CIVIL DEATH AND PENAL POPULISM IN NEW ZEALAND

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"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage".[1]

The ability of the governed to partake in matters of governance has long been considered the keystone of democratic legitimacy. It is a sentiment that resonates through treaties and constitutional documents throughout the world. As a specific form of political participation, the right to vote is often considered to be a fundamental democratic tenet. This is because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[2] *It is remarkable that there is no genuine international consensus with regard to the way in which franchise (the right to vote) should be distributed. Generally, eligibility to vote is framed in the light of the Universal Declaration of Human Rights (UDHR)*[3] *and the International Covenant on Civil and Political Rights (ICCPR),*[4] *each of which prescribes to the principles of universal suffrage. It should be noted that universal suffrage is rarely applied in a truly universal manner. Limited exceptions to universal suffrage are commonly permissible, most of which can be grouped under the category heading of mental incapacity. Mental incapacity may only be successfully used as a defence for disenfranchisement on "grounds which are established by law and which are objective and reasonable."*[5] *It is on this principle, among others, that minors are disenfranchised.*[6] *This line of reasoning has also encouraged the widespread practice of disenfranchisement of those who suffer from cognitive impairment, though not without considerable criticism.*[7]

Not all disenfranchisement operates on the basis of mental capacity, however. Many states disqualify criminals from voting as a punitive sanction. In 2010, New Zealand amended its electoral eligibility legislation to condemn incarcerated prisoners to a "civil death"[8] *for the same duration as prescribed prison sentence length. The blanket ban brings New Zealand in line with the policies of States such as the United Kingdom, Russia and India, but puts it at odds with a growing jurisprudential opinion which is in*

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1 Universal Declaration of Human Rights (adopted 10 December 1948), art 21(3).

2 *Reynolds v Sims* 377 US 533 (1964) at 562.

3 Universal Declaration of Human Rights, above n 1.

4 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 25(b).

5 United Nations Human Rights Committee (HRC) *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, CCPR/C/21/Rev.1/Add.7 (1996) at [4].

6 Arthur Elster "Lowering the Voting Age to Sixteen: The Case for Enhancing Youth Civic Engagement" (2009) 29 CLRJ 64 at 64.

7 See generally Sally B Hurme and Paul S Appelbaum "Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters" (2007) 38 McGeorge Law Review 931.

8 Alec C Ewald "Civil Death: The Ideological Paradox of Criminal Disenfranchisement in the United States (2002) 5 Wis L Rev 1045 at 1049.

favour of granting prisoners the right to vote.[9] *The assent of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 ("the Amendment") raises many questions about the legitimacy and necessity of the practice of prisoner disenfranchisement. Of these questions, this paper aims to answer three. Firstly, by what measure does the disenfranchisement of prisoners contribute to efforts made to manage and mitigate criminal behaviour within society? Secondly, why has New Zealand returned to the practice it first adopted in 1956*[10] *by choosing to disenfranchise all incarcerated prisoners? Thirdly, is it possible to reconcile New Zealand's international and domestic civil rights obligations with its decision to cause the civil death of over 8,400*[11] *electors? It is surmised that there is little by way of empirical evidence or academic support to suggest that the disenfranchisement of prisoners has substantial penological merit. This finding becomes inauspicious when viewed in appreciation of New Zealand's widely-acknowledged tendency to allow populism a long leash in the way that it influences penal policy-making.*[12] *A view is also formed which points to a series of conflicts between prisoner disenfranchisement and New Zealand's uncodified constitution, the ICCPR and the UDHR. It is concluded that the reintroduction of a blanket prisoner disenfranchisement policy in New Zealand is an unwarranted erosion of what might be considered the most essential civil right.*

I. DISENFRANCHISEMENT – A BRIEF HISTORY

As a sanction available to the state, records of disenfranchisement date back to the advent of democracy. There is evidence to suggest that early instances of disenfranchisement took place in the Ancient Greek city of Athens. Here, it was known as a declaration of atimia,[13] which bears a resemblance to the later practice of infami[14] in Ancient Rome. Atimia and infami were mainly mechanisms used to punish those who acted in a politically detrimental manner.[15] This was effective because a man who did not participate in political affairs would be seen "not as a man who minds his own business, but as useless."[16] The men who found themselves branded by atimia or infami would essentially become politically impotent, as they were deprived of access to the Assembly, courts and temples,[17] and were denied the right to obtain public office.[18] Similar

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9 See generally *Hila Alrai v Minister of the Interior and Yigal Amir* H.C. 2757/96 (1996), *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1, *Sauvé v Canada* (Chief Electoral Officer) 2002 3 SCR 519, *Hirst v the United Kingdom* (No 2) [2005] ECHR 681, *Frodl v Austria* [2010] ECHR 508 and *Greens and MT v United Kingdom* [2010] ECHR 1826.

10 Electoral Act 1956, s 42(1)(d).

11 Department of Corrections "Prison Facts and Statistics – December 2011" Department of Corrections <www.corrections.govt.nz>.

12 John Pratt and Marie Clark "Penal Populism in New Zealand" (2005) 7 Punishment and Society at 303.

13 William George Smith and Charles Anthon *A Dictionary of Greek and Roman Antiquities* (Harper, New York, 1870) at 354.

14 Christopher Francese *Ancient Rome in So Many Words* (Hippocrene Books, New York, 2007) at 181.

15 This was not always the case. Some individuals were believed to be inherently *less* than citizens, such as gladiators or slaves. See Luciana Jacobelli *Gladiators at Pompeii* (Getty Publications, Los Angeles, 2003) at 21.

16 RK Sinclair *Democracy and Participation in Athens* (Cambridge University Press, Cambridge, 1991) at xi. Note that Athenian law prescribed a political punishment for a political offence; this connection between the punishment and the nature of the offence (with regards to disenfranchisement) has recently been re-iterated by the European Court of Human Rights in *Hirst v United Kingdom* (No 2) [2005] ECHR 681.

17 Douglas MacDowell *The Law in Classical Athens* (Cornell University Press, Ithaca, 1986) at 74.

18 Christopher Francese *Ancient Rome in So Many Words* (Hippocrene Books, New York, 2007) at 181.

instances of formal political ostracism can be identified in later Germanic and Anglo-Saxon law.[19] Fifteenth century England saw the practice of a disenfranchisement policy which differed significantly from its historical equivalents. However, 15th century English disenfranchisement was used in a much more far-ranging capacity than its Ancient Athenian or Roman counterparts. For example, a Writ of Outlawry included the loss of legal and political rights as directed by the judiciary. A declaration of caput gerat lupinum ("let him bear the wolf's head")[20] stripped the legal status of the individual concerned. This was typically in response to a series of failures to appear in court for criminal charges; accordingly, this form of disenfranchisement can rightly be seen as a collateral result of a larger mechanism aimed towards increasing the strength of the criminal justice system. More than a mere loss of rights, the Writ of Outlawry actively encouraged a form of vigilante justice, where it became "the right and duty of every man to pursue [the offender], to ravage his land, to burn his house, to hunt him down like a wild beast and slay him."[21] The contrast between the political-centric atimia and infami and the crime and punishment-centric Writ of Outlawry is significant, as it denotes a shift from disenfranchisement as a tool to improve the quality of political representation towards a focus on punishment through the civil death of offenders. It is predominantly the latter approach which finds application in the modern world. This form of disenfranchisement was spread widely by rapid colonial expansion of England in the late 16th and early 17th centuries. Disenfranchisement is now usually[22] employed as a collateral sanction of an imprisonment sentence of a prescribed length, as is seen in the United Kingdom,[23] Bulgaria[24] and India.[25]

A. Disenfranchisement in New Zealand

The New Zealand Constitution Act 1852 introduced prisoner disenfranchisement to New Zealand. Actions which resulted in disenfranchisement at that time were restricted to "treason, felony, or infamous offence within any part of her Majesty's dominions."[26] The subsequent one hundred and sixty years saw the application of a wide assortment of approaches in an attempt to determine the appropriate status of prisoner franchise. In 1879, the threshold was altered in order to include all offenders "within twelve months after he has undergone the sentence or punishment to which he shall be adjudged".[27] A blanket ban which disenfranchised all prisoners serving a

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

20 Frederick Pollock and Frederic Maitland *The History of English Law before the time of Edward I* (Little, Brown and Company, London, 1895) at 459.

21 At 449.

22 Felon disenfranchisement is an example of an alternative disenfranchisement practice. In West Virginia, ex-felons are prohibited for voting for life unless they successfully apply for restoration from the Governor. See S David Michell "Undermining Individual and Collective Citizenship: The Impact of the Exclusion Laws on the African-American Community" (2006) 34 Fordham Urb Law J 831 at 834.

23 Representation of the People Act 1983 (UK), s 3.

24 Constitution of the Republic of Bulgaria, art 42(1).

25 Representation of the People Act 1951 (IN), s 62(5).

26 New Zealand Constitution Act 1852 (UK), s 8.

27 Qualification of Electors Act 1879, s 2(4).

term of a year or more was introduced in 1905.[28] This remained the case until the assent of the Electoral Act 1956, which disqualified all prisoners from voting.[29]

All prisoners were briefly granted franchise between 1975 and 1977, following the assent of the Electoral Amendment Act 1975. The amendment was greeted with moderate approval, as it was seen as a "parliamentary appreciation of the prisoners' existence."[30] Despite this, in 1977, s 42(1) of the Electoral Act 1956 was reinstated, restoring the original practice of blanket disenfranchisement.[31] The 1977 Amendment was passed as part of a larger attempt to remedy what the National Government perceived to be "a mess of the amendment to the electoral law"[32] made by Labour in 1975. Specifically, there were concerns that there were difficulties involved in determining how a prisoner's electorate should be determined.[33]

From 1993 to 2010, the Electoral Act 1993 defined the extent to which disenfranchisement was applicable to prisoners in New Zealand:[34]

> The following persons are disqualified for registration as electors:
> … a person who, under—
> (i) a sentence of imprisonment for life; or
> (ii) a sentence of preventive detention; or
> (iii) a sentence of imprisonment for a term of 3 years or more,—
> is being detained in a prison.

The 1993 provisions were enacted in accordance with the views of the Royal Commission on the Electoral System, which, in 1986, stated that "punishment for a serious crime against the community may properly involve a further forfeiture of some rights such as the right to vote."[35] At the time, it was thought that an offence should meet a predetermined test for seriousness in order to warrant the loss of voting rights. A sentence of three years or more was subsequently selected as the threshold for disenfranchisement. This was deemed to be appropriate, as it was the same period of time that had to lapse before a New Zealander living overseas would lose his or her right to vote in New Zealand elections.[36]

B. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010

The status of the franchise of prisoners remained unchanged in New Zealand until 2010, when the Electoral (Disqualification of Convicted Prisoners) Amendment Bill was introduced.[37] This amendment, introduced by Bernard "Paul" Quinn MP on 10 February 2010, aimed to amend the

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28 Electoral Act 1905, s 29(1).

29 Electoral Act 1956, s 42(1)(d).

30 Jeremy Pope "Voting Inside" [1975] NZLJ 605.

31 Electoral Amendment Act 1977, s 5.

32 (7 April 1977) 410 NZPD 5150.

33 (7 April 1977) 410 NZPD 5150.

34 Electoral Act 1993, s 80(1)(d) (as at November 2010).

35 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral Commission: Towards a Better Democracy* (1986) at 236.

36 At 232.

37 During Select Committee, it was recommended that the name of the Electoral (Disqualification of Convicted Prisoners) Amendment Bill be changed to the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill. See Law and Order Committee *Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (2010) at 2.

Electoral Act 1993 to disenfranchise *all* incarcerated individuals. The Bill had a controversial journey through the legislative process. Most notably, it was sent to the Law and Order Committee as opposed to the Justice and Electoral Committee, which was arguably more appropriate and able to more comprehensively examine the Bill.[38] Over 95 per cent of the submissions made to the Committee were in opposition to the Bill.[39] These submissions were largely disregarded, however, and the Bill was assented on 15 December 2010. The amended legislation now reads:[40]

> The following persons are disqualified for registration as electors: ... a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

The basis on which the previous three-year imprisonment sentence was selected as the vote-disqualification threshold formed a central theme of Quinn's argument in favour of amendment. He rightly pointed out that the amount of years was selected in order to match the similar threshold set for overseas voters.[41] He then asserted that the aim of this threshold-setting had a significant relationship to the severity of offences committed, which he believed was decided arbitrarily.[42] He would be correct if this connection was the basis on which the threshold was determined. However, there were other considerations made when the three year threshold was selected.

When the three-year threshold was chosen, it was not on the belief that it would effectively divide serious and non-serious offenders. It, like the limit placed on overseas voters, intended to ensure that voters may only cast a ballot in elections where they have a legitimate and identifiable vested interest in the political composition of the New Zealand Parliament. It was resolved that voters who have been absent from New Zealand for over three years – the parliamentary term length – are no longer sufficiently intrinsically involved in the political affairs of the State to have the right to cast a ballot.[43] This threshold – and the principle that underlies it – translates neatly to the context of prisoner disenfranchisement, given a certain contentious ideology which seems to imply that prisoners serving a term of three years or longer are as disassociated from the political life of their State to the extent that they should no longer have a say on the way in which it is run. There are certain problems with such an assumption. Every aspect of an incarcerated prisoner's life is ordained by the State in which he or she is held. The location in which a prisoner is held, the manner in which he or she is treated, and processes including sentencing, appeals and parole hearings are all matters that are to some extent presided over by the elected representatives of the State. Prisoners in New Zealand also have access to televisions and news publications, which allow them to stay informed of news on a daily basis.

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38 The Committee received advice from officials from the Department of Corrections (as opposed to officials from the Ministry of Justice) whose previous electoral experience allegedly extended to instances where "they handed the ballot box around the clink to allow those who were eligible to vote to put their ballot in the ballot box." See (20 October 2010) 667 NZPD 14679.

39 "Electoral (Disqualification of Convicted Prisoners) Amendment Bill – Submissions" (2010) New Zealand Parliament <http://www.parliament.nz>.

40 Electoral Act 1993, s 80(1)(d).

41 Royal Commission on the Electoral System, above n 35, at 232.

42 "[T]he royal commission based its recommendation on the fact that in its view people were sent to prison for committing misdemeanours; the simple reality of life is that they are not." (10 November 2010) 668 NZPD 15184.

43 Royal Commission on the Electoral System, above n 35, at 233.

Prisoners continue to pay tax while incarcerated. In many ways, the State has an inherent relationship to incarcerated prisoners that is much more significant than those it has with free members of the public. The claim that prisoners are somehow separated from the State is untenable.

In this light, it seems that the three-year threshold for disenfranchisement was a result of the marriage between two incompatible assumptions. There is no rational connection between disenfranchisement as a mechanism used to ensure that people who vote in New Zealand elections live (to an extent) within its borders, and disenfranchisement as a punishment for those seen to be in violation of the social contract and therefore not worthy of a vote. The perceived need for a threshold for disenfranchisement arose on the back of a belief that only serious offenders should be prevented from voting. The threshold itself was selected on the basis of social and political involvement. The "continuous absence" rule for the disqualification of New Zealand citizens living abroad simply seems to have been used as a proxy threshold in s 80(1)(d) of the Electoral Act 1993. Quinn is correct in stating that many prisoners who serve a sentence of less than three years could quite rightly be regarded as "serious offenders", but he is incorrect in assuming that this is a reason to support altering the threshold to affect all prisoners. Instead, the flawed reasoning of the Royal Commission on the Electoral System in 1986 gives more reason to abolish prisoner disenfranchisement altogether.

II. The Penological Merit of Prisoner Disenfranchisement

Penal policy can be appraised on the basis of how well it performs with regard to the four main areas of punitive theory (or "penological principles").[44] While this is not a comprehensive method of evaluating legislation, it does provide us with a useful platform for further discussion. Utilitarian punitive theory is consequentialist in nature; consequently, it is concerned with the impact punitive policy has on a societal scale. This emphasis has influenced the identification of three major principles within the field: deterrence, societal protection (or incarceration) and rehabilitation.[45] Retributive punitive theory provides a fourth point to be taken into consideration – retribution. The general expectation tends to be that policy makers at least consider the way in which proposed penal legislation acts to the benefit (or detriment) of these four values.[46] The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 does not seem to meet this expectation, as "[d]isenfranchising criminals fails to serve any of these purposes."[47]

A. Deterrence

Deterrence is frequently raised in support of prisoner disenfranchisement. During the Committee debate on the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill, Quinn asserted that disenfranchisement has a deterrent effect.[48] This justification rests on the notion that

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44 Susan Easton and Christine Piper *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, Oxford, 2008) at 20; Ewald, above n 8, at 1101.

45 Easton and Piper, above n 44, at 22.

46 Cyndi Banks *Criminal Justice Ethics: Theory and Practice* (2nd ed, SAGE Publishers, New York, 2008) at 115.

47 Ewald, above n 8, at 1104.

48 (10 November 2010) 668 NZPD 15184.

potential offenders will consider the threat of losing the right to vote a daunting prospect. This is a demonstrably unsound line of reasoning. Deterrence is based on the archetypical Hobbesian behavioural assumption[49] which identifies appetite and aversion as the sole motivators of human conduct.[50] This reductionist appreciation of deterrence is misleading in its simplicity, however. Crucial to the effectiveness of a deterrence-orientated punishment is the need for the potential sanction to weigh heavily on the mind of a would-be offender. This can be problematic, as there is some concern that "the threatened punishments of crime deter criminally prone individuals less ... because of their impulsive ... present-orientated natures."[51] This becomes an especially salient consideration when considering the merits of prisoner disenfranchisement. Legislators must ensure that deterrence-focussed sanctions are formulated in light of the fact that they must "deter those with different personalities that predispose them to crime."[52] There can be little doubt that most people find the prospect of losing the right to freedom of movement, association and liberty via incarceration to be daunting. It is unlikely that the same could be said of the prospect of losing the right to vote. Even if most would-be offenders thought about disenfranchisement when evaluating the risks involved with crime, it is probable that "this loss ... pales in comparison to the wholesale deprivations that accompany incarceration."[53] If true, then the deterrent effect of prisoner disenfranchisement can only be seen as having a collateral impact which is so infinitesimal as to make it an irrelevant consideration when evaluating the penological merit of the practice. A second criticism which has been levelled at the deterrent effect of prisoner disenfranchisement is that it is unlikely to have any meaningful impact due to its relative obscurity as a sanction available to the State. The deterrence of any given policy will only be as powerful as how widely-recognised it is.[54] It is clear that prisoner disenfranchisement lacks any significant deterrent strength.

B. Societal Protection

While it is not commonly used as a means of defending prisoner disenfranchisement, social protection is nonetheless examined here to allow for penological completeness. Imprisonment, as a mechanism for social protection, segregates offenders from society in order to prevent further harm from taking place. When the principle of social protection is applied to prisoner disenfranchisement, the equivalent segregation becomes one of a political nature. Preventing prisoners from voting then impliedly protects society from the political participation of those who are deemed detrimental to political affairs. There are immediately evident problems with such a position. Any test for whether a political view is – or is not – detrimental to the running of a state is inherently subjective. There is no need for an extensive academic analysis here in order

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49 Daniel Nagin "Deterrence" in Francis Cullen & Cheryl Jonson (eds) *Correctional Theory* (SAGE Publishers, New York, 2011) 67 at 69.

50 Thomas Hobbes, Brian Battiste (ed) and Aloysius Martinich (ed) *Leviathan Parts I and II* (Broadview Press, Peterborough, 2010) at 67.

51 Bradley Wright and others "Does the Perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control, and Crime" (2004) 41 JRCD 180 at 182.

52 Daniel Nagin, above n 49, at 68.

53 Christopher Uggen, Angela Behrens and Jeff Manza "Criminal Disenfranchisement" (2005) 1 Annu Rev Law Soc Sci 307 at 331.

54 Susan Easton "Electing the Electorate: The Problem of Prisoner Disenfranchisement" (2006) 69 The Modern Law Review 443 at 446.

to establish that this is a justification that would be wide open to abuse. Similar arguments have defended the disenfranchisement of racial minorities, religious groups and social movements in a range of notorious instances throughout the history of democracy. Accordingly, isolation cannot form a legitimate supporting argument for the implementation of prisoner disenfranchisement.

C. Rehabilitation

In New Zealand, high recidivism rates make a significant contribution to the overall crime rate. A recent Ministry of Corrections report based on research which followed released prisoners over a series of years indicated that as many as 52 per cent of all offenders will be returned to incarceration within 60 months of being released from prison.[55] It is widely acknowledged that states which significantly incorporate rehabilitation into penal legislation can expect to see a quantifiable reduction in recidivism.[56] The opposite is also true; ineffectual rehabilitation policies can often result in higher rates of recidivist offending. New Zealand has an unfortunate track record of treating the rehabilitation of offenders as a "secondary goal",[57] and recent attempts to politicise the issue seem to have been stifled.[58] The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 seems to be another example of the on-going relegation of rehabilitation as an objective of penal legislation. No quantitative study has been undertaken in New Zealand to measure the way in which disenfranchisement affects the rehabilitation of offenders. However, comparable studies undertaken in the United States have evidenced a link between the re-enfranchisement of offenders and recidivism rates.[59] It is thought that disenfranchisement can "reinforce a self-fulfilling cycle of disempowerment and civic irresponsibility."[60] These findings have gone some way to reinforce the belief that if a prisoner is granted franchise, then this will supplement the development of a sense of societal inclusiveness which is an essential component of a successful rehabilitative process. There are contextual dissimilarities between the United States and New Zealand which would make any direct imputation of this evidence misleading. Nevertheless, it is clear that disenfranchisement makes no positive contribution to the rehabilitation of offenders.

D. Retribution

While deterrence is often explicitly raised in favour of disenfranchisement, retribution is arguably the punitive perspective largely responsible for the on-going existence of the practice in modernity. Retribution has played a significant role in law for centuries. Lex talionis ("an eye for an eye") and the Law of Retaliation in the Old Testament are but two examples of the place

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55 Arul Nadesu *Reconviction Patterns of Released Prisoners: A 60-months Follow-up Analysis* (Department of Corrections, 2009) at 6.

56 Francis Cullen and Paul Gendreau "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects" in U.S. Department of Justice (ed) *Policies, Processes and Decisions of the Criminal Justice System* (2000) at 110.

57 Hon Judge A J Becroft, Principal Youth Court Judge "Alternative Approaches to Sentencing" (CMJA Triennial Conference 2006, Toronto, 12 September 2006).

58 New Zealand Labour Party "Barker Asks Committee to hold Recidivism Enquiry" (press release, 15 December 2010).

59 Christopher Uggen and Jeff Manza "Voting and Subsequent Crime and Arrest: Evidence from a Community Sample" (2004) 36 Columbia HRLR 193.

60 Graeme Orr "Ballotless and Behind Bars: The Denial of the Franchise to Prisoners" (1998) 26 Federal Law Review 56 at 62.

historic societies have given to retribution in punitive policies. Retribution is founded on the concept that "[i]t is morally fitting that a person who does wrong should suffer in proportion to his guilt."[61] This paper has illustrated that disenfranchisement does not inflict any measurable form of pain on offenders. Despite this, for the electorate, it can be seen as a righteous means of retributive recourse. Retribution is a widely accepted aspect of a legitimate state sanction. However, public endorsement alone does not form the entirety of the criteria required to make a punishment legitimate. Firstly, punishment should be proportional to the offence committed. This has been a fundamental element of punitive theory at least since Cicero's *De Legibus,* "noxiae poena par esto" [62] or "Let the punishment be equal with the offence". This presents a problem for proponents of prisoner disenfranchisement. Most punitive sanctions have a mechanism whereby a punishment can be scaled to appropriately meet the severity of the offence committed. Prison sentences, for example, have a length determined on the basis of offence seriousness. It could be argued that disenfranchisement, as a collateral effect of a prison sentence, is inherently proportionate as a sentenced individual is disenfranchised for an appropriate length of time (insofar as the imprisonment itself is proportionate to the offence). This is unrealistic as it overlooks the reality that elections are periodic, which gives rise to some situations which are clearly disproportionate. For example; an election might take place while a prisoner serves a minor sentence of a few months, which effectively disenfranchises the individual concerned for the duration of the subsequent parliamentary term. This seems absurd when a prisoner serving a sentence for violent offending might be released the week before an election was to begin. In the words of the Attorney-General, "The irrational effects of the Bill ... cause it to be disproportionate to its objective."[63] The need for the proportionality restraint in retributive sentencing is essential, as it helps to deliver consistency and fairness for offenders. Accordingly, retribution does not offer any penological defence for the practice of prisoner disenfranchisement.

E. Penological Analysis Conclusions

From a penological standpoint, the practice of prisoner disenfranchisement appears to be almost entirely without value. The four penological principles identified in this analysis are essential in the achievement of effective penal policy. However, it is abundantly clear that "[d]isenfranchising criminals fails to serve any of these purposes."[64] This raises an important question: for what reason was the Amendment passed into law, if not to further rehabilitative, deterrent, retributive or isolative aims?

III. PENAL POPULISM

Democracy demands that politicians bow to political imperatives of some form. Populism has long been acknowledged as an inevitable consequence of liberal democracy, as this system of governance provides incentives for politicians to endorse policy which appeals to public

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61 John Rawls *Collected Papers* (Harvard University Press, Cambridge, 1999) at 21.

62 Marcus Tullius Cicero *De Legibus: Book III* at [20].

63 Chris Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (House of Representatives 2010) at 4.

64 Ewald, above n 8, at 1101.

sentiment. Populism is not in itself an undesirable thing. In a sense, it is an essential ingredient of a legitimate democracy because it allows for legislators to respond to the wishes of the electorate. This is known as reactionary populism, as it is concerned with identifying public demand and taking action to best achieve these desires.[65] However, it is undesirable for policy makers to anticipate public demand by legislating in such a way as to appeal to *unspoken* wishes of the electorate. This issue becomes compounded when this type of proactive populism produces policy which is dubious in terms of its legitimacy and value. It is possible that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 is largely a result of penal populism.

In many States, there is "an entrenched belief that the public is punitive."[66] This provides a seemingly irresistible political imperative for legislators to endorse tough penal policy. It is thought that Sir Anthony Bottoms was the first to identify this trend as "populist punitiveness" in 1995.[67] Penal populism[68] (as it is more commonly known in modernity) is thought to play a powerful role in the formulation of law and order policy in democracies throughout the world. This is certainly no less true in New Zealand, where "politicians encourage punitive laws and sentences and thereby improve their chances of re-election by making such responses to indicators of public moods or sentiments."[69] Many find this trend concerning, because "penal populists allow the electoral advantage of a policy to take precedence over its penal effectiveness."[70]

A. *The Emergence of Penal Populism in New Zealand*

In 1999, a Citizens Initiated Referendum provided a catalyst for an increase of the prevalence of penal populism in New Zealand. It asked:[71]

> Should there be a reform of our Justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

The response was unequivocally in favour of reform; 91.78 per cent of respondents answered positively. This was seen to be a demonstration of the discontent felt by the public with regard to the way in which the criminal justice system dealt with serious violent offenders. Interestingly, this sentiment was expressed despite 1999 having the lowest overall recorded crime rate in the five years immediately preceding.[72] There is a wealth of research to suggest that there is a discrepancy between crime statistics and public perception of crime rates. It is postulated that the

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65 Julian V Roberts and J M Hough *Understanding Public Attitudes to Criminal Justice* (McGraw-Hill International, New York, 2005) at 16.

66 Easton and Piper, above n 44, at 11.

67 Anthony Bottoms "The Philosophy and Politics of Punishment and Sentencing" in Chris Clarkson and Rod Morgan (eds) *The Politics of Sentencing Reform* (Clarendon Press, Auckland, 1995) at 40.

68 Roberts, above n 65, at 16.

69 Pratt and Marie, above n 12, at 304.

70 Roberts, above n 65, at 16.

71 New Zealand Electoral Commission "Return of Citizens Initiated Referenda Poll Votes – Reform of the Criminal Justice System" (1999) Election Results <http://electionresults.org.nz>.

72 New Zealand Police "National Annual Recorded Offences for the Latest Calendar Years" (2011) Statistics New Zealand <http://www.stats.govt.nz>.

news media plays a central role in this misconception, partly because "crime reporting is biased towards the reporting of serious violent crimes".[73] International research suggests that significant portions of society rely primarily on the news media as a source of information about crime trends,[74] and it is likely that the same is true of the New Zealand public.[75] This perspective is intensified by the widespread proliferation of news media reports and press releases which sensationalise the supposed comfort within which prisoners reside.[76]

Unsurprisingly, in the years since the referendum, law and order has become a key policy for most of the major parties, including the National Party,[77] the Labour Party,[78] the ACT Party,[79] and New Zealand First.[80] The popularising of law and order policy continues to be a major draw-card for the larger parties on New Zealand's political scene.[81] This political attitude has led to a series of legislative developments. Two pieces of legislation which were introduced in the following years are of particular significance: the Sentencing Act 2002 and the Parole Act 2002. These Acts were introduced to replace much of the Criminal Justice Act 1985. In a 2002 report on these Acts, the Ministry of Justice indicated that a key objective in the drafting of the legislation was to "[r]espond to the 1999 referendum which revealed public concern over the sentencing of serious violent offenders."[82] This comprehensive reform took place less than four months after the re-election of an incumbent Labour Party-led government, following "a particularly virulent law and order campaign in 2002."[83] The broad reforms which took place soon after can be perhaps seen as the beginning of a centre-stage role for penal Populism in New Zealand politics. The years since have seen the assent of several well-publicised and controversial legislative amendments which were aimed at increasing sentence severity. Of these new measures, the introduction of strict new rules for repeat offenders under the Sentencing and Parole Reform Act 2010 stood out as particularly controversial. Under the Act, the "Three Strikes Law" imposed non-discretionary maximum sentences for some types of repeat offences. It received rigorous criticism from sentencing reform lobby groups and academics, who thought that the Bill was being introduced "for purely strategic political reasons."[84] It was also suggested that the "three strikes and you're out" rule was an unnecessary impugnation on the independent discretionary ability of the judiciary.[85] Despite these complaints, the Sentencing and Parole Reform Act 2010 received royal assent on 31 May 2010 in order to "enhance the integrity of the

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73 Ministry of Justice *Attitudes to Crime and Punishment: A New Zealand Study* (2003) at 4.

74 Julian V Roberts "Public Opinion, Crime, and Criminal Justice" (1992) 16 Crime & Just 99 at 116.

75 Ministry of Justice, above n 73, at 4.

76 New Zealand National Party "Milton Hilton a Monument to Bad Management" (press release, 10 May 2007).

77 National Party "Law and Order: Victims" (2011) Policy Manifesto <http://www.national.org.nz>.

78 Labour Party "Labour Party Manifesto" (2011) Labour Party at 327 <http://www.labour.org.nz>.

79 ACT New Zealand "Law and Order" (2011) Policies <http://www.act.org.nz>.

80 New Zealand First "Election Manifesto" (2011) New Zealand First at 87 <http://www.nzfirst.org.nz>.

81 "Prisoners Feast on Venison, Crayfish" *The Press* (New Zealand, 9 April 2005).

82 Ministry of Justice, *Reforming the Criminal Justice System* (Ministry of Justice, 2002).

83 Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, Australia, 2008) at 34.

84 Audrey Young "Three Strikes Law may see Early Releases – Criminologist" *The New Zealand Herald* (New Zealand, 20 January 2010).

85 Nick Russell and James Dunne "Three Strikes and You're Out, Version 2: The New Proposed Sentencing and Parole Reform Bill" *NZLawyer* (2 October 2010).

parole system and to protect the public from the worst repeat offenders."[86] There has been some muted support offered for California's similar Three Strikes Law[87] due to its "significant deterrent"[88] force. The State saw an immediate and constant decline in the overall crime rate in the years after the new law came into effect.[89] A similar phenomenon may be occurring in New Zealand presently; 2011 saw the lowest recorded crime rate in over fifteen years.[90] However, it is far too early to speculate whether the implementation of the Sentencing and Parole Reform Act 2010 has a causative link to the recent drop in recorded crime. The financial implications of the reform are not insignificant. An estimated 56 extra beds would be required in prisons within the next five years,[91] which was seen in a particularly unfavourable light given the expense of keeping prisoners ($249.25 per prisoner, per day)[92] and a growing awareness that New Zealand prisons are on the cusp of overcrowding. The reform is predicted to cost $356,000,000 within the next fifty years.[93] The Sentencing and Parole Reform Act 2010 is cumbersome and expensive, but may yield results that justify the expense. Either way, it was a policy change which rang true with retributive proponents around New Zealand.

B. Responding to the "Not-So-Retributive" Public

There seems to be an emerging understanding among members of the New Zealand public that lowering the threshold for incarceration is both unaffordable and ineffective, especially insofar as reducing recidivism is concerned. In 1990, the overall prison population floated around 4,000. This number has more than doubled, and now sits in the vicinity of 8,433.[94] This bloom – and the cost associated with it – has been well publicised. It is arguable this has encouraged legislators to become more "creative" with penal policy in non-expensive ways. An example of this might be seen in the tabling of the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill introduced by Simon Powers. This Bill aimed to go one step further than the Prisoners' and Victims' Claims Act 2005 by re-directing *all* compensation awarded to prisoners to victims of crimes. Opponents to the Bill suggested that it "knocks out one of the key safeguards against prisoners being abused".[95] The Attorney-General found the Bill was inconsistent with the Bill of Rights Act 1990 and that this inconsistency was unjustifiable.[96] Powers' Bill did not pass its first reading in Parliament.

Like the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 appeared to be

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86 (10 April 2009) 652 NZPD 1420.

87 Ca Pen Code § 667(e)(2)(A)(ii) and § 1170.12(c)(2)(A)(ii).

88 Franklin Zimring, Gordon Hawkins and Sam Kamin *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford University Press, Oxford, 2001) at 91.

89 At 91.

90 New Zealand Police, above n 72.

91 Judith Collins "National and ACT agree to Three-Strikes Regime" (press release, 19 January 2010).

92 Judith Collins "National and ACT agree to Three-Strikes Regime" (press release, 19 January 2010).

93 Judith Collins "National and ACT agree to Three-Strikes Regime" (press release, 19 January 2010).

94 Department of Corrections, above n 11.

95 Green Party "Prisoner Bill Knocks Out Safeguards" (press release, 18 October 2011).

96 Chris Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill* (House of Representatives 2010) at [1].

an attempt to increase the severity of sentencing in New Zealand without incurring significant financial cost. It also appeared to be politically inexpensive, as disenfranchisement is a common practice in many liberal democracies. Throughout the legislative process, Quinn was outspoken about the public demand for a stricter approach to prisoner voting rights.[97] His vehemence on the subject is understandable; if he could attest that there was public demand for the Bill he introduced, his actions could be seen as responsive (and therefore warranted insofar as democratic mandate is concerned). However, despite his frequent claims to the contrary, to date no evidence of this support has been produced on request. Quinn was unable to adduce proof of the "overwhelming majority"[98] that was purportedly in support of the introduction of the Bill because it "was provided verbally and via email (since deleted)".[99] Public submissions made to the Select Committee were almost unequivocally against the disenfranchisement of prisoners; fifty submissions were against the passage of the Bill, and two were in support of it (one of which was from Quinn himself).[100] It was predicted that the majority of submissions made in opposition to the Bill would be from "prisoner aid-type organisations".[101] Instead, submissions were received from a range of parties including community law centres, university students and the New Zealand Law Society.

C. Penal Populism Conclusions

In the absence of evidence to the contrary, it is reasonable to assume that there was no active public demand for the blanket disenfranchisement of incarcerated offenders in New Zealand. Accordingly, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 then appears to be merely *popular*, instead of responsive. Purely popular policy-making is not a beneficial behaviour to cultivate in legislators. This is precisely what leads to situations where elected representatives place a heavy emphasis on the electoral advantage of a policy, to the detriment of its effectiveness.[102] This form of populism has played a role in the reduced part that penal policy experts play in the drafting of new legislation.[103] The perils of side-lining experts from the "criminal justice establishment"[104] in favour of public sentiment are fairly self-evident. Often, it results in a severely compromised level of effectiveness and, arguably, the legitimacy of new legislation.[105] This effect is clearly evident in the passage of the Amendment. Not only is it likely that blanket disenfranchisement will be wholly ineffective (if not counterproductive), but it may also put New Zealand in contravention with its international obligations.

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97 (17 March 2010) 661 NZPD 9610.

98 (10 November 2010) 668 NZPD 15194.

99 Email from Bernard "Paul" Quinn MP to Liam Williams regarding the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (14 October 2011).

100 "Electoral (Disqualification of Convicted Prisoners) Amendment Bill – Submissions" (2010) New Zealand Parliament <http://www.parliament.nz>.

101 (17 March 2010) 661 NZPD 9610.

102 Roberts et al, above n 65, at 16.

103 John Pratt *Penal Populism* (Taylor & Francis, New York, 2007) at 3.

104 John Pratt "When Penal Populism Stops: Legitimacy, Scandal and the Power to Punish in New Zealand" (2008) 41 Aus NZJ Criminology 364.

105 At 366.

IV. Prisoner Disenfranchisement and New Zealand Civil Rights Obligations

It is difficult to identify a compelling justification for the disenfranchisement of prisoners in New Zealand. Not only is the practice almost entirely devoid of penological merit, but it also seems to conflict with New Zealand's constitutional arrangements. This is unsurprising, given that the right to vote guarantees the protection of all other fundamental rights. Section 12 of the New Zealand Bill of Rights Act 1990 gives the right to vote to "[e]very New Zealand citizen who is of or over the age of 18 years", which is subject to the "justified limitations" of s 4. Christopher Finlayson, the Attorney-General of the time, provided an extensive and technical inspection of the Amendment under s 7 of the Bill of Rights Act. He raised several concerns, chief among them the "disproportionate"[106] way in which prisoners would be deprived of the vote. He concluded that the amendment was inconsistent with s 12 of the Bill of Rights Act, and that it was unjustifiable under s 5 of the Act.[107]

Re Bennett is the judiciary's subdued response to prisoner disenfranchisement as it sits with regard to New Zealand constitutional arrangements. Grieg J found that he could not consider the Electoral Act 1956[108] under ss 5 or 6 of the Bill of Rights Act 1990 as such an analysis was precluded by s 4. Instead, he opted to indicate that the practice of prisoner disenfranchisement presented a "clear conflict with the Bill of Rights".[109] This case is particularly relevant in modernity given that the current disenfranchisement practice is the same that was exercised on the date of this judgement. It is therefore highly likely that a similar conclusion would be reached if a similar case made its way to the High Court with regards to the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

New Zealand is a state party to the ICCPR. Article 25 of the Covenant states that "[e]very citizen shall have the right and the opportunity ... to take part in the conduct of public affairs". Reasonable restrictions are considered to be those which are made "on grounds which are established by law and which are objective and reasonable."[110] While there is no international jurisprudence on the matter of art 25 of the ICCPR in relation to prisoner disenfranchisement, the findings of the European Court of Human Rights (ECHR) offer some enlightening comparisons. Protocol 1, art 3 of the ECHR is very similar to its ICCPR counterpart, with the conspicuous omission of any wording that pertains to universal suffrage. Notwithstanding this absence, the ECHR has released several rulings which have consistently found that the practise of blanket prisoner disenfranchisement is incompatible with the ECHR.[111] These rulings make a compelling case for inconsistency between prisoner disenfranchisement in New Zealand and its obligations under the ICCPR, especially in light of the universal suffrage component found in the Covenant.

Disenfranchisement provisions have been successfully challenged by domestic courts around the world. The Israeli Supreme Court refused a request to remove the citizenship rights of Yigal

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106 Finlayson, above n 63, at 4.

107 At 4.

108 Electoral Act 1956, s 42(1)(d).

109 *Re Bennett* (1993) 2 HRNZ 358 (HC) at 361.

110 United Nations Human Rights Committee, above n 5, at [4].

111 *Hirst v the United Kingdom* (No 2) [2005] ECHR 681, *Frodl v Austria* [2010] ECHR 508 and *Greens and MT v United Kingdom* [2010] ECHR 1826.

Amir, the man imprisoned for the assassination of Prime Minister Yitzak Rabin in 1995. Had his citizenship been revoked, Mr Amir would no longer be able to exercise his right to vote. This was of concern to the Court, which held that "[w]ithout the right to vote, the infrastructure of all other fundamental rights would be damaged."[112] Similarly, in 1999, the Constitutional Court of South Africa ruled against prisoner disenfranchisement, declaring that:[113]

> The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.

Similarly, in 2002 the Supreme Court of Canada judged that the "[d]enial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law".[114] In 2007, the High Court of Australia found that a complete ban on prisoner voting rights went "beyond what is reasonably appropriate and adapted (or 'proportionate') to the maintenance of representative government".[115] The Court deemed acceptable a prior policy which only disqualified prisoners serving more than three years in prison. This was purportedly because it helped to "distinguish between serious lawlessness and less serious but still reprehensible conduct".[116]

V. SUMMARY

The denial of franchise to all prisoners in New Zealand puts the State in an interesting position. As a signatory to the International Covenant on Civil and Political Rights and thus an adherent to the general principles of universal suffrage, the passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 makes New Zealand appear out of step with international jurisprudence and academic opinion. An absolute ban finds inconsistent application between offenders, is disproportionate to most offences committed, is counterproductive for the purposes of rehabilitation and derogates from the principles of universal suffrage without due cause. In the absence of any compelling argument to the contrary, it is difficult to see the reintroduction of a comprehensive prisoner disenfranchisement policy as anything other than an appeal to the conjectural "retributive public". Such an appeal resembles what was described in 1776 by John Adams as a "democratic despotism"[117], where the *perceived* popular opinion of the majority becomes a sufficient political incentive to subvert the voting rights of minority groups. It is concluded that the amendment of the Electoral Act 1993 in 2010 to disqualify prisoners from voting was unnecessary, disadvantageous and contrary to New Zealand's civil rights obligations. This seemingly arbitrary disposal of the right to vote – a fundamental democratic right – sets a concerning precedent for the future of civil rights in New Zealand.

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112 *Hila Alrai v Minister of the Interior and Yigal Amir* HC 2757/96 (1996).

113 *August v Electoral Commission* 1999 (3) SA 1 at [17].

114 *Sauvé v Canada (*Chief Electoral Officer) 2002 3 SCR 519 at [58].

115 *Roach v Electoral Commissioner* [2007] HCA 43 at [95].

116 *Roach v Electoral Commissioner* [2007] HCA 43.

117 Marc Slonim and James H. Lowe "Judicial Review of Laws Enacted by Popular Vote" (1979) 55 Wash L Rev 175 at 185.