggested that disenfranchising prisoners sends the message "that crime will not be tolerated."[108] Likewise, Ms Goudie stated that the Government was "sending a very strong message that [it is] not soft on crime."[109] But, as McLachlin CJ indicated, it is reasonable to interpret the message as stating that "those who commit serious breaches are no longer valued as members of the community".[110] This inherent ambiguity tells against using disenfranchisement as a measure of denunciation, because its meaning is "mixed and diffuse".[111] Furthermore, in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*, Chaskalson CJ rejected the idea that a government could disenfranchise prisoners to demonstrate it was "tough on crime":[112]

> It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could

104 Penal Policy Review Committee, above n 17, at [208].

105 *Sauve*, above n 30, at [146] per Gonthier J.

106 NZPD, above n 94, at 15973 per Robertson; see also Human Rights Commission "Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill" at [7.1].

107 Robins, above n 42, at 184.

108 *Sauve*, above n 30, at [182].

109 NZPD, above n 2, at 10346; see also Clegg, above n 15, at 177: re-enfranchising prisoners sends the message that "[w]e do not consider criminal behavior such a serious matter that the right to vote should be denied because of it."

110 *Sauve*, above n 30, at [40].

111 At [39] per McLachlin CJ.

112 *NICRO*, above n 45, at [56].

> it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals.

(b) Deterrence

Disenfranchisement is ineffective in deterring criminal offending for two primary reasons. First, few criminals are likely aware of the measure. If one does not know a particular consequence is attached to an action one cannot be influenced by it.[113] But even if prisoners are aware of disenfranchisement law, it is difficult to see why it would serve as a deterrent. If the threat of imprisonment is not enough to deter criminal offending, then "it stretches credulity" to argue that disenfranchising prisoners "will suddenly do the trick".[114] This view is supported by empirical evidence. States that attach civil disabilities to convictions have found that such measures do not necessarily lower crime rates.[115] Indeed, as the New Zealand Human Rights Commission concluded, "disenfranchisement has no recognised deterrent effect".[116]

(c) Rehabilitation

Article 10(3) of the ICCPR states that the "essential aim" of the prison system is prisoners' "reformation and social rehabilitation". In *Sauve*, Gonthier J considered that disenfranchisement is "tailored towards rehabilitation and reintegration" and "is therefore ultimately focussed upon inclusion rather than exclusion".[117] Nevertheless, the South African Constitutional Court declared that universal suffrage has been instrumental in achieving "an all-embracing nationhood" because:[118]

> In a country of great disparities of wealth and power [universal suffrage] declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.

In *Sauve*, McLachlin CJ stated that "neither the record nor common sense supports the claim that disenfranchisement ... rehabilitates criminals".[119] The

113 Reiman, above n 26, at 9; see also Demleitner, above n 1, at 100.

114 Lippke, above n 29, at 568.

115 Mandeep K Dhami "Prisoner Disenfranchisement Policy: A Threat to Democracy?" (2005) 5 Analyses of Social Issues and Public Policy 235 at 240.

116 Human Rights Commission, above n 106, at [2.10]. The British, Canadian and New Zealand governments disagree with this assertion. But it is telling that none of them offer empirical or argumentative support for their position. For Britain, see *Hirst*, above n 21, at [50] where the government argued the legislation was legitimate because it served the purpose of "preventing crime". For Canada, see *Sauve*, above n 30, at [92]. For New Zealand, see the Parliamentary debates, particularly Sandra Goudie's comments, above n 2.

117 At [185].

118 *August*, above n 83, at [17] per Sachs J.

119 *Sauve*, above n 30, per McLachlin CJ at [49].

New Zealand Human Rights Commission,[120] the International Human Rights Committee,[121] the New Zealand Council for Civil Liberties,[122] and a number of academic commentators have considered that disenfranchising prisoners serves no reformative or rehabilitative function.[123] Nevertheless, Mr Quinn stated, "there is no evidence" supporting the claim that disenfranchisement is antithetical to rehabilitation.[124] He contended that s 80(1)(d) sends the message that after serving time, a prisoner "will be empowered with the same rights as other law abiding citizens".[125] Section 80(1)(d), however, not only disqualifies prisoners from voting; it removes them from the electoral roll and prevents their registration while they are incarcerated.[126] Upon their release, prisoners are not suddenly "empowered" with all the rights of other citizens; rather they must take the positive action of re-enrolling on the electoral roll.

This is problematic because prisoners often come from social groups that are difficult to enrol even once.[127] As Hon Lianne Dalziel MP noted, encouraging those in marginalised societal groups to register on the electoral roll is one of he most difficult aspects of the election campaign.[128] Finally, disenfranchising prisoners is therefore contrary to the Human Rights Committee's General Comment 25, which provides that States should not impose obstacles to registration on the electoral role.[129]

V PROCEDURAL DEFECTS

This section examines the inadequacies of the Parliamentary processes that gave rise to s 80(1)(d). Specifically, it criticises the flaws in the Select Committee analysis and the Parliamentary debates.

A Flawed Select Committee

The Select Committee process was "faulty from the beginning".[130] Legislation concerning electoral law is usually referred to the Justice

120 Human Rights Commission, above n 106, at [1.6]: the law is "inconsistent with the aim of the penal system to rehabilitate offenders".

121 See the concurring opinion of Fabian Omar Salvioli in Human Rights Committee *Yevdokimov v Russian Federation* Communication No 1410/2005 at [7]: "I cannot understand how deprivation of the right to vote used as a form of punishment can have a rehabilitative effect."

122 New Zealand Council for Civil Liberties "Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill" at [4.4]: the law is "clearly designed to indicate that those persons are both unwanted and lesser members of society".

123 For just two examples, see Robins, above n 51, at 185: "[i]t is widely accepted that disenfranchisement serves no deterrent or rehabilitative value"; and Reiman, above n 26, at 9: "it goes without saying that it serves no rehabilitative function".

124 Quinn, above n 91, at [6.2].

125 At [6.3].

126 Electoral Act 1993, s 60: provides that only those registered on the electoral roll may cast a vote.

127 Geddis, above n 24, at 448.

128 NZPD, above n 2, at 10340–10341.

129 At [11].

130 Geddis, above n 24, at 463.

and Electoral Committee or the Electoral Legislation Committee; but the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill 2010 (117-2) ("the Bill") was referred to the Law and Order Committee. Members of Parliament (MPs) on this Select Committee have no experience in electoral law. The advisors to the Select Committee were from the Department of Corrections rather than the Ministry of Justice — the latter being responsible for administering the Electoral Act. In fact, the Chair of the Select Committee (Ms Goudie) refused a request by opposition MPs to allow Ministry of Justice officials to appear before, and advise the Select Committee. Andrew Geddis and Ms Dalziel suggest that the Bill was referred to this Select Committee for political reasons — the Bill could gather more support from this Select Committee and the Bill would receive less scrutiny without the Ministry of Justice presence.[131] The Bill was thus scrutinised by those with no experience or expertise in this area of law.

And it showed. When the Select Committee reported to the House at the Bill's second reading, the Bill's drafters advocated the repeal of s 80(1)(d) entirely (to be replaced by a new section). Because no transitional provision was inserted, if enacted, the Bill would have disenfranchised the entire prison population. Furthermore, the majority report provided no reasons why the Select Committee considered the Bill to be justifiable.[132]

Finally, the Select Committee is required to consider public submissions. It is unlikely that this Select Committee paid any attention to the 53 submissions it received or to the Attorney-General's report. Only two submissions supported the Bill: one from David Farrar and one from Mr Quinn himself. Thus only one submission outside Parliament supported the Bill. Neither Farrar nor Mr Quinn undertook an analysis of the NZBORA. With respect to New Zealand's international obligations, Mr Quinn stated that he did "not take much notice of UN edicts".[133] Mr Quinn's primary justification was that punishment is "serious",[134] and Farrar's was that a three-year threshold is "arbitrary".[135] Even minimal analysis reveals these are insufficient reasons for the Bill. Section 5 of the NZBORA requires any limitation on an NZBORA right to be "reasonable" and "demonstrably justified". Mr Quinn defended his rejection of the 51 opposing submissions on the basis that they were from "boffins who hide away in ivory towers, paid for by the government" and "[m]andarin chardonnay socialists who masquerade as independent advisors".[136] Given that authors of the submissions included various local Community Law Centres, the Law and Order Committee and the Government's own Human Rights Commission, it is difficult to make sense of Mr Quinn's comments. The Select Committee was therefore flawed in its membership, analysis and procedure.

131 (20 October 2010) 667 NZPD 14684.

132 Geddis, above n 29, at 464.

133 NZPD, above n 153, at 14679.

134 Quinn, above n 105, at [8.1]–[8.4].

135 Farrar, above n 84, at [11]–[20].

136 NZPD, above n 153, at 14679.

Inadequacy of the Debate

Given the overwhelming opposition to the Bill, one would expect those in favour of the Bill to justify their position. In the event, the debate was, however, "at best perfunctory".[137] The following statement by MP Hilary Calvert represents the full account of Act's support for the Bill at the third reading:[138]

> I cannot pretend this bill is my favourite thing. Trevor Mallard leaving the House earlier, and not being able to vote while he was away, could count as a favourite thing. Perhaps popping a ping-pong ball in the mouth of the honourable member over there who all day keeps turning his head from side to side with his mouth open could count as my favourite thing. This bill is not my favourite thing. However, Act is supporting National on this bill.

When one considers that Act's five members provided the Parliamentary majority required to bring the Bill into law, one might hope to find a more considered speech at the earlier stages. At each reading individual members may speak for up to 10 minutes. Yet at the first reading, David Garrett MP spoke for all of five minutes and Heather Roy MP at the second reading spoke for less than thirty seconds. During the Bill's final reading, four out of five National MPs spoke for no more than five minutes. It was thus not only the quality of the debate but the length that was troubling. Only one Minister (the Minister of Defence) spoke to the Bill. The then Minister of Justice, Hon Simon Power MP, was absent from the entire debate.[139]

Parliamentary debates need not be perfect. But, as Geddis writes, they must be "good enough".[140] Removing a fundamental right from a group in society "should be one of the most carefully considered and closely weighed decisions" of a legislative body.[141] The above indicates a flawed procedure and a laissez-faire attitude toward one of the most fundamental rights of the most vulnerable citizens.

VI A BILL OF RIGHTS APPROACH

Introduction

Those who have carried out an analysis of s 80(1)(d) of the Act and its compliance with the NZBORA have concluded that s 80(1)(d) is unjustifiably inconsistent with s 12(a).[142] In employing the approach adopted by the New Zealand Supreme Court in *R v Hansen*, this section gives consideration to

137 Geddis, above n 29, at 444.

138 NZPD, above n 108, at 15969.

139 NZPD, above n 94, at 15961.

140 Geddis, above n 24, at 467.

141 At 459.

142 At 459; Human Rights Commission, above n 106, at [1.6]; New Zealand Law Society, above n 96, at [2(a)]; and Finlayson, above n 91, at [16].

the problems associated with how s 80(1)(d) applies in practice. The three-step process outlined by Tipping J is employed containing: the rational connection test, the minimal impairment test and the proportionality test.[143]

1 Rational Connection

Because the analysis above consists of taking a justification for disenfranchisement and showing it is either illegitimate or does not serve the goal it is intended to, Part IV of this article by itself can be taken as an analysis of the rational connection test, concluding that no justification meets it. Nevertheless, for academic purposes, the other two limbs will be analysed.

2 Minimal Impairment: the Law's Arbitrary Application

The minimal impairment test requires that the "[c]ourt must be satisfied that the limit imposed ... is no greater than is reasonably necessary to achieve Parliament's objective".[144] This section explains that the amendment cannot be said to minimally impair the right to vote because it is totally arbitrary in its application. It was for this reason that the Attorney-General deemed the Bill inconsistent with the NZBORA.[145]

First, the law's timing is arbitrary. As the Attorney-General indicated, the right to vote "will depend entirely on the date of sentencing [of a prisoner's]".[146] Whether one is disenfranchised in a given election is not determined by the length of one's sentence, or what one was sentenced for, but rather by the simple fact of whether one is presently incarcerated. Consequently, it is possible that prisoners with a higher degree of offending will not lose their vote if the election date does not fall within their term of imprisonment, while those who commit lesser offences may be deprived of their vote if the election date coincides with their term of imprisonment.[147] This arbitrariness owing to timing that results from the blanket ban has been noted by various legal commentators.[148]

The law is also arbitrary because it only applies to those who are sentenced to imprisonment. It is therefore possible for two people to commit the same crime and yet receive a different punishment.[149] There are four ways in which this can happen. The first is where two identical offences might result in differing voting rights purely owing to timing considerations. The second is through the exercise of judicial discretion. This may not be

143 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [125]–[138].

144 At [126] per Tipping J.

145 Finlayson, above n 91, at [14]–[15].

146 At [15].

147 At [14].

148 At [16]; Royal Commission on the Electoral System, above n 14, at [9.20]; Lardy, above n 11, at 530; Geddis, above n 24, at 449; New Zealand Law Society, above n 96, at [15]; and Human Rights Commission, above n 106, at [4.5]–[4.6].

149 Royal Commission on the Electoral System, above n 19, at [9.20].

objectionable as different circumstances dictate different sentences. But the third way is that those convicted of an offence awaiting an inevitable sentence of imprisonment can still vote, while those who committed an identical (or lesser) offence and are in prison cannot.

The fourth situation is perhaps the worst of all: those without a house or family connections cannot be sentenced to home detention and hence go to jail, while those who do have such connections are sent home and thus retain their vote.[150] Hone Harawira MP made the point bluntly, declaring that "[w]hen they get convicted of the same offence, poor brown people go to jail and rich white folks do not."[151] Tellingly, this situation reinstates to some extent the old proprietary requirements for the exercise of the vote.

Some commentators do not dispute the above, but claim that any line-drawing exercise results in some kind of arbitrariness, so it is best to opt for no line at all. Clegg states that:[152]

> ... drafting a statute that would properly calibrate seriousness of offense, number of offenses, and how recently they occurred is probably impossible. The better approach is an across-the-board ban on felons voting ... .

But there is a background assumption in all of this, namely, that some level of disenfranchisement is necessary. For example, Andrew Altman suggests, "there is no policy regarding criminal disenfranchisement that can escape line-drawing controversies".[153] But this statement ignores the glaringly obvious — that a policy of universal suffrage avoids drawing lines altogether. It is hence difficult to see how blanket disenfranchisement is the "more logical threshold" on this arbitrary metric.[154] More fundamentally, it is questionable whether the difficulty of drawing lines should result in the abrogation of fundamental rights.

In sum, the present law is arbitrary in that not only might two criminals who commit identical offences have different voting rights, but also whether one loses the vote is dependent on timing. Section 80(1)(d) "disenfranchises in an irrational and irregular manner", and hence cannot be said to minimally impair s 12(a) of the NZBORA.[155]

3 Proportionality

At the proportionality stage of the analysis the Court asks whether "the effects of the intrusive provision are proportionate to the objective advanced".[156]

150 Geddis, above n 24, at 449; see also NZPD, above n 2, at 10341 per Dalziel.

151 NZPD, above n 131, at 14689.

152 Clegg, above n 15, at 175.

153 Andrew Altman "Democratic Self-Determination and the Disenfranchisement of Felons" (2005) 22 J Applied Phil 263 at 266.

154 Farrar, above n 71, at [3].

155 Finlayson, above n 91, at [14].

156 *Hansen*, above n 143, at [225] per McGrath J.

This question requires a "balance to be struck ... between social advantage and harm to the right".[157] The current legal consensus is that "a prisoner retains the ordinary rights of a citizen, insofar as they are consistent with his loss of liberty".[158]

The law is disproportionate because it is discriminatory. It is well documented that both in New Zealand and abroad, indigenous and minority groups suffer higher incarceration rates than their peers.[159] A Ministry of Justice review in 2009 confirmed the existence of bias against ethnic minorities and indigenous individuals at every stage of the criminal justice system.[160] In spite of comprising just 15 per cent of the nation's population, Māori make up over 50 per cent of prison inmates in New Zealand.[161] Given its disproportionate effect on minority groups, disenfranchising prisoners is a form of indirect discrimination. Section 65 of the Human Rights Act 1993 makes indirect discrimination unlawful where no good reason can be established for it. Whether there is "good reason" is assessed objectively by balancing the value of the discriminatory policy against the degree of its discriminatory impact. One must pay particular regard to whether the means chosen meet a legitimate need and whether they are suitable and necessary for achieving this objective.[162]

The New Zealand Law Society[163] and the New Zealand Human Rights Commission have considered that prisoner disenfranchisement in New Zealand amounts to indirect discrimination.[164] The first limb of the test, that a policy that is not ostensibly discriminatory nevertheless has a discriminatory impact, seems indisputably satisfied by the statistics above. It is the second limb that requires analysis. Parliament's reason for s 80(1)(d) was somewhat unclear, but as outlined above it appears the primary reason was punishment. As explained in Part IV, because disenfranchisement is not a necessary consequence of imprisonment, justification is needed to show why additional punishment is necessary and why that punishment should be disenfranchisement.

Arguing against this view in the Canadian context, in *Sauve* Gonthier J considered that prisoner disenfranchisement is not discriminatory. First, Gonthier J considered that Aboriginal people as a group or individually cannot "show that disenfranchisement effectively and adversely compromised their

157 At [134] per Tipping J.

158 Penal Policy Review Committee, above n 17, at [202].

159 For Australia, see Dan Oakes "Indigenous jail rate 'shameful'" *The Age* (online ed, Victoria, 6 March 2012); and for United States, see Christopher Uggen, Sarah Shannon and Jeff Manza "State-Level Estimates of Felon Disenfranchisement in the United States, 2010" The Sentencing Project <www.sentencingproject.org>.

160 Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, November 2011).

161 Department of Corrections "Prison facts and statistics" (March 2012) <www.corrections.govt.nz >; and Statistics New Zealand "Demographic Trends: 2011" (2011) <www.stats.govt.nz>.

162 *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC); and New Zealand Bill of Rights Act 1990, s 19(1).

163 New Zealand Law Society, above n 96, at [3(b)].

164 Human Rights Commission, above n 106, at [1.6].

political expression".[165] This justification is problematic because it rests on utilitarian grounds. It amounts to the claim that the availability of suffrage depends on the extent to which that suffrage makes a difference. For example, Altman offers that "[t]he fact that these minorities have sometimes had the franchise has proved insufficient to protect their legitimate interests".[166] If this statement is true, then on Gonthier J's logic, there is a reason in favour of disenfranchising all these minority groups, or at the very least have no reason against doing so. The notion that voting rights may be dependent on the extent to which they make a practical difference should be strongly rejected. Such an argument fails to recognise that voting is not a privilege and that minority groups already struggle for political representation.

Secondly, Gonthier J considered that even if there is a discriminatory impact, this does not tell in favour of granting minorities in prison the franchise. Rather, his Honour considered that this problem should be addressed by dealing with the root causes of the overrepresentation of minority groups in the criminal justice system.[167] This, however, does not support the conclusion that the law is not discriminatory or its discriminatory effect is justified. This simply supports the principle that society ought to remedy the social and economic inequities suffered by minority groups. This is entirely consistent with prisoner enfranchisement. In fact, given the statistics cited above, it arguably tells in favour of it. The proper conclusion of the argument is that when minority groups suffer from systemic disadvantage this calls for a just resolution, not that there is no discrimination.

This article therefore concludes that s 80(1)(d) of the Electoral Act is an unreasonable limitation on the right to vote under s 12(a) of the NZBORA.

VII CONCLUSION

This article has aimed to highlight the objectionable aspects about the Act in law, principle and procedure. It has argued that justifications for depriving prisoners the vote either pursue an illegitimate aim or fail to achieve their stated aim. It has highlighted the serious procedural defects associated with the Bill's enactment. Finally, it has shown that s 80(1)(d) is inconsistent with s 12(a) of the NZBORA because it applies both arbitrarily and discriminatorily. It should not be forgotten that not only does New Zealand have legal commitment to the principle of universal suffrage; as the first country to enfranchise women and enact universal suffrage in 1893, our country has historically led the way in granting the vote to its citizens. This article therefore advocates the repeal of s 80(1)(d) and the enactment of other provisions designed to ensure that positive steps are taken to enable those eligible to vote in law to cast their vote in practice.

165 *Sauve v Canada (Chief Electoral Officer)* [2000] 2 FC 117 (FCA) at [114] quoted in *Sauve*, above n 37, at [202] per Linden JA.

166 Altman, above n 153, at 271.

167 Sauve, above n 30, at [204]; see also Clegg, above n 15, at 177.