Delinquent Democracy:

Examining the Nature, Scope, and Effects of the Trend towards Greater Criminal Enfranchisement

by

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Abstract

Universal suffrage is a guiding principle of democracy. However, it has a long history of being selectively denied. While many of these exclusions have dissipated in twentieth century rights revolutions’, the right to vote is still widely withheld for prisoners. This paper looks at criminal disenfranchisement, its origins, development, and contemporary manifestations. Part I will discuss the history of criminal disenfranchisement to trace its development from a tool of social exclusion to a collateral consequence of criminal conviction. Part II will look at the judicial treatment of contemporary disenfranchisement laws through a selection of representative case studies. Part III will consider how the representative cases form a trend towards criminal enfranchisement, and the implications of this trend for future constitutional challenges in jurisdictions where such laws persist. This paper argues that this trend, while tangible, is tentative and its force may be strengthened through a transnational judicial dialogue.
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Introduction

The recognition of human rights has undergone a veritable revolution in the twentieth and twenty-first centuries.1 The progress in the protection of fundamental human rights even boasts ‘generations’, with new categories of rights being recognized as time passes.2 Despite this seemingly unstoppable progress of rights-respecting regimes, socially marginalized groups have yet to enjoy some of the rights that are taken for granted by most other members of society. Civil and political rights are first generation rights that include the right to vote, the right to run for elections, and freedom of speech and expression.3 While most would consider this category of rights to have long-standing protections, important limitations remain.4 For example, the right to vote may be considered fundamental, but it is not universal.5 Barring restrictions based on age and capacity, political citizenship is granted reluctantly to prisoners and in some cases ex-convicts.6 Recently, this reluctance to grant prisoner franchise has been subject to greater judicial scrutiny across many jurisdictions.7 There has been considerable attention given to this issue of enfranchising prisoners on the basis of constitutionally entrenched principles like equality and

1 Kenneth Cimiel. “The Recent History of Human Rights” (2004) 109:1 The American Historical Review 117. “Few political agendas have seen such a rapid and dramatic growth as that of ‘human rights’. Prior to the 1940s, the term was rarely used. There was no sustained international movement in its name…[t]here was no international law crafted to protect our human rights. By the 1990s, however, you couldn't escape it.”


3 Ibid.


5 Ibid.

6 Alec C Ewald & Brandon Rottinghaus, eds. Criminal Disenfranchisement in an International Perspective. (Cambridge: Cambridge University Press, 2009). “Dozens of countries, particularly in Europe, allow and even facilitate voting by prisoners, whereas many other bar some or all people under criminal supervision from the franchise. A very small number of countries and several states in the United States disqualify some convicts even after their sentences have been completed entirely. As part of the contemporary ‘rights revolution’ some courts have regarded voting rights as universal, fundamental, and inalienable. Meanwhile, however, many countries are simultaneously moving toward more restrictive and punitive criminal justice policies. The ballot access of convicts hangs in the balance, a policy at the nexus of punishment, democracy, and citizenship.” p. 2-3.

7 Ibid. p.3 “…constitutional courts in Israel, Canada, and South Africa, as well as the ECHR [European Court of Human Rights] have…grappled with these policies in the last decade.”
non-discrimination. To date, there has been some progress in enfranchising a greater number of prisoners in the jurisprudence of certain nations. This paper will focus its analysis on nations with an English colonial heritage, as they all share English common law as the basis for their legal regimes.

While there has been a wealth of literature assessing the constitutionality of criminal franchise exclusions in a given jurisdiction, little attention has focused on this issue in the context of a greater transnational judicial discourse, and its relationship to the global trend towards greater prisoner franchise. This paper will address this lacuna by examining leading judicial decisions on criminal disenfranchisement in Canada, South Africa, and the United Kingdom with reference to Australian and American experiences to engage in a comprehensive review of the trend towards greater criminal franchise. The strength of this trend as a persuasive judicial approach will also be considered. Additionally, what role a transnational judicial discourse may play to help enfranchise prisoners in other countries, which have not benefitted from successful constitutional challenges, will be discussed.

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8 For example contemporary challenges to criminal disenfranchisement in the United States are considered to have begun in 1974 with Richardson v. Ramirez, 418 U.S. 24; 94 S. Ct. 2655 (1974), which contended that such disqualifications were inconsistent with the Fourteenth Amendment to the Constitution.

9 See generally Ewald and Rottinghaus, supra note 6, less restrictive disenfranchisement regimes are now a feature of Canadian, South African, and European states bound by the ECHR for example.


11 More recently some attempts have been made to look comparatively among common law jurisdictions including Ewald and Rottinghaus supra note 6, and Michael Plaxton & Heather Lardy. “Prisoner Disenfranchisement: Four Judicial Approaches” (2010) 28 Berkeley Journal International Law 101, for example.
This paper will proceed in three parts. Part I will detail the history of criminal disenfranchisement, with particular emphasis on the purposes it has served in history. In its earliest forms, disenfranchisement was a feature of ancient societies which reflected principles of honour and shame. Ancient disenfranchisement will be examined through the mythology and the practice of social exclusion by Greek statesmen. It will be seen that in order to best maintain the honour of both the victim and society, there was a strong emphasis put on exacting punishment by restricting the privileges of citizenship. The continuation of this logic of honour and shame will be explored through the practice in medieval England of attainder and the related practices of civil death and corruption of blood. New forms of ownership during this time also affected the nature of disenfranchisement. Property, and its associated status of privilege and wealth, became an additional element of social punishment. Finally, the colonial transfer of disenfranchisement will also be discussed by briefly looking at Canadian, Australian, South African and American case studies.

Part II will explore the continuation of disenfranchisement laws into the twentieth century. Representative cases from Canada, South Africa, and the United Kingdom will be presented and critically assessed. For each case, the main arguments of the parties will be discussed along with the reasoning of the courts’ majority judgments and dissenting opinions. From this survey of representative cases, the major elements of the trend towards greater prisoner franchise will be introduced. This section will also consider what role the colonial legacy of prisoner disqualification has played in both the longevity and eventual decline of these provisions. A synthesis section will consider what other factors have contributed to the prevalence of disenfranchisement provisions. Political motivations, as well as the role of public opinion will be considered.

Part III will examine the nature, scope and effects of the trend towards greater prisoner franchise. It will be seen that there is a constitutional pattern that each of the challenges to disenfranchisement has taken. Governments have used similar justifications in defense of their disqualification regimes. Prisoners across jurisdictions commonly cite disproportionately discriminatory effects. Central to the judicial treatment of disenfranchisement laws is whether such laws are interpreted as regulatory or punitive in nature. While each court places a different emphasis on the regulatory or punitive argument, generally a ‘guardian of human rights protection’ approach can be identified. The potential effects of such an approach to the issue of
criminal franchise are explored. The extent to which the United States, currently an exception to this general trend, could be influenced by such an approach by the force of a transnational judicial dialogue is also considered. The judicial recognition of the concept of human dignity will also be looked at within the framework of the transnational judicial dialogue to assess what role it may play in facilitating further criminal enfranchisement.

The debate surrounding criminal disenfranchisement centres around reconciling long-standing views on punishment with the contemporary commitment to the protection of human rights. Many issues remain with a liberalized criminal franchise regime, including implementation issues and public opinion. However the experience of re-enfranchising criminals speaks to the greater goal of achieving truly universal human rights protections. Whereas the means and methods of punishment have evolved with societal norms, underlying beliefs about crime, punishment and the power of administrative restrictions on constitutional rights are slow to change. The trend towards greater criminal franchise challenges the parameters of state controlled punishment. However, as this paper will show, the trend is weak and has not succeeded in abolishing the disqualification altogether, only in minimizing its scope. This paper argues that through a persuasive transnational judicial dialogue, this tentative trend towards prisoner enfranchisement can gain greater force. Relying on fundamental principles of human rights protection, like human dignity, the judiciaries of even the most repressive criminal disenfranchisement regimes will have to reconsider the rules of their delinquent democracies.


1. The History of Criminal Disenfranchisement

The history of criminal disenfranchisement dates back many thousands of years, and reflects underlying attitudes of selective social exclusion. Disenfranchisement has been, and remains a collateral consequence of criminal conviction.\textsuperscript{14} Beginning as early as the Greek classical period, disenfranchisement has endured through many changes of social, political, and penal norms.\textsuperscript{15} This section will consider the history of prisoner disenfranchisement. It will begin by presenting a brief overview of ancient disenfranchisement, and its transformation as a penal practice through the centuries. It will consider the time periods most relevant to a discussion about penal disqualification. In chronological order, these are the ancient Greek era, the English medieval period, the transfer of disenfranchisement from England to its colonies, and finally the modern day manifestations of the practice in these now independent nations. This chronology of disenfranchisement will show its far reaching roots as policy, and the legal justifications underlying its practice. It will be seen that little has changed when it comes to using civil disqualification against prisoners as a shame punishment, reflecting an intimate connection between citizenship and social inclusion. Inherent to the analysis of criminal disenfranchisement is a discussion of the history of crime and especially the ideology, administration, and execution of punishment.\textsuperscript{16}

\footnotesize


\textsuperscript{16} Anthony Babington. \textit{The Power to Silence: A History of Punishment in Britain} (London: Robert Maxwell Publishing, 1968). Babington summarizes the shift from tribal justice to state controlled justice as follows: “in the primitive stage of civilization crime, as we understand the word, did not exist… Within the tribes the idea of communal responsibility for the preservation of order gradually gained acceptance and it became the custom that if one member was slain by another, the family of the victim had the right to kill off a relative of the murderer. Later in time, when the corporate ownership of moveable and immovable property by the whole tribe gave way to ownership by individuals within the tribe, the kinsmen of a murdered person frequently compounded their right of revenge by accepting a payment in kind, for instance by way of arms, of cattle, or of land from the family of the killer instead of demanding their recompense in blood. As soon as kings and governments had decided that they themselves were entitled to a share in the compensation, the notion of fines and state-controlled penalties automatically came into being ...” p. 3.
1.1 Criminal Disenfranchisement in Ancient Greece

The Greek approach to punishment depended heavily on the notion of honour and its role as a measure of societal balance and control.\(^\text{17}\) Hamblet notes that:

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\text{[a]ncient ideas about justice, crime and punishment took shape within a particular worldview, the}
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\[
cult of the Greek warrior-hero. This heroic idea of justice was rigorously focused upon the}
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outraged victim (\textit{atimos} or one deprived of honor), who felt dishonored (\textit{atimastos} or without}
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\[
honor but also unpunished) by the “crime” (\textit{atimia}), which threw into question his elevated status}
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\[
deserving of highest respect. The victim’s (and the community’s) anger at the affront that upset}
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the social order became the “measure” of compensatory penalty...that was due to the}
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offended...justice constituted a “giving back” of what was taken. The work of justice was to ‘give}
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\[
and take’ honors such that the social register was rebalanced in light of the offense.}\(^\text{18}\)

In the ancient conception of crime and punishment, there was a disproportionate focus on the victim, where “justice assumed the exaggerated economy of vengeance...[t]he quick-tempered}
warrior princes were merciless in exacting revenge upon their offenders...they tended toward}
punitive excessiveness.”\(^\text{19}\) This excessiveness “[a]gainst their peers...meant exacting penalties}
that degraded and humiliated, just as in battle, they crushed and disgraced their enemies...”\(^\text{20}\)

Crime did not operate in a vacuum, but was instead a function of the larger societal balance.
Honour was both social and public property, and any citizen who committed crimes that were}
considered infamous suffered a collective form of punishment, which “required that the citizen}
disappear from the polity so that his act would cease to pollute its collective honor.”\(^\text{21}\) This}
mythical underpinning of revenge justice represented “…an intricate system of interlocking rights}
and privileges [which] ensured individual sovereignty while preserving the balance of power}
among the aristocratic classes...justice was the balance of interest that preserved social}
harmony.”\(^\text{22}\) Revenge punishment along with the social hierarchy in Greek society, meant that

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\(^\text{17}\) Pettus, \textit{supra} note 10, p. 12  
\(^\text{18}\) Hamblet, \textit{supra} note 15, p. 5  
\(^\text{19}\) \textit{Ibid}. p.6 Hamblet further notes that “…in the heroic worldview, affront tended to simulate exaggerated anger in the victim, a feral fury that often sought, not merely a reasonable pay-back, but the utter destruction of the offender. Therefore archaic justice, though modeled as a “give and take” of honors, tended to give more (shame and pain) to the offender than he had originally taken.”  
\(^\text{20}\) \textit{Ibid}.  
\(^\text{21}\) Pettus \textit{supra} note 10 p. 13, 21.  
\(^\text{22}\) Hamblet \textit{supra} note 15, p.61.
the judicial system was always seeking a constant balance which disproportionately affected the offender.\textsuperscript{23} The manifestation of this disgrace was putting offenders in their correct societal place.\textsuperscript{24} Central to the punitive model of this society were core ideas of honour, social place, and balance.\textsuperscript{25} The most important privilege of citizenship, civic participation, was the source of the greatest social punishment. While there was concern that this approach to justice was heavy handed,\textsuperscript{26} the actual practice remained largely unchanged. This earliest record of criminal disenfranchisement helps to highlight the extent to which societal values shape what is considered acceptable punishment. The appropriateness of criminal disenfranchisement as a punishment was inherently linked to the dominant retributive goal of punishment. This retributive logic would endure through the ages and helps to explain how criminal disenfranchisement endured for centuries as punishment.

1.2 Criminal Disenfranchisement in Medieval England

During the English medieval period, punishments such as attainder, outlawry, and civil death helped to advance the exclusionary logic developed in ancient Greek societies. Outlawry is perhaps the practice most influenced by Greek civil disqualification. Once declared an outlaw, land and all other possessions were automatically forfeited, and “...henceforth he became a

\begin{itemize}
  \item[\textsuperscript{23}] Hamblet \textit{supra} note 15, p.61 “in spite of the plethora of important changes in politics, laws, and social attitudes and practices that brought the Greeks from a tribal aristocracy to a democratic \textit{polis}, their understanding of justice remained fairly consistent for more than eight hundred years: the function of justice was to repay dishonorable conduct...with a punishment that in turn disgraced”p.62
  \item[\textsuperscript{24}] \textit{Ibid.} p. 63 “…according to the Greek Worldview, everything had its proper place- gods in the heavens, make citizens in the courts and war councils, women in the houses, children in the nursery, and slaves in the fields. Thus...it seemed natural that those who behaved disgracefully should be exiled from civilized society, hidden out of sight in prison cells, displayed for ridicule in the public squares, or, in the worst cases, executed and their bodies dumped unceremoniously outside the city walls.”
  \item[\textsuperscript{25}] \textit{Ibid.}
  \item[\textsuperscript{26}] \textit{Ibid.}, p.6. “The vengeance model of justice, with its punitive logic of shaming, has remained with the Western world for thousands of years, despite the fact that the flaws in this form of justice were identified very early in the history of the West. The archaic Greeks recognized the problems associated with the vengeance model of justice...[t]he trial by jury… built safeguards into the system to funnel the hair-trigger responses… into an extended process that granted expression of all sides of the case. The offended could express his rage before an audience who shared his moral code, but his testimony had to be marshaled within strict boundaries- channeled into the formal language and rational argument of the court. The hope was that the victim’s fury could be placated by venting before the sympathetic community, but al so that the offender’s testimony balance the victim’s understanding of the crime. The trial by jury justice system strove toward a fair and even-handed resolution, imaged in the scales of justice... the Athenian courts preferred to err on the side of generosity: where doubt remained of the offender’s guilt, after a day-long trial, punishment was foregone.”
\end{itemize}
wandering fugitive with no more claim to life than a reptile or wild beast.”27 Additionally, “all law-abiding subjects could kill him with impunity, indeed it was their bounden duty to do so.”28 Outlawry was less a criminal sanction, and more so a civil penalty, “…by which a party to a suit who absconded before his action was commenced could be declared an outlaw and as such was liable to the penalty of forfeiture.”29 It is easy to see the Greek influence in the practice of outlawry. There is a pronounced emphasis on the community which justified a harsh punishment for the offender. Whereas outlawry as a civil penalty officially ended in 1879, criminal outlawry survived until 1938.30

The related practice of attainder was also influenced heavily by Greek infamy and outlawry.31 One considered attained following a conviction an individual “...was subject to three penalties; forfeiture [of property], corruption of the blood, and loss of civil rights.”32 Central to the practice of attainder was the infliction of ‘civil death’.33 Attainder was restricted to those who committed only the most serious of crimes.34 However, the threshold for a crime to amount to a felony was low and in practice, attainder was commonplace.35 Attainder as punishment was

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27 Hamblet supra note 15, p.6, Scott provides another definition: “…a form of community retaliation against the criminal. The theory was that the criminal, in effect, had declared war on the community by violating its laws, giving the latter the right to retaliate by whatever means seemed appropriate. The rough justice of England...meant the criminal lost not only all his civil and property rights, but frequently his life as well, for he could be killed with impunity by anyone. The imposition of civil disabilities as an additional sanction for a criminal conviction became an integral part of the heavily punitive English penal system...” Jud Scott. “Civil Death in California: A Concept Overdue for its Grave” (1975) 15 Santa Clara Lawyer 427.

28 Ibid.

29 Ibid.

30 Ibid. Outlawry was abolished by the Administration of Justice (Miscellaneous Provisions) Act 1938, 1 and 2 Geo (U.K.) c.63.


32 Pettus supra note 10, p. 30 Corruption of blood is the idea that the bloodline, or the convict’s family, would pay a societal price including for example restrictions on owning land and property.

33 Edgely supra note 31 “[t]he offender’s property was forfeited to the Crown he was prevented from entering [into] contracts or receiving property by way of gift or inheritance; his marriage was dissolved, his wife was made a widow, his children orphaned. He lost all forms of civil capacity....as time went on and civil and political rights developed, the attained was denied these rights as well...he was already dead in the eyes of the law.”

34 Ibid.

35 Ibid. Edgely notes that at this time “…almost all felonies carried the death penalty, including offences that would be considered trivial today. Clearly views about who is ‘fit to live upon the earth’ change over time.”
abolished by in 1870 with the *Forfeiture Act*.\(^{36}\) Importantly however, the penalty of forfeiture endured, and upon a felony conviction one automatically forfeited their land, and correspondingly convicted felons automatically forfeited the right to vote which stemmed from land ownership.\(^{37}\)

The logic of medieval disenfranchisement reflected beliefs about social inclusion initiated in Ancient Greece, and adapted this logic to reflect social realities of England at that time.\(^{38}\) The most striking feature of medieval England was the rise of personal property ownership. It was not long before punishment capitalized on the lucrative business of property over less profitable methods such as fines and corporal punishment.\(^{39}\) Justice and punishment quickly changed control from the feudal lords to higher administrative powers, and eventually sovereigns.\(^{40}\) This new control, combined with new legislation invoked to suppress dissidence, would mark a shift from a measure of informal local justice to state penal repression.\(^{41}\)

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\(^{36}\) *Forfeiture Act* 1870, (U.K.) c.23.

\(^{37}\) Edgely *supra* note 31, p. 405.

\(^{38}\) Hamblet *supra* note 15, p.140 “…in the medieval worldview, all along the Great Chain of Being, nature reflected the goodness of god … The church fathers and monarchs taught that god granted knowledge as he granted economic fortune and power entirely discriminately, according to faith and by grace.”

\(^{39}\) *Ibid.* p. 142 “…penances and punishments almost always took the form of a monetary fine. Fines were generally carefully graduated to fit the social status of the offender but also reflected the seriousness of the crime, according to the social status of the offender relative to the social status of the victim. But offenders from the lower classes had enormous difficulty making good the least of penance requirements. Therefore, over time corporal punishment came to replace penance as the punishment most regularly exacted upon the poorer citizens.”

\(^{40}\) *Ibid.* p.143 “The sizable revenue that justice represented was the main reason that the machinery and technology of justice proliferated over time and shifted its venue form the private and communal domain in the hands of the feudal lords and church fathers, into the jurisdiction of increasingly centralized authorities of the state…”

\(^{41}\) John Briggs et al. *Crime and Punishment in England: An Introductory History* (London: University College London Press, 1996). p. 17-18; “Between the late thirteenth and mid seventeenth centuries, there was a change in the conception of crime in England; “later medieval kings were first and foremost concerned to control the rich and powerful. It was the aristocrats and their armed retainers who threatened the integrity of the kingdom…[i]n the face of popular uprisings such as the Great Revolt of 1381 the perception of crime had changed, more and more disorder among and crimes by the common people were seen as threats to society…legislation was passed to meet the perceived challenge to privilege and order…the criminal law became increasingly an instrument of social control…[p]arliament met more frequently. This meant changes to the criminal law could be and were introduced more easily hitherto. By the end of the sixteenth century there were more statute offences to commit.”
1.3 Criminal Disenfranchisement into the Twentieth Century

Criminal disenfranchisement would endure from the medieval era through to the colonial period in England. Whereas criminal processes and physical punishment underwent vast changes since the medieval period, criminal disenfranchisement would remain largely a constant consequence of incarceration during the nineteenth and twentieth centuries. This section will focus primarily on the transfer of criminal disenfranchisement from England to its colonies and how this policy was adapted once these nations gained independence. Specifically, the cases of Canada, Australia, South Africa, and the United States will be considered. The Canadian and Australian case studies will show how a retributive logic justified maintaining and increasing the intensity of disenfranchisement provisions. The South African and American examples will show how prevailing social attitudes such as racism can add an additional exclusionary element to criminal disenfranchisement. This section will conclude by looking at other factors which have contributed to the longevity of criminal disenfranchisement laws, like support from politicians and public opinion.

1.3.1 Canadian Disqualifications

The Constitutional Act of 1791 established an independent Upper and Lower Canada and contained an explicit provision against criminal franchise: “...no Person shall be capable of voting at an Election of a Member to serve in such Assembly, in either of the provinces...who shall have been attained for Treason or Felony in any Court of Law within any of His Majesty’s Dominions ...” As time passed, the disqualification remained in practice and a subsequent electoral law did not address it. The 1885 Electoral Franchise Act mentioned a vague applicability requirement, that “voters should be of full age of twenty-one years, and....not by this Act or nay law of the Dominion of Canada, disqualified or prevented from voting.” The 1898 Franchise Act made a more explicit confirmation of a blanket ban on prisoner

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42 Hamblet supra note 15, p.140.
43 The Constitutional Act of 1791, formally The Clergy Endowments (Canada) Act, 1791 (31 Geo. 3. c.31).
disenfranchisement, noting that “[a]ny person, who at the time of an election, is a prisoner in a jail or prison undergoing punishment for a criminal offence”, was not eligible to vote.\textsuperscript{45}

This disqualification would last until Canada’s enactment of a formal constitutional document, the \textit{Canadian Charter of Rights and Freedoms} in 1982.\textsuperscript{46} The Canadian \textit{Charter} expressly recognized the right to vote in the third section: “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”\textsuperscript{47} The twentieth century in Canada would be characterized by greater inclusivity in franchise law.\textsuperscript{48} Suffrage continually extended to previously excluded groups over time, including women, non-aboriginal racial minorities, and aboriginals.\textsuperscript{49} However, the disqualification of all convicted felons remained intact and unchallenged until 1993.\textsuperscript{50} Canadian history shows that in the immediate post-independence period, there was a significant emphasis on the concept of the ideal voter. This person was one who was a loyal British subject and according to the English model, those who held significant wealth and property.\textsuperscript{51} In the nineteenth and twentieth centuries, franchise was a function of political policy and notions of political inclusion and exclusion, expanded and contracted depending on the prevailing social norms of societal belonging of the day.\textsuperscript{52}

\subsection*{1.3.2 Australian Disqualifications}

In Australia, there was a similar colonial legacy of criminal disenfranchisement carried on from the British Empire. The \textit{Australian Colonies Government Act} 1850 delineated territorial

\begin{itemize}
\item \textsuperscript{45} \textit{The Electoral Franchise Act, 1898}, S.C. 1898, c. 14.
\item \textsuperscript{46} \textit{Canadian Charter of Rights and Freedoms}, Part I of the \textit{Constitution Act, 1982} being Schedule B to the \textit{Canada Act 1982} (U.K.), 1982, c. 11.
\item \textsuperscript{47} Ibid.
\item \textsuperscript{48} Chief Electoral Officer. \textit{A History of the Right to Vote in Canada}. (Ottawa: Elections Canada, 2007) p.80-82.
\item \textsuperscript{49} Ibid.
\item \textsuperscript{50} Sauvé v. Canada (Attorney General), [1993] 2 S.C.R. 438.
\item \textsuperscript{51} Chief Electoral Officer, supra note 48.
\item \textsuperscript{52} Ibid.
\end{itemize}
divisions in Australia, and granted these areas representative constitutions. Independent Australian electoral law was quickly progressive, in 1856 South Australia was the first colony to advocate universal manhood suffrage “undiluted by property qualification[s]”. Australia’s use as a penal colony by Britain was an influential factor in deviating as far as possible from established English norms. Between 1895-1899, women over the age of 21 were eligible to vote in all colonies. The Commonwealth Franchise Act of 1902 granted universal adult suffrage, but excluded the aboriginal and prisoner vote. This law expressly disenfranchised prisoners “for any offence punishable by imprisonment for one year or longer.” Similar to Canada’s experience, subsequent electoral law did not significantly change the franchise situation for prisoners, consider for example the Commonwealth Electoral Act of 1918.

In 1983 a legislative amendment clarified that the disenfranchisement provision applied to persons “...under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for five years or longer.” Of interest in this revision was that the length of the sentence which disqualified a prisoner was the potential sentence for a category of crime committed, and not the actual sentence that was handed down. This was changed in 1995, and only prisoners serving an actual sentence of five years or more were


54 Ibid. Other colonies in Australia were quick to join South Australia, and even if they had a property requirement, it was minimal so as to include the greatest number of male voters.

55 Ibid.

56 Ibid.

57 Australian Electoral Commission, supra note 53 Aborigines technically participated in elections until 1901, however the first Commonwealth Parliament excluded “Aborigines and other coloured people...unless entitled under section 41 of the Constitution.”

58 Ewald and Rottinghaus, supra note 6, p.170 “Section 41 maintained that anyone who was enfranchised in their state elections, could vote at the federal level. This narrowing of the scope of franchise reflected the ignorance and racism associated with the aboriginals in the early twentieth century. It would not be until a referendum in 1967 that the Aboriginal franchise question was definitively answered with about 90% of the Australian population voting in favour of renewed Aboriginal franchise.”

59 Ibid.


61 Ibid.
disqualified. A more recent 2006 law represented an end to the expansion of Australian franchise law, and increased the scope of disenfranchisement provisions by disqualifying all prisoners serving full time custodial sentences for federal elections.

Australian electoral law was more progressive than in Canada. Onerous and discriminatory requirements for franchise eligibility were reversed during the first decades of its independence. It is noteworthy however that Australia seems to have regressed with its 2006 law, which affirmed its commitment to disenfranchising criminals at a time when this is an uncommon practice in nations like Canada, South Africa, and in Europe.

1.3.3 Disqualifications Rooted in Racism: The South African and American Examples

The South African and American examples expand the theme of criminal disenfranchisement as a part of an English colonial legacy. What differs from the Canadian and Australian examples however, is the fact that disenfranchisement was used more so as a tool of social exclusion on the basis of race. In the following examples, it will be seen how criminal disenfranchisement applied in settings prone to severe racial discrimination, has the potential to lead to a veritable penal crisis. To this end, the United States is known to have the most oppressive disenfranchisement regime of all the former English colonies. In some states, convicted felons are disenfranchised even after their sentences have been served, facing a lifetime of political exclusion. The South African case study shows how an American-type penal crisis was averted. After the fall of apartheid, and a new commitment to greater human rights protection, this state now has a restricted disenfranchisement regime in place.

62 Ewald and Rottinghaus, supra note 6, p.171.
64 Ibid, p. 184-5 While it is noted that the resurgence of disenfranchisement in law was not done amidst great social debate as is the case in many other countries, it seems that “[i]n the short term, the disenfranchisement act [the 2006 Act] might be seen as a form of wedge politics aimed mainly at strengthening the Howard government ... [which] has become adept at identifying a number of mainly moral or cultural issues such as gay marriage, attitudes towards asylum seekers and immigrants, and antiterrorism legislation, where they feel confident that they are in tune with and can excite public opinion, exploit anxiety and insecurity, mobilize talkback and tabloid outrage, and engender left/right splits in the opposition.”
1.3.3.a South African Disqualifications

South Africa has a troubled history of colonial control, differing beliefs about punishment, and racism. First colonized by the Portuguese in the sixteenth century, and later settled and controlled administratively by the Dutch East India Company, South Africa faced a long period of foreign control. Slavery of both indigenous and imported populations was common practice in South Africa by the late 1600s. Criminal justice was a brutal affair: “violence was...an endemic feature of [B]oer communities’ criminal justice ‘system’... floggings, torture, mutilation and execution were commonplace punishments, [t]he system was imported from Holland [and] [w]hites as well as blacks were subject to this brutal regime, although it seems likely that such discretion as the system permitted was exercise to the benefit of white rather than native black ‘criminals’.” Expansion continued, and by 1815 this area once controlled by the Dutch East India Company would become an English colony. Unfavorable experiences governing past colonies meant that the English would pursue an active control in the administration of this territory. This active control retained some of the Dutch practices, which were by this time long-established, namely slavery and exclusion based on colour.

Electoral law began to develop substantially in the mid-nineteenth century, and although technically colour blind in theory, their effect was discriminatory on the basis of class and colour much like in Britain at the time: “...the Cape’s monetary qualification was de facto


67 Ibid p. 2 Slaves were imported from Asia and Mozambique. Slave owners had many legal powers: “the Dutch laws of slavery which were adopted in the Cape afforded owners virtually absolute property rights over the life and body of their slaves.”

68 Ibid. p.3.

69 Ibid. p.5 This was the result of two wars between the French and the English who each had interests in expanding their influence to the Cape, British rule was solidified in the Congress of Vienna.

70 Loveland supra note 66, p.9 Loveland describes the British policy in Canada and the United States as ‘salutary neglect’ whereby there was a certain degree of independence in internal affairs for native populations under the close watch of English colonists and lawmakers. This approach changed in the late eighteenth century to a more direct control, with the independence and loss of the American colonies.

71 Ibid.“One of Britain’s first legal initiatives was to introduce a law requiring native blacks to carry passes if they wished to enter the ‘white’ areas of the colony.”
disproportionately beneficial to whites, whose superior economic status translated directly into superior political power.”

Even after there was a measure of imperial freedom granted by the end of the nineteenth century, many of the colonially divided towns unified but such unification was only within communities sharing the same colour.

The early nineteenth century would see talks of governing a unified South Africa guided by segregationist politics after two Anglo-Boer wars. The culmination of segregationist thinking would occur in 1948 when an official policy of apartheid was inaugurated with the coming into power of the National Party. At a time when most common law jurisdictions had extended their franchise and were continuing to do so, South Africa remained divided by segregation which sought to promote the dominance of the descendants of European settlers, as well as white supremacy in all spheres of life. Suffrage was granted on highly discriminatory terms, and all non-white residents lacked basic civil rights much less the right to vote. It would not be until 1993 that an interim constitution would be adopted which guaranteed equal civil and political rights.

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72 Loveland supra note 66, p. 19-20. “The right to vote for members of the representative assembly established under the Cape’s 1853 constitutional arrangements was restricted, but on a ‘colour blind’ basis. The franchise was granted to all adult male British subjects who either earned an income of at least £50 per year or who occupied (as owner or tenant) property with an annual rental value of £25 or more...”

73 Saul Dubow. “South Africa and South Africans: Nationality, Belonging, Citizenship” in Carolyn Hamilton, Bernard K Mbenga, & Robert Ross, eds. The Cambridge History of South Africa, Vol. 2 (New York: Cambridge University Press, 2011), p.33“In the political space created by the partial retreat of imperialism, but not yet filled by the emergence of full-fledged nationalisms, the ideology of white South Africanism began to unfold on broader terrain. Reconfigured and radiating out from Cape colonial nationalism, South Africanism was animated by a powerful spirit of reconciliation that sought to assuage bitterness and to construct a common white identity within a spatially integrated but racially separated nation-state.”

74 Ibid p. 35 “The concept of segregation, which had entered general political discourse, was duly presented as the appropriate answer: proponents of segregation assumed that the interests of blacks and whites were fundamentally at variance, and they rationalised the need for political and social separation, either by reference to immutable racial differences or else on the theoretically more flexible grounds of cultural relativism. Considerable intellectual and political energy was expended to render Africans perpetual political minors by removing their vestigial citizenship and franchise rights.”

75 Ibid, p. 35.

76 Daisy M Jenkins. “From Apartheid to Majority Rule: A Glimpse into South Africa’s Journey to Democracy”(1996) 13 Arizona Journal of International and Comparative Law 463, p.468 “Apartheid combines the two ideological themes of white supremacy in South Africa as a means of guaranteeing racial peace and of maintaining a pure white race. The first theme was segregation as domination....The second theme was segregation as trusteeship, which would allow blacks to express themselves completely within their own communities.” p.471-2.

77 Ibid, p.472.
political rights to every South African citizen, without distinction based on race. In terms of criminal disenfranchisement, the Constitution provided that with a few exceptions, all prisoners could vote. South Africa is now considered to have one of the most progressive rights-protecting regimes of many of its common law counterparts.

1.3.3.b American Disqualifications

The United States gained its independence in 1776 and sought to distinguish itself from the policies of its English colonial past. The civil disabilities of attainder, forfeiture of property and corruption of blood were not retained for the punishment of most crimes. Criminal disenfranchisement did however retain its allure. It did not take long for laws to be established in eleven states, and then almost universally in all states. At the time of the Civil War, some nineteen of thirty four states had enacted disenfranchisement laws. Courts also supported the idea of criminal disenfranchisement, albeit without much constitutional power to do otherwise.

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79 The Electoral Act disqualifies those prisoners who had committed specific serious offences including murder, robbery with aggravating circumstances and rape or attempts to commit these crimes. (Electoral Act, Act 202 of 1993) in August and Another v. Chief Electoral Officer (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999) para 2 the exception to universal suffrage was where a prisoner could be disqualified if prescribed by law.

80 For example, socio-economic rights were recently recognized by the constitutional court see Government of South Africa v. Grootboom and Others 2001 (1) SA 46 (CC).

81 Nora V. Demleitner. “U.S Felony Disenfranchisement: Parting Ways with Western Europe” in Ewald and Rottinghaus, eds, supra note 6. “Although the United States rejected the broad notion of civil death, it did retain disenfranchisement. The practical applicability of this restriction was limited at a time when many, if not most, crimes carried the death penalty and only a few individuals were enfranchised.” p. 83.

82 Pettus supra note 10, p. 12 The exception was treason.

83 Ibid, and George Brooks. “Felon Disenfranchisement” (2005) 32 Fordham Urban Law Journal 101, p.103 between 1776 and 1821 eleven states adopted some form of disenfranchisement as punishment for felony convictions. By the time the Fourteenth Amendment was ratified in 1868, eighteen more states had some form of disenfranchisement laws.

84 Pettus, supra note 10, p. 31.

85 Cornell University Law School, Legal Information Institute. “The Constitution of the United States of America.” Online <http://www.law.cornell.edu/constitution/>. Article I, Section 2 reads “The People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” Such qualifications were determined by state policy and were not contested on the basis of non-discrimination or equality as they would be today.
and rationalized their support on the idea of the purity of the ballot box. For example, in *Washington v. State*, it was held that:

…it is quite common also to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. …The presumption is, that the one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage.

In reality, little had changed from English colonial practice regarding the inclusion and exclusion of those deemed unfit to participate. This contrasts the seemingly progressive legislation in this early independence period. For example, the Thirteenth Amendment to the Constitution abolished slavery. The Fourteenth Amendment declared all Americans to be equal in the eyes of the law. The Fifteenth Amendment assured all Americans that they had a right to vote no matter their race or gender. The reality was that such provisions did not apply universally, and the judiciary was not compelled to enforce these provisions in an inherently racist society. The enactment of ‘Jim Crow’ laws was a real reflection of American society. Among other things, these laws advocated segregation, especially in the South where justifications for racist laws were based on the perceived biological inferiority of African Americans. Such racist agendas permeated into electoral law, and many state policies directly or indirectly excluded the African

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86 75 Ala. 582 (1884).
87 Ibid. para 585.
88 Cornell University, *supra* note 85. The Thirteenth Amendment reads “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2 Congress shall have power to enforce this article by appropriate legislation.”
89 Ibid. The Fourteenth Amendment reads: “no state may deny to any person within its jurisdiction the equal protection of the laws.”
90 Ibid. The Fifteenth Amendment Sections 1 and 2 read: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude”, and “[t]he Congress shall have power to enforce this article by appropriate legislation.”
92 Ibid, p. 76.
American vote. For example, voters had to pay poll taxes or take literacy tests for franchise eligibility. 93 The situation changed little in the nineteenth and twentieth centuries. 94

Change seemed to be forthcoming with the enactment of the Voting Rights Act in 1965. 95 This law was intended to reinforce Fifteenth Amendment protections, and create equal access to the ballot box. 96 However, this hope was short lived, “[a]s civil rights legislation increased throughout the 1960s, policies repressing minority groups increasingly emanated from the criminal justice system, which seemed to provide a legitimate outlet where racism could be camouflaged behind concerns about crime.” 97 As will be seen later on in this paper, the United States effectively closed the possibility that criminal disenfranchisement laws may be contested on constitutional grounds with its decision in Richardson v. Ramirez giving states the freedom to expand their disenfranchisement regimes. 98 Contemporary criminal disenfranchisement rates are alarming: forty eight states have some form of disenfranchisement law in place that disqualifies incarcerated felons and parolees, and twelve states permanently disqualify felons who have served their time or received a pardon. 99 Disenfranchisement laws are still a reflection of

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93 Klarman, supra note 91, p.77 Other measures included ‘Grandfather clauses’ whereby those who had voted before 1867 were eligible to vote. This date automatically cut off African American voters who were not permitted by law to vote at that time.

94 Demleitner, supra note 81, “although the late 19th and 20th centuries witnessed the expansion of the franchise to non-property holding men, non-whites, women and other groups that had previously been excluded from the polls, an ever larger number of felons became disenfranchised as racial politics began to motivate the expansion of conviction-based disenfranchisement in many states.” p. 83-84.

95 The Voting Rights Act of 1965 42 U.S.C.S.

96 Ibid. Section 2 is “a nationwide prohibition against the denial or abridgment of the right to vote on the literacy tests on a nationwide basis.”

97 Demleitner, supra note 81, p. 81.

98 Richardson, supra note 8.

America’s racist past, within the estimated 5.3 million Americans that are criminally disqualified, two million or about thirteen percent are African American men.

1.4 Criminal Disenfranchisement as a Disqualification through the Ages

The experiences of Canada, Australia, South Africa and the United States show that criminal disenfranchisement has been an enduring legacy of English imperialism. What differs between these former colonies is how they have adapted this punishment to correspond with the norms and values of their societies. In almost all examples, criminal disenfranchisement prospered on discriminatory conceptions of gender, class, and/or race. In Australia such distinctions were less pronounced, but have become increasingly used as a political strategy to appeal to voters in the twenty first century. In Canada, disqualifications based on gender and race were eventually eliminated in the course of the twentieth century. In the United States and South Africa, disqualification based on race was far more exaggerated. The South African apartheid regime applied the age-old colonist thinking of white superiority, and change would only come with the establishment of a democratic regime in the early 1990s. The South African franchise exclusions based on race benefitted from the passing of time, and ultimately a democracy committed to the highest degree of human rights protection. The situation in the United States shows how race and franchise exclusions continue to this day. Central to the colonial legacy of all of these nations is an underlying approach to social exclusion, expressed through penal policy.

100 Demleitner, supra note 81. Demleitner provides the following reasons for the uniquely American disenfranchisement experience: i) the necessary link between race and punishment ii) the emphasis in American society on faith and moral correctness which translates into the concept of the ideal citizen as a moral citizen and iii) the far reaching implications of the decision in Richardson which make it that much more difficult to contest disenfranchisement laws on the basis of constitutionally protected rights. See p. 81-85.

101 Sentencing Project Website, supra note 65.

102 Mauer, supra note 99, p. 551 Convicted criminals, albeit in limited categories, are still disenfranchised to this day. In Canada, South Africa, and the United Kingdom these disqualifications are reserved for criminals who have committed serious crimes warranting incarceration for at least two years. In the United States, disenfranchisement practices vary by state. The most excessive regimes are in Iowa, Florida, Kentucky and Virginia where convicted felons face lifetime exclusion. See also Ewald and Rottinghaus, supra note 6, and Murray, supra note 10.
2. A Survey of Representative Cases in the Trend towards Criminal Enfranchisement

Part II of this paper will build upon the history of franchise exclusions discussed in Part I and consider contemporary constitutional challenges to criminal disenfranchisement. These cases represent a serious reconsideration of prisoner voting restrictions, and are indicative of the trend towards a liberalized criminal franchise. Part II will proceed by highlighting the representative cases. Leading cases from the following jurisdictions will be considered: Canada, South Africa, and the United Kingdom (with reference to the decisions of the European Court of Human Rights, hereafter ECtHR). The cases that will be examined are Sauvé v. Chief Electoral Officer (no.2), Minister of Home Affairs v. NICRO, and Hirst v. United Kingdom (no.2) respectively.

This case review will proceed by identifying the disenfranchisement laws in question in each jurisdiction. The facts of the case, as well as the arguments offered by both parties will be considered, as well as the plurality and dissenting judgments. A synthesis section will follow the comprehensive review of the representative cases, and will explore the socio-political context of continued prisoner disenfranchisement. This Part II review will provide the basis for a discussion in Part III, where this trend towards prisoner enfranchisement will be examined in greater detail.

2.1 Canada: Sauvé v. Chief Electoral Officer (no.2)

The Supreme Court of Canada in Sauvé sought to determine to what extent Section 51(e) of the Canada Elections Act, guaranteed the right to vote and as such was able to be limited

103 Sauvé v. Canada (no.2) [2000] 2 Federal Court Reports 117.

104 Minister for Home Affairs v NICRO (National Institute for Crime prevention and the Reintegration of Offenders), CCT 03/04.

105 Hirst v. The United Kingdom No. 2 (Application no. 74025/01).

106 Canada Elections Act, R.S.C. 1985, c. E-2 Section 51 reads: “[t]he following persons are not qualified to vote at an election and shall not vote at an election... (e) Every person who is imprisoned in a correctional institution serving a sentence of two years or more.”
reasonably under the *Canadian Charter of Rights and Freedoms*. The possibility of limiting a right or freedom guaranteed by the *Charter*, is contained in Section 1 and is been subject to a two part test by Canadian courts. Known as the *Oakes test*, an allowable Section 1 infringement on a *Charter* right must be shown to “...achieve a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified.”

2.1.a Majority Decision

The majority decision takes a purposive approach to the definition of the right, and makes reference to the intent of the framers of the *Charter*. The Court recalls the fundamental importance of the right to vote, which should not be easily subject to legislative whims. The main argument of the government in limiting prisoner franchise is that it is an issue of competing social philosophies. The government contends that deference is justified based on the social and philosophical aims of disenfranchisement policy. The stated objectives are: promoting civic responsibility, promoting respect for the law, and imposing appropriate punishment. These broad objectives are subjected to the *Oakes* test described above. In terms of achieving a

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107 *Canadian Charter of Rights and Freedoms, supra* note 45, Section 3 grants the right to vote to every citizen, it reads “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” Section 1 reads: “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”


109 *Sauvé, supra* note 103, para 7 “...two-part inquiry -- the legitimacy of the objective and the proportionality of the means -- ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights violation is warranted -- that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.”

110 *Ibid*, para 11, Justice Mc Lachlin stated that “[a] broad and purposive interpretation of the right is particularly critical in the case of the right to vote.”

111 *Ibid*. “The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override...”

112 *Ibid*, para 14 “…*Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside.”

113 *Sauvé, supra* note 103, para 12.


constitutionally valid purpose, the reasoning of the lower court is accepted. The more interesting analysis occurs with relation to whether the reasons given in defense of the disqualification provision are sufficient to show an allowable infringement of the right to vote.

Justice McLachlin finds that the reasons advanced by the government are too vague to justify infringing a constitutionally protected right. The first justification of promoting civic responsibility and respect for the law is deemed unacceptable, as it is seen to have the opposite effect in reality. Another facet of the majority’s judgment is the fact that those prisoners who are disenfranchised are serving sentences of two years or more for a variety of offences, which have different levels of moral blameworthiness. The majority contend that the idea that all offenders may be educated through denial of the right to vote is simplistic. They also point out that disenfranchisement as a tool of social exclusion is an obsolete practice, and they further dismiss the suggestion that it can demonstrate a rationale connection between the government’s infringement of a right and the goal it seeks to achieve. The final justification provided by the government is that disenfranchisement is a legitimate form of punishment. This argument is

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116 Sauvé, supra note 103, para 21 Justice McLachlin seems reluctant to accept that the mentioned broad objectives achieve a specific purpose, especially considering the fact that Section 51(e) of the Canada Elections Act was not meant to respond to a particular penal problem, the opinion of the lower court seem to be readily accepted for the sake of simplicity: “on the basis of "some glimmer of light", the trial judge ... concluded that they could be advanced as objectives of the denial. I am content to proceed on this basis.”

117 Ibid, para 23 “Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective must be accurately and precisely defined so as to provide a clear framework for evaluating its importance and to assess the precision with which the means have been crafted to fulfill that objective... [i]f Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of ‘our symbols are better than your symbols’ [n]either outcome is compatible with the vigorous justification analysis required by the Charter.”

118 Ibid, para 38 “…[d]epriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility.”

119 Ibid.

120 Sauvé, supra note 103, para 39.

121 Ibid, para 43-44 “The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. ...[w]e should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law...[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter.”

122 Ibid, para 64.
rejected on the basis that if a punishment requires the infringement of a fundamental right it is not sound, and that such an approach is inconsistent with established jurisprudence that punishment must serve a valid penal purpose. The judges also warn that allowing disenfranchisement to be used as a form of punishment could set a dangerous precedent. The punishment argument fails on the grounds that social contract theory cannot be interpreted narrowly, that this punishment is imposed arbitrarily, and that it does not meet a valid criminal purpose. It was held that Section 51(e) of the Canada Elections Act unjustifiably violated Section 3 of the Charter.

2.1.b Dissenting Opinion

The minority, led by Justice Gonthier, frames the issue in Sauvé as whether or not Parliament has the authority to temporarily suspend the right to vote for inmates. Their conclusion is that Section 51(e) of the Canada Elections Act is indeed a violation of the right to vote contained in Section 3, but is justifiable under Section 1 of the Charter. This limitation is justifiable in their opinion, because Section 1 of the Charter must necessarily be interpreted


124 Ibid, para 46 “The argument, stripped of rhetoric, proposes that it is open to Parliament to add a new tool to its arsenal of punitive implements -- denial of constitutional rights. I find this notion problematic. I do not doubt that Parliament may limit constitutional rights in the name of punishment, provided that it can justify the limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the Charter. It is doubtful that such an unmodulated deprivation, particularly of a right as basic as the right to vote, is capable of justification...”

125 Ibid, para 47 “The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, 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.”

126 Ibid, para 48 in terms of being an arbitrary punishment, criminal disenfranchisement applies as a ‘blanket’ ban on all convicts regardless of the nature of their crime and criminal actions.

127 Sauvé, supra note 103, para 65.

128 Ibid. para 66.
within the greater and ever-changing socio-political landscape in mind.\textsuperscript{129} The dissenting judgment also refers to the history of disenfranchisement for support. It points out that contemporary criminal disenfranchisement is “strikingly and qualitatively different from these past discriminatory exclusions.”\textsuperscript{130} This is because the contemporary disqualification is “...based exclusively on the serious criminal activity of the offender. It is the length of the sentence, reflecting the nature of the offence and the criminal activity committed, that results in the temporary disenfranchisement during incarceration.”\textsuperscript{131} There is an emphasis on the concept of “responsible citizenship” which is said to have a logical connection to an individual’s criminal activity, contrary to other discriminatory characteristics like race, gender or class.\textsuperscript{132} In terms of the \textit{Oakes} test, the dissenting justices again focus on the importance of a taking a contextual approach.\textsuperscript{133}

The Court reminds that the fact that Section 3 is a qualified and not an absolute right is a crucial consideration in this analysis.\textsuperscript{134} An allowable breach, one within the parameters of Section 1 is “not a matter of one value clearly prevailing over the other, but is rather a matter of developing the significance of the values being dealt with and asking whether Parliament, in its attempt to reconcile competing interests, has achieved a rational and reasonable balance. Proportionality, in the context of \textit{Charter} analysis, does not mean a perfect solution...”\textsuperscript{135}

\textsuperscript{129} Sauvé, \textit{supra} note 103, para 67 “[i]n such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive \textit{Charter} scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional.”

\textsuperscript{130} Ibid, para 69.

\textsuperscript{131} Ibid, para 69.

\textsuperscript{132} Ibid, para 70.

\textsuperscript{133} Sauvé, \textit{supra} note 103, paras 80,81“when engaging in \textit{Charter} analysis, context and flexibility are highly relevant...[f]actual, social, historical and political context provides a backdrop against which is essential to develop in order to properly analyze what is at stake in the case of an alleged infringement of a right.”

\textsuperscript{134}Ibid, para 84.

\textsuperscript{135}Ibid, para 91, see also para 98 “[t]he role of this Court, when faced with competing social or political philosophies and justifications dependent on them, is therefore to define the parameters within which the acceptable reconciliation of competing values lies. The decision before this Court is therefore not whether or not Parliament has made a proper policy decision, but whether or not the policy position chose is an acceptable choice amongst those permitted under the \textit{Charter}.”
minority believe that Parliament has acted within its vested powers.\textsuperscript{136} While the minority acknowledge that there is an infringement on the right to vote in the disputed provision, they find that the justifications provided by the government in so doing are legitimate.

2.2 South Africa: \textit{Minister for Home Affairs v NICRO}

This case dealt with the constitutionality of the \textit{Electoral Laws Amendment Act} 2003. This legislation had the effect of depriving convicted prisoners, serving sentences with no option of a fine, of the right to vote during their incarceration.\textsuperscript{137} This application was initiated by the National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO), on behalf of two prisoners. Before this law, there were no provisions specifically disenfranchising prisoners in electoral law.\textsuperscript{138} The decision in the previous case of \textit{August and Another v. Electoral Commission and Others}, found that the Electoral Commission was under an obligation to ensure that prisoners were able to vote and to facilitate this process from registration to submitting their ballots.\textsuperscript{139} The alleged incompatibility in the \textit{Amendment Act} arises from sections 8(2)f and 24B(1)(2).\textsuperscript{140} The effect of these provisions is that disenfranchised prisoners serving sentences for which there is no option of paying a fine, were unable to register and thus vote while in prison.\textsuperscript{141} Other prisoners, and detainees awaiting trial, could still vote and special

\begin{footnotesize}
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  \item \textsuperscript{136} Sauvé, \textit{supra} note 103, para 109 “I suggest that, in enacting s.51(e) of the Act and in providing justification of that provision before the courts, Parliament has indicated that it has drawn a line. This line reflects a moral statement about serious crime, and about its significance to and within the community. The core of this moral statement is the denunciation of serious crime, serious antisocial acts.”
  \item \textsuperscript{137} NICRO, \textit{supra} note 104, para 2.
  \item \textsuperscript{138} \textit{Ibid}, para 11.
  \item \textsuperscript{139} \textit{Ibid}.
  \item \textsuperscript{140} \textit{Ibid}. These provisions read as follows: 8(2) “The chief electoral officer may not register a person as a voter if that person . . . (f) is serving a sentence of imprisonment without the option of a fine.” 24B(1) “In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters’ roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voters’ roll for the voting district in which he or she is in prison.” 24B(2) “A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine.”
  \item \textsuperscript{141} NICRO, \textit{supra} note 104, para 13.
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provisions were made to facilitate their voting. The given provisions of the Amendment Act were challenged on the grounds that they were in violation with Sections 1 and 3 of the Constitution, which protect universal adult suffrage and common and equal citizenship. Furthermore, Section 36 of the Constitution provides that rights may be limited only “...to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

2.2. a Majority Decision

The plurality begins their judgment by emphasizing the fundamental nature of the right to vote. As articulated in cases like August, “...the universality of the franchise is important not only for nationhood and democracy...[t]he vote of each and every citizen is a badge of dignity and of personhood...[q]uite literally, it says that everybody counts.” This statement is especially true in post-apartheid South Africa. Inclusion in the National Voters’ Roll is critical to the exercise of the right to vote. The disputed provision limits prisoner participation in two ways; first by denying prisoners serving a sentence without the option of a fine to vote, and second by disallowing them to register as voters while imprisoned. As a result of this rule, if a prisoner has not been registered pre-incarceration, and is released after the voter’s roll has closed, then they will not be able to vote despite the fact that they are no longer incarcerated.

142 NICRO, supra note 104, para 14-15 For example, in Section 8 of the Amendment Act they were considered to be a constituent of a riding where they were ordinarily a resident, and Section 64 provided for mobile voting stations to be set up in prisons.

143 Ibid para 20, 24 Section 1 of the Constitution reads; “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms (b) Non-racialism and non-sexism (c) Supremacy of the constitution and the rule of law (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” Section 3 of the Constitution reads “(1) There is a common South African citizenship (2) All citizens are (a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship. (3) National legislation must provide for the acquisition, loss and restoration of citizenship.”

144 Ibid, para 23.

145 Ibid, para 28.

146 NICRO, supra note 104, para 29.

147 Ibid, para 31.

148 Ibid.
The proportionality analysis conducted by the Court is known as the limitation analysis, and is defined in Section 36 of the *Constitution*.\textsuperscript{149} The proportionality test is described as being “…one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.”\textsuperscript{150}

The majority in this case acknowledge that the standard of proof required in the Section 36 analysis differs from the standard used to adjudicate competing facts.\textsuperscript{151} The government argues that while they considered implementing special voting procedures for prisoners during the enactment of the *Amendment Act*, they were concerned about the integrity of the voting process.\textsuperscript{152} In their opinion, these procedural hurdles justify limiting the groups of people for whom special arrangements must be made.\textsuperscript{153} Correspondingly, it was conceded that the right of prisoners to vote should be facilitated through special arrangements, however it was decided that “some but not all prisoners should be allowed to vote….a distinction was made between three classes of prisoners.”\textsuperscript{154} The third class of individuals, those serving sentences with no option of a fine, were differentiated from the other categories on the basis of their moral fitness; “[i]t was

\begin{footnotes}
\textsuperscript{149} NICRO, supra note 104, para 23 Section 36 of the *South African Constitution* reads “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the legislation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve that purpose.”

\textsuperscript{150} Ibid, para 33.

\textsuperscript{151} Ibid, para 35 “[a] legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between the means and ends, that may be enough to justify action taken to address them.”

\textsuperscript{152} Ibid, para 40 “[s]crutiny to ensure that there is no tampering with special votes or interference with voters at mobile polling stations presents certain difficulties...provisions of special arrangements...puts a strain on the logistical and financial resources available to the [Electoral] Commission...”

\textsuperscript{153} NICRO, supra note 104, para 41.

\textsuperscript{154} Ibid, para 43, The three classes were (1) prisoners awaiting trial, (2) prisoners sentenced to a fine with the alternative of imprisonment and (3) prisoners serving a sentence without the option of a fine. It was determined that prisoners awaiting trial were not yet declared guilty, and as such did not lose the right to vote. Additionally, prisoners serving a sentence with the option of a fine were deemed to be serving their sentences due to an inability to pay the fine, and so should not lose their right to vote due to poverty.
considered reasonable to deny them the right to register to vote whilst they serving their sentences.”  

The basis for this determination was that the incarcerated have already been deprived of their liberty by a fair trial, and so are unable to participate normally as a consequence of a legally imposed sentence anyway.  

This class of prisoners should not be subject to special privileges and accommodations in voting procedure, unlike those law abiding citizens who are seen to be more deserving.  

The position taken was not a “…denial of the right to vote…simply a refusal to make special arrangements”, a position previously taken and rejected in the August case. The government further supported its legislation with reference to the international practice of criminal disenfranchisement, and the idea that liberalizing felon franchise would “…send an incorrect message to the public that the government is soft on crime.”

In the end, it was held that the Electoral Commission had disproportionately violated the right to vote of incarcerated felons, and much emphasis was placed on the particular history of discriminatory franchise in South Africa. Rebutting the government’s arguments the majority cited unconstitutional, and vague policy goals.

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155 NICRO, supra note 104, para 43.  
156 Ibid, para 44.  
157 Ibid.  
158 Ibid. para 45.  
159 NICRO, supra note 104, para 46.  
160 Ibid, para 47 “…the right to vote is foundational to democracy which is a core value of our Constitution. In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected.”  
161 Ibid, para 53 For example: “[t]he mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners. [w]hether or not that is reasonable as a matter of policy raises different considerations” and para 56 “[a] fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration...[i]t could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image.”

162 Ibid, para 65. “[i]n a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose disenfranchiseism was intended to serve.”
2.2.b Dissenting Opinion

Justice Madala, speaking for the minority, finds that the limitation analysis is satisfied in a law which disenfranchises a select group of prisoners, for a limited period of time during their incarceration for serious crimes. For the dissenting Justices, the central question in the limitation analysis is if a temporary disqualification during the time of imprisonment is “reasonable and justifiable in an open and democratic society.”

There is an emphasis on the temporary nature of the disqualification which lends greater credibility of its use as a form of punishment. In the opinion of the minority, there is an infringement of the right to vote, albeit one that is justified. They assert that the criminal disenfranchisement regime is complex, and accomplishes many things, foremost “…to inculcate responsibility in a society which, for decades, suffered the ravages of apartheid; demeaning its citizens and creating irresponsible persons whose lives have become a protest…”

Despite acknowledging the exclusionary function that disenfranchisement served during apartheid, the minority still believe that the infringement is justified. This is because while it continues to operate on the basis of a type of discrimination, the prejudice is based on criminal culpability and not race, and so is more acceptable. There is also an opposition to the use of international jurisprudence to solve a South African problem. This is in response to the persuasive status that Sauvé enjoyed with the majority. Despite their statements to the contrary, the minority are also quick to cite the dissenting opinion of Justice Gonthier from

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163 NICRO, supra note 104, para 109.
164 Ibid.
165 Ibid.
166 Ibid, para 113.
167 NICRO, supra note 104, para 114 “…what happens in South Africa today results squarely form our unsavoury recent past...it also means that uniquely South African problems require uniquely South African solutions and that one cannot simply import into a South African situation a solution derived from another country…”
168 Plaxton and Lardy, supra note 11, p.102 “…the majority and dissenting opinions in Sauvé provide the most sophisticated judicial treatment of the kinds of arguments available to a government attempting to justify limitations on the right to vote. Though the majority opinion is grounded in many unspoken and contestable premises, it sets the benchmark for principled analysis.”
Sauvé in their assertions.\textsuperscript{169} For Justice Madala, the temporary nature of disenfranchisement provisions is an acceptable form of denunciation, and the key to a justified limitation.\textsuperscript{170} This conclusion is further supported by international practice, namely the disenfranchisement of criminals in the United States,\textsuperscript{171} and some countries in Europe.\textsuperscript{172} Other compelling reasons for justified limitation of the right to vote, included the consideration that Parliament made before promulgating the law,\textsuperscript{173} and a desire to protect the integrity of the voting process.\textsuperscript{174}

2.3 The United Kingdom - \textit{Hirst v. United Kingdom (no.2)}

This case involves a claim against the government of the United Kingdom by a British citizen and inmate, John Hirst. As a convicted prisoner, he was subject to the blanket ban on the right to vote, one that affected all prisoners by virtue of their incarceration. He challenges this law on the basis of Article 3, Protocol 1 as well as Article 10, and 14 of the European Convention of Human Rights (hereafter ECHR).\textsuperscript{175} After exhausting all domestic remedies, his claim was admissible for review by the ECtHR.\textsuperscript{176} The legislative provision in question is Section 3 of the

\begin{footnotes}
\textsuperscript{169} NICRO, supra note 104, para 115-116 “As was stated by Gonthier J in \textit{Sauvé v Canada} (Chief Electoral Officer): “[t]emporarily removing the vote from serious criminal offenders while they are incarcerated is both symbolic and concrete in effect. Returning it on being released from prison is the same.”

\textsuperscript{170} Ibid. para 117 “[i]n my view, the temporary removal of the right to vote by certain categories of prisoners is very much in line with the government objective of balancing individual rights and the values of society... [y]ou cannot reward irresponsibility and criminal conduct by a person who has no respect for the law the right and responsibility of voting.”

\textsuperscript{171} Ibid, para 118-119.

\textsuperscript{172} Ibid, paras 120-121.

\textsuperscript{173} NICRO, supra note 104, para 125.

\textsuperscript{174} Ibid. para 126 “They [the limitations of criminal franchise] ensure that the integrity of the voting process is protected. They give the public the assurance that the interests and the rights of ordinary law-abiding citizens are as important as those of prisoners. In this way, they engender public confidence in the democratic process and the criminal justice system.”


\textsuperscript{176} Hirst, supra note 105, para 5.
\end{footnotes}
The most recent incarnation of the voting disqualification at the time of this case, was the *Representation of the People Act 2000*, which carried on criminal disenfranchisement with the legislature invoking Section 4 of the Human Rights Act.\(^{178}\)

### 2.3.a Judgments of the European Court of Human Rights

The ECtHR acts as a final court of appeal for matters involving rights protected by the ECHR.\(^{179}\) States party are obliged to treat judgments from its court as having persuasive authority.\(^{180}\) While member states are accorded a margin of appreciation for certain issues,\(^{181}\) in matters directly implicating a convention right the Court has strong persuasive authority.\(^{182}\) The Strasbourg Court sees national authorities as best placed to afford human rights protections. In the *Handyside* judgment it was found that:

...the machinery of protection established by the Convention is subsidiary to the national systems regarding human rights. The Convention leaves to each contracting state, in the first place, the task of securing the rights and liberties it enshrines...by reason of their direct and continuous contact...

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\(^{177}\) The *Representation of the People Act 1983*, c.2 Section 3 reads: “A convicted person during the time that he is detained in a penal institution in pursuance of his sentence...is legally incapable of voting at any parliamentary or local election.” This statute continues the long-established practice of criminal disenfranchisement initiated by the *Forfeiture Act 1870*, (U.K.), c.23.

\(^{178}\) The *Human Rights Act, 1998*, c.42, Section 4 reads: “4(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right and 4(2) if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.” The declaration of incompatibility allows domestic legislators to make laws which they acknowledge may infringe a Convention right.


\(^{180}\) Ibid.

\(^{181}\) The margin of appreciation is essentially when the Court affords a certain degree of deference to the member state because it is believed that its domestic government is better placed to deal with certain matters. It was first introduced in the *Lawless v. Ireland* (Application No. 332/57, Judgement of 1 July 1961) case where it was said “[h]aving regard to the high responsibility that a government bears to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion—a certain margin of appreciation—must be left to the government” para 90.

with the vital forces of their countries. State authorities are in principle better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” or a “restriction” or “penalty” intended to meet them.\textsuperscript{183}

The Court has certain enforcement mechanisms to ensure that their judgments are taken seriously. The Court gives detailed suggestions on changing the unacceptable policies, a timeline for completion subject to review by the court, and finally the power to impose a fine.\textsuperscript{184} All member states are bound by the decisions of the ECtHR, whether or not the case directly implicates them or not.\textsuperscript{185}

2.3.b Majority Decision

The Court set out to establish the scope of the right contained in Article 3, Protocol 1 as a starting point. The Court notes that while the phrasing of this article:

...appears to differ from the other rights guaranteed in the Convention and Protocols, as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom...the Court has established that it guarantees individual rights, including the right to vote and to stand for election...\textsuperscript{186}

\textsuperscript{183} Handyside v. the United Kingdom, (5493/72) [1976] ECHR 5 (7 December 1976).

\textsuperscript{184} See European Court of Human Rights, Press Unit. “Factsheet: Prisoners’ Right to Vote.” (May 2012) Online at <http://www.echr.coe.int/>. Following the Hirst judgment, the English government was required to amend its legislation so as to bring it into conformity with the courts’ ruling. By the time a second disenfranchisement case was heard by the court (Greens and MT v. United Kingdom [2010] ECHR 1826 (23 November 2010) no changes had yet been implemented. The Council of Europe extended this six month deadline after the findings in Scoppola v Italy (No. 3) (Application no. 126/05, 22 May 2012) where a similar violation was found in Italian law.

\textsuperscript{185} George Ress. “The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order” (2004) 40 Texas International Law Journal. 359, p. 371. Ress best explains the force and effect of the decisions of the ECtHR, “[j]udgments are of a declaratory nature. They only state whether and to what extent there has been a violation of a human rights guarantee under the Convention. That the states have to abide by the judgments (Article 46) is an indication of the underlying legal structure that goes far beyond the formally declaratory nature of the judgment. The judgment is only an expression of an underlying norm of international law that requires the respondent states to make good the violation of the human rights, either by restitutito in integrum or by just satisfaction, and furthermore require states to bring to an end any continuing or future violation of human rights of this kind.”

\textsuperscript{186} Hirst, supra note 105, para 56-7.
This conclusion is based upon a purposive interpretation of the preparatory work leading up to the adopting of the article, and previous judicial interpretation. The Court maintains its commitment to the use of democratic principles “...underlying the interpretation and application of the Convention...”, and asserts that Article 3 is an important guarantee of an “...effective and meaningful” democracy. The Court continues to stress the importance of Article 3 as a right and not a privilege, especially in the light of the fact that in the twentieth first century “...the presumption in a democratic state must be in favour of inclusion...universal suffrage has become the basic principle.” The Court does however concede that this right is qualified and not absolute, subject to “implied limitations...contracting states must be allowed a margin of appreciation in this sphere.”

The pressing question in this case is the extent of the margin of appreciation towards the English government, with regards to Article 3. The Court has found that the margin of appreciation is wide concerning the organization of electoral systems generally, which differ in the European Union based on history, culture, and dominant political ideologies of each state. The Court proceeds to undertake its proportionality analysis as the last arbiter of whether or not the positive obligation placed upon states in Article 3 has been breached. States must not “...curtail the rights in question to such an extent as to impair their very essence and deprive

187 Namely, the Article is meant to be interpreted in the context and spirit of the Convention as a whole. It was in the case of Mathieu-Mohin and Clerfayt v. Belgium (Judgment of 2 March 1987, Series A no. 113) that the court found that Article 3 Protocol 1 guaranteed the right to vote.

188 Hirst, supra note 105, para 58.

189 Ibid.

190 Ibid, para 59.

191 Ibid, para 60.

192 Hirst, supra note 105, para 61.

193 JF Akandji-Kombe. “Positive Obligations Under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights.” Human Rights Handbooks No.7. Council of Europe Publications. <http://www.echr.coe.int/>., p.9. The ECtHR interprets the negative obligation as the member state refraining to act in a manner which contravenes a Convention right. The positive obligation, as was discussed in Belgian Linguistic Case (No 2) ((1968) 1 EHRR 252) requires national authorities to take “the necessary measures to safeguard a right, or more specifically, to adopt reasonable and suitable measures to protect the rights of the individual.”
them of their effectiveness." Effectiveness is the ability of the people to express themselves politically, being subject to no overriding conditions which could compromise the integrity of the electoral system. The Court emphasized that prisoners retain certain rights during incarceration.

Ultimately, the Court decides that the disqualification legislation fails its test of proportionality. The Court is skeptical that the aim of this provision is to prevent crime and enhance civic responsibility, as argued by the government, because “at the time of the passage of the latest legislation the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment… [t]his was also the position espoused by the Secretary of State in the domestic proceedings.” However, with no real power to challenge the law making power of the government, the Court accepts that a legitimate aim was pursued “…whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting.” The proportionality of this measure failed for same reasons as in the lower court:

…the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the Act of 2000 which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in

194 Hirst, supra note 105, para 62.
195 Ibid. The Court further warns that “[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates.”
196 Ibid, para 69 The Court uses the example of Article 3, Article 5, the freedom of expression and the right to practice their religion and also paras 70-1 “[t]here is no question, therefore, that a prisoner forfeits Convention rights merely because of his status as a person detained following conviction.”
197 Ibid, paras 77-82 To determine whether an infringement on a Convention is acceptable the court considers whether it was i) prescribed by law, ii) has a legitimate aim and, iii) is necessary in a democratic society. The third element is further broken down as the Court’s proportionality test, namely whether there is a pressing social need for the restriction, whether the restriction impairs the Convention right minimally, and whether sufficient reasons are provided for the infringement.
198 Hirst, supra note 105, para 74.
199 Ibid, para 84. “[i]n a case such as the present, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1…”
200 Ibid, para 75.
prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be...201

Compelling reasons for a finding contrary to Article 3, Protocol 1 were that the English legislation applied indiscriminately to a large class, and was an automatic consequence of criminal conviction.

2.3.c Dissenting Opinion

The dissenting justices argue that Article 3 does not grant individual rights, and contains no conditions for electoral policy other than they ensure the free expression of the opinion of the people.202 The minority believe that “[t]his indicates that the guarantee of a proper functioning of the democratic process was considered to be of primary importance.”203 While the Court recognized that individual rights existed in this provision, they also conceded that with this right came certain implied limitations which are a legitimate basis for deference to the local authorities due to the margin of appreciation.204 Based on previous case law,205 the arguments advanced by the United Kingdom for disenfranchisement were deemed acceptable as serving a legitimate aim.206 In terms of the margin of appreciation, the dissenting justices’ point out that deference is justified based on the varying historical and political experiences of each member state.207 They also warn that the majority is not interpreting the right to vote in a dynamic or dynamic or

201 Hirst, supra note 105, para 82. My emphasis.
203 Ibid.
204 Ibid.
205 Namely in M.D.U v. Italy (Dec. No 5854/00, 28 January 2003) it was accepted that a voting ban imposed for a two year period for a conviction for tax fraud was legitimate based on the Governments justification of the proper functioning and preservation of the democratic regime.
206 Hirst, supra note 105 Joint Dissenting Opinion, para 3.
207 Ibid, para 4, Py v. France (Judgment of June 6 2005, Application no. 66289/01) is cited where the Court noted that “…for the purposes of Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another.”
evolutive way, and risks assuming legislative functions.\textsuperscript{208} It is also argued that insufficient weight is given to the practices of other members of the European Union when considering whether a European consensus on the issue exists.\textsuperscript{209} Instead, international judgments from Canada and South Africa which support the line of reasoning of the majority are favoured.\textsuperscript{210} Additionally, the minority stress that the task of court in proportionality analysis is not to determine the validity of the general application of the law, but rather the application of the law in the given circumstances of the applicant at hand.\textsuperscript{211} The political nature of the issue, the lack of a general practice, and little evidence to show that Article 3 affords an individual right, are compelling reasons in the dissenting judgment. Additionally, the minority do not believe that the ECtHR is in a position to determine whether criminal disenfranchisement should be limited, or indeed abolished in a given member state.\textsuperscript{212}

\section*{2.4 Synthesis}

The examined cases have provided an overview of the constitutional considerations evoked by the criminal disenfranchisement debate. From this case review, it is apparent that they refer to each other in their findings. This is no accident. Criminal disenfranchisement involves complex questions of effective punishment both past and present, the legitimacy of a government’s penal politics, and a judiciary’s willingness to protect a fundamental right. Among these countries, issues of separation of powers and judicial activism are also important considerations. This final section will consider how the historical practice of criminal disenfranchisement from Part I connect with contemporary challenges to disqualification provisions. It will be shown that ideas about crime, punishment, and social exclusion have retained their legitimacy despite

\begin{footnotesize}
\begin{enumerate}
\item Ibid, para 6.
\item Hirst, supra note 105 Joint Dissenting Opinion, para 6.
\item Ibid.
\item Ibid, para 8 “[w]e consider it essential to underline that the severity of the punishment not only reflects the seriousness of the crime committed, but also the relevance and weight of the aims relied on by the respondent rule out the possibility restrictions may be disproportionate in respect of minor offences and/or very short sentences....no need for Court to enter into this question in the circumstances of the present case. The court has consistently held in its case-law that its task is not normally to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention.”
\item Ibid, para 9.
\end{enumerate}
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revolutionary advances in human rights protections. Reasons for the prevalence of these ideas will be discussed.

2.4.1 The Colonial Legacy of Disenfranchisement

In Part I of this paper, the history of criminal disenfranchisement was explored. Common to the ancient, medieval, and contemporary uses of criminal disenfranchisement was an emphasis on punishment, shame, and social exclusion from the community. These base concepts were shown to have influenced the practice of criminal disenfranchisement until the late twentieth century. This was in sharp contrast to general electoral law, which over the course of the twentieth century became less and less restrictive, in favour of more universal franchise. Despite significant changes in beliefs about crime and punishment, justifications of criminal disenfranchisement have remained rooted in ancient ideas about the worth and exclusion of criminals. Hamblet offers the following explanation:

> [t]he penal revolution occurred because in an age of globalizing capitalism and expanding empires, criminology and penology followed the forces of the market and the interests of the ruling classes. The new forms of punishment that replaced cruel public spectacles of the medieval period served the need for cheap labor. Cruelty transformed into labour in prison manufactories, galleys, or colonies. To a large extent, the forms of justice and punishment invented in the early mercantile period have maintained throughout the Western world into modernity with some significant alterations...[t]he overwhelming modern choice for punishments is the prison.

Incarceration has become the preferred method of dealing with criminality, a social and political institution. Punishment is still seen as the solution to crime intended to “...produce obedient citizens...”

2.4.2 The Role of Public Opinion in Punishment

Proof of imprisonment as the solution of choice in modern times is found in statistics. The imprisonment epidemic is also combined with the new role of public opinion in the


production of penal policy. For example, the practice mandatory minimum sentencing illustrates the extent to which public opinion can influence a country’s penal policy. Mandatory minimum sentences are “statutory provisions binding courts to impose specific criminal penalties for certain criminal conduct.” These sentencing regimes have been used increasingly in the United States, the United Kingdom and more recently in Canada. There is much academic opposition to these sentencing categories because they remove judicial discretion which forms the basis of a fair sentence, in favour of prosecutorial discretion favouring the victim’s sense of vengeance. While this practice may result in more consistent sentences within certain categories of crime, it ultimately ignores the subjective elements unique to each crime which may mitigate the severity of a sentence. Mandatory minimum sentencing laws in various states have often been the result of strong public reaction to shocking crimes and public cases, combined with opportunistic political endorsement. Much like mandatory minimum sentences are strongly rooted in public opinion, criminal disenfranchisement retains its allure for policymakers because it is consistent with the idea of being tough on crime. This was alluded to directly in the NICRO judgment, and more indirectly in Sauvé and Hirst, as ‘enhancing civic

217 Roberts and Hough call this a form of “penal populism” defined as “…where politicians promote policies simply because they are judged to be attractive to the electorate, regardless of their actual value in reducing crime rates or promoting justice.” p. 2 See Julian V Roberts & Michael Hough. Understanding Public Attitudes to Criminal Justice (New York: Open University Press, 2005).


219 Ibid. Mandatory minimum sentencing regimes are also a feature of English criminal law, and soon Canadian criminal law with the passing of the Omnibus Crime Bill C-10.


221 Ibid.

222 Michael Vitiello. “Three Strikes: Can We Return to Rationality?” (1997) 87 Journal of Criminal Law and Criminology, p. 407, The three strikes legislation in California, for example, was a citizen initiated legislation based on the deaths of Kimber Reynolds and Polly Klass at the hands of repeat offenders.
responsibility’. Criminal disenfranchisement is also consistent with the idea of promoting civic responsibility, and a social contract argument of belonging in a community.

The examined cases show how shame, infamy, and exclusion still define the citizen-convict relationship. Such justifications premised on effective penal policy are continuations of discriminatory attitudes framed in political terms. Thankfully, constitutional courts have taken a stand for the protection of human rights, in an attempt to overcome ancient ideas about moral worth and societal inclusion. To further this discussion, Part III of this paper will examine what common characteristics of the examined cases form a trend in electoral policy towards greater criminal enfranchisement.

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223 NICRO supra note 104, para 46 “Counsel for the Minister submitted that making provision for convicted prisoners to vote would in these circumstances send an incorrect message to the public that the government is soft on crime.”

224 See for example Hirst supra note 105, para 50 “[t]he Government argued that the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country” and Sauvé supra note 103, para 115 “[t]he denunciation of crime and its effects on society is often explained by reference to the notion of the social contract. The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests. In my view, the social contract necessarily relies upon the acceptance of the rule of law and civic responsibility and on society’s need to promote the same.”
3. Examining the Trend towards Criminal Enfranchisement: Nature, Scope and Effects

Part III of this paper will examine in greater detail the trend towards greater criminal enfranchisement. This section will build upon the history of disenfranchisement from Part I, and the detailed analysis of representative cases in Part II. Part III will look at what elements common to the representative cases, amount to a trend in the judicial treatment of disenfranchisement provisions. This section will proceed by first examining what composes the trend towards greater prisoner enfranchisement. The judicial interpretation of a disqualification provision as a matter of administrative policy, or as a punitive measure is of interest to this effect. It will be seen that in all cases, hybrid justifications are provided for disenfranchisement laws. While the courts place different emphasis on the nature of disenfranchisement laws, they all ultimately take what is described as a ‘guardian of human rights protection’ approach. The scope of this trend will also be considered.

The effects of the trend towards greater criminal franchise will then be explored. The theme of judicial interpretation of disenfranchisement as punishment, will be further examined through an American case study. American disenfranchisement law is considered to be one of the more restrictive disenfranchisement regimes. The idea of using the ‘disenfranchisement as punishment’ argument as the basis for a constitutional challenge will be explored with reference to the Eighth Amendment of the American Constitution. A brief history of American constitutional challenges to disenfranchisement will be presented, to better understand why they have not been successful. Reasons why a challenge based on the Eighth Amendment offers some promise, will also be considered. It will be shown that although the trend towards greater prisoner franchise is weak, it has succeeded in minimizing the number of those disqualified and not the abolition of the law altogether. However, there is promise that the trend could gain force through a transnational judicial dialogue premised on the concept of human dignity.

3.1 The Nature of Criminal Disenfranchisement Provisions: Regulatory or Punitive?

Common to the examined criminal disenfranchisement cases are the arguments by governments that such provisions are an administrative and regulatory power, and are a valid form of punishment. This line of reasoning illustrates a “fundamental ambiguity” in disenfranchisement law, whether its nature is punitive or regulatory in nature.\textsuperscript{226} The interpretation of this ambiguity has important implications for the way the court conducts a proportionality analysis, and generally assesses the legitimacy of a disenfranchisement law. This section will provide a brief overview of what justifications have been provided in the representative cases. It will be seen a hybrid approach, citing both regulatory and punitive reasons, is common way of justifying criminal disenfranchisement. The courts in the chosen cases have dealt with these justifications in different ways, but have ultimately taken what can be called a ‘guardian of human rights’ approach, privileging the right to vote.

3.1.1 Justifications for Criminal Disenfranchisement Laws

The reasoning in Sauvé has been often duplicated by governments seeking to justify their laws, and justices evaluating the regulatory and/or punitive nature of these laws. Recall that in Sauvé, the government relies on two main arguments. The first of these arguments is that criminal disenfranchisement promotes civic responsibility and respect for the law.\textsuperscript{227} This approach is regulatory in nature. The second approach is that disenfranchisement laws impose appropriate punishment, it is punitive in nature.\textsuperscript{228} In the NICRO case, the governmental justifications were also hybrid. On the regulatory side, the South African government pointed out that they had considered providing special electoral arrangements to facilitate prisoner voting, but ultimately determined that only certain classes of prisoner should be privy to such special arrangements.\textsuperscript{229} In effect, prisoners awaiting trial or those sentenced to terms with the option of paying a fine were eligible, while those serving more severe sentences with no option of a fine

\textsuperscript{226} Ewald and Rottinghaus, supra note 6, p.12.

\textsuperscript{227} Sauvé, supra note 103, para 18.

\textsuperscript{228} Ibid, para 15.

\textsuperscript{229} NICRO, supra note 104, para 44.
were not for supposed logistical and financial reasons. The punitive element of the government’s argument was that those serving more severe sentences were not deserving of such special arrangements, likening disenfranchisement to additional punishment. In Hirst, the government claimed disenfranchisement laws promote civic responsibility and respect for the rule of law. Disenfranchisement as additional punishment was also argued, with reference to social contract theory. In all of the representative cases disenfranchisement was justified on both regulatory and punitive grounds.

### 3.1.2 Justifications for Criminal Disenfranchisement Laws

The judicial examination of the nature of disenfranchisement laws in the examined cases was dominated by the logic of the Supreme Court of Canada in Sauvé. This approach may be seen as the court acting as a ‘guardian of human rights’ protection, the emphasis of the majority judgment in Sauvé was foremost the protection of a constitutionally protected right. As a regulation, criminal disenfranchisement is subject to a different standard of legitimacy by courts because “…the government’s ability to punish individuals is significantly more constrained, both procedurally and substantively, than its ability to regulate them.”

Governments must first prove that they are competent to make the given regulation, and then show to the court’s satisfaction that there is a legitimate reason for regulating in a way where a fundamental right is necessarily denied. As was noted in Sauvé, “[t]he range of constitutionally valid objectives is not unlimited…the protection of competing rights might be a valid objective… a simple majoritarian preference for abolishing a right altogether would not be

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230 NICRO, supra note 104, para 41.

231 Ibid, para 44.

232 Hirst, supra note 105, para 50.

233 Ibid, para 51, Namely, they asserted that because criminals had broken the social contract by their own actions, a temporary disqualification served as an added punishment.

234 Plaxton & Lardy, supra note 11 p.102 “[t]hough the majority opinion [in Sauvé] is grounded in many unspoken and contestable premises, it sets the benchmark for principled analysis.”

a constitutionally valid objective.” Courts are willing to take a stand against governments who are unable to justify infringing legislation, at the risk of undermining principles central to democracy: “[w]hen legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.” The majority opinion is focused on concepts which give effect to human rights protections including dignity, and equality.

Little serious attention is given in Sauvé to the punitive justifications of the government’s argument. Such arguments are quickly dismissed; “[p]unishment must also fulfill a legitimate penal purpose...[t]hese include deterrence, rehabilitation, retribution, and denunciation...[n]either the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals.” Disenfranchisement as valid punishment is rejected on the basis that the provision in question is indiscriminate, and as such cannot possibly be legitimate punishment because it is not imposed differentially based on a given offender’s criminal conduct.

This ‘guardian of human rights’ approach is also found in the NICRO judgment. In this case, the court acknowledges that “[t]he right to vote by its very nature imposes positive

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236 Sauvé supra note 103, para 20.

237 Ibid, para 15.

238 Ibid, para 44 “[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter.”

239 Ibid. para 43 “The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered "civil death", by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or "worthy" of voting -- whether by reason of class, race, gender or conduct -- played a large role in this exclusion. We should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law.”

240 Sauvé supra note 103, para 49.

241 Ibid, paras 51,52 “Section 51(e) imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender’s act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment. When the facade of rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing. On all counts, the case that s. 51(e) furthers lawful punishment objectives fails.”
obligations upon the legislature and the executive... this right which is fundamental to democracy
requires proper arrangements to be made for its effective exercise.”

The Constitution of South Africa is based on human dignity and equality, non-discrimination, supremacy of the rule of law, and universal adult suffrage. The court, in its assessment, also placed a significant emphasis on the protection of the fundamental right to vote building upon the related judgment in August and Another v. Electoral Commission. Unlike Sauvé however, the government placed a greater emphasis on the regulatory nature of the disenfranchisement provision, which clearly had the effect of being in contravention of the right to vote, compared to the stated penal goal.

The Court in Hirst was a little more reserved in citing the protection of fundamental rights as the deciding factor in their judgment. Arguably however, this has more to do with the Courts’ position as a supranational court, than anything else. The Court retains its authority and legitimacy by deferring matters which are considered to be the exclusive domain of domestic governmental competency.

Matters like national security, education, health and tourism are


243 Constitution of the Republic of South Africa, Act 108 of 1996, 10 December 1996. Section 1 of the South African Constitution reads: “[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms (b) Non-racialism and non-sexism (c) Supremacy of the constitution and the rule of law (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

244 NICRO, supra note 104, para 28 Notably, the court cited Justice Sachs from August whose judgment noted “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.”

245 Sauvé, supra note 103, para 66 This was admitted by the majority when comparing the present case to Sauve: “[t]he main thrust of the justification in the present case was directed to the logistical and cost issues which cannot be sustained. The policy issue has been introduced into the case almost tangentially.”

246 NICRO supra note 104, para 49 The policy justification was a weak argument; “[a]rrangements for registering voters were made at all prisons to accommodate unsentenced prisoners and those serving sentences because they had not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. There is nothing to suggest that expanding these arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission. Apart from asserting that it would be costly to do so, no information as to the logistical problems or estimates of the costs involved were provided.”

247 Hirst, supra note 105, para 60 “...the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.”

248 Masterman, supra note 180.
generally considered to be exclusive state affairs and the European Union institutions, including the ECtHR, act only in a supporting role.\textsuperscript{249} Accordingly, the Court in \textit{Hirst},\textsuperscript{250} did not critique too harshly the stated policy goals advanced by the government unlike in \textit{Sauvé}\textsuperscript{251} or \textit{NICRO}.\textsuperscript{252} \textit{Hirst} can still however be placed in the same category as \textit{Sauvé} and \textit{NICRO} because ultimately its judgment is in the spirit of a ‘guardian of human rights’ approach. The definitive factor in finding the blanket ban was disproportionate rested, on the indiscriminate and automatic nature of the ban. The Court took the opportunity to protect not only the right to vote, but also the right against inequality and discrimination in a policy area normally requiring deference under the margin of appreciation.\textsuperscript{253} The court did stress that their role was not to determine the substance of the law, but rather whether its effects are proportional.\textsuperscript{254} A judiciary taking a bolder position

\begin{itemize}
\item \textsuperscript{250} \textit{Hirst, supra} note 105, para 75 The European Court simply concluded that “whatever doubt there may be as to the efficacy of achieving these aims through a ban on voting, the Court finds no reason in the circumstances of this application to exclude these aims as untenable or incompatible \textit{per se} with the right guaranteed under Article 3 of Protocol No. 1”, choosing not to comment in any detail about the efficacy of a vague policy goal as a defence.”
\item \textsuperscript{251} \textit{Sauvé, supra} note 103, para 52. “When the facade of rhetoric is stripped away, little is left of the government’s claim about punishment other than that criminals are people who have broken society’s norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing...”
\item \textsuperscript{252} \textit{NICRO, supra} note 104, para 56 “A fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration. It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could 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.”
\item \textsuperscript{253} \textit{Hirst, supra} note 105, para 82 “[s]ection 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right.”
\item \textsuperscript{254} \textit{Ibid}, para 61 “[t]here are numerous ways of organising and running electoral systems and a wealth of differences, \textit{inter alia}, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision” and para 62 “[i]t is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.”
\end{itemize}
outlawing criminal disenfranchisement would likely face allegations of judicial activism, but would also send a strong message to legislators that penal policy violating constitutionally protected rights will not be tolerated.

3.2 The Scope of the Trend towards Criminal Enfranchisement: A Present but Tentative Step Forward

The representative cases considered, there is a tangible trend towards criminal enfranchisement with constitutional courts taking a rights protection approach. It is important to note however, that this trend is tentative. While each of the representative cases lessens the number of those affected by criminal disenfranchisement laws in their respective jurisdictions, no court goes so far as to outlaw the practice altogether. The reluctance of the judiciary in the representative cases highlights the difficult distinction between disenfranchisement as regulation, and disenfranchisement as punishment. A government is justified in making electoral policy and penal policy as it sees fit. The judiciary must be careful in not overstepping its mandate for fears of being labeled activist or wannabe legislatures. It is for the court to evaluate executive policy and not frame it. Ultimately however, the courts in the representative cases have taken a progressive step forward in using international jurisprudence to the maximum effect to identify a higher standard of prisoner rights, one which necessitates some level of conformity.

3.3 Potential Effects of the Trend towards Criminal Enfranchisement

The chosen cases have all favoured a rights protecting approach to criminal disenfranchisement law. It has been seen that punitive justifications for criminal disenfranchisement laws are difficult to prove, as they rest on abstract and immeasurable goals such as promoting civic responsibility and respect for the law. However, while disenfranchisement as punishment has been an ineffective argument for governments, there is reason to believe that this argument may work to the favour of prisoners in proving

255 This is an especially pressing issue for the court due to the fact that its judgments are declaratory and there is much suspicion that the factual basis of one case can effectively apply to facts of cases in all member states. In R (Gillian) v. Metropolitan Police Commissioner [2006] 2 A.C. 307 Lord Bingham warned of the dangers of applying Strasbourg judgments as factual precedents at para 23, as did Lord Brown in Secretary of State for the Home Department v. JJ [2007] UKHL 45 at para 101. See also Alastair Mowbray. “The Creativity of the European Court of Human Rights” (2004) 5:1 Human Rights Law Review 57.
disenfranchisement laws amount to excessive punishment. This line of reasoning has been considered by academics in the particularly dire disenfranchisement regime that exists in the United States.\textsuperscript{256} This section will explore how conceiving criminal disenfranchisement as punishment could be successfully used, by considering American constitutional challenges. There is hope in assessing the constitutionality of criminal disenfranchisement in light of international standards. Through a transnational judicial dialogue based on human dignity, American judges may be able to break free of the confines of state and federal law to better protect prisoner franchise.

3.3.1 The Promise of Interpreting Criminal Disenfranchisement as Punishment: An American Case Study

The American criminal disenfranchisement regime has been subject to numerous constitutional challenges. Three main categories of constitutional challenges can be identified; challenges based on equality, the right to vote, and most recently based on the prohibition against cruel and unusual punishment. This section will consider these constitutional challenges. Reasons why arguing that criminal disenfranchisement is cruel and unusual punishment may offer some promise over the other categories of challenge, will also be examined.

3.3.1.a Challenging Disenfranchisement on the Basis of the Fourteenth Amendment

The initial wave of challenges to criminal disenfranchisement were based on the Fourteenth Amendment, known as the ‘equal protections’ clause. Section one of the Fourteenth Amendment reads “no state may deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{257} In essence, this Amendment ensures that the law offers an equal protection to all its citizens. The constitutionality of criminal disenfranchisement was challenged on the basis that such policies had a disproportionate effect on racial and ethnic communities overrepresented in American prison populations. It was in the case of \textit{Richardson v. Ramirez} that this issue was first


\textsuperscript{257} Cornell University Law School, \textit{supra} note 85.
considered.\footnote{258} This case was important because it set a precedent for the use of the Fourteenth Amendment against a disenfranchisement law. It was held that the Fourteenth Amendment was not contrary to disenfranchising a group of individuals; instead it endorsed the practice especially in regards to excluding felons.\footnote{259}

The importance of this finding was that definitively closed the possibility that any state law which defined a felony, whose implementation would lead to automatic disenfranchisement, was contrary to the Fourteenth Amendment. \textit{Post-Richardson} only minor changes occurred to state disenfranchisement laws due to this finding.\footnote{260} In effect, \textit{Richardson} had a crippling effect on criminal disenfranchisement which seemed to be on the decline in nineteen seventies America.\footnote{261} The legacy of \textit{Richardson} still lives on, it is almost impossible to challenge criminal disenfranchisement on a validly constructed state law that shows no obvious disproportionate effect.\footnote{262} The judiciary exercised complete deference to the competence of the state in creating penal policy.\footnote{263}

\footnote{258} \textit{Richardson}, supra note 8.

\footnote{259} \textit{Ibid.} It was found that the intent of the framers of the amendment and held “the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment” at para 55 and that “…the more modern view is that it [criminal disenfranchisement] is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term…. [b]ut it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view.” at para 56.

\footnote{260} For example, there were attempts to limit the scope of disenfranchisement provisions to apply only in the case of a felony conviction as opposed to blanket restrictions on all prisoners. See \textit{Hunter v. Underwood} 469 U.S. 878.

\footnote{261} Demleitner, supra note 81, p. 84 “As capital punishment appeared to wither away by the early 1970s, in some states, felon disenfranchisement similarly began to be undermined. When the California Supreme Court struck down that state’s felon disenfranchisement law in 1973, felon disenfranchisement seemed to be on its way out. This proved untrue…when the Supreme Court upheld California’s disenfranchisement provision as a legitimate exercise of state power under the Fourteenth Amendment [in Richardson].”

\footnote{262} \textit{Ibid.}

\footnote{263} See \textit{United States v. Lopez} 514 U.SD (1995) at 552: “.states have always been sovereign” in criminal law enforcement, and “the powers delegated...to the federal government are few and defined” compared to “numerous and infinite” state power, and Rachel E Barkow. “Our Federal System of Sentencing” (2005) 58:1 Stanford Law Rev.119.
3.3.1.b Challenging Disenfranchisement on the Basis of the Voting Rights Act

The second wave of constitutional challenges was based on the Voting Rights Act. Passed in 1965, the rationale in passing this Act was to give greater clout to the protections contained in the Fifteenth Amendment as they had proven insufficient to prevent racist electoral policy. It was found that state electoral policy could inherently dilute the right to vote. A 1982 amendment obligated state law makers to create electoral policy which would not dilute the right to vote. It would seem that a challenge to disenfranchisement on the basis of the Voting Rights Act would be seamlessly successful. However, the contention that disenfranchisement disproportionately restricted the African American vote due to their overrepresentation in felony convictions, was not accepted. There was some acknowledgement upon appeal that overtly racist sentencing policies of the past did unfavourably affect African Americans, but in the end this was not enough for a finding of vote dilution contrary to the Voting Rights Act. Practices of the past were not admissible to show current vote dilution, and the disputed

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265 Hull supra note 256, p. 106.
266 Ross J Adams. Whose Vote Counts? Minority Vote Dilution and Election Rights (1989) 35:11 Washington University Journal of Urban and Contemporary Law, p. 220. Adams defines vote dilution as diminishing “…a minority’s group’s political power by weakening the effectiveness of its vote [by methods such as] … at – large and multimember district schemes…gerrymandering and annexation.” In Reynolds v. Sims 377 US 533, 555 1964, it was noted that “…[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”
267 The amended Section 2 reads: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”.
268 Demleitner, supra note 81, p. 84 Demleitner notes that “[a]lthough racial minorities have been disproportionately stigmatized as criminal offenders throughout U.S history, with the onset of the war on drugs, such disparities have dramatically increased. Because many of the states with large African American communities have also tended to have expansive disenfranchisement provisions, African Americans have been disproportionately excluded from the franchise.”
269 Wesley v. Collins 791 F.2d 1255.
270 Ibid.
271 Ibid at para 13, “While the district court ascertained the presence in Tennessee of certain factors enumerated in the legislative history… such as a history of racial discrimination, the effects of which continue to the present day, such evidence of past discrimination cannot, in the manner of original sin, condemn action that is not in itself unlawful.”
disenfranchisement provision was found to punish offenders regardless of race. Further case law did little to bridge the gap between historical and contemporary disenfranchisement practices. In *Baker v. Pataki*, this logic was cemented with the court finding that the *Voting Rights Act* could not be used as a basis to challenge disenfranchisement laws as they “...are generally enacted for compelling, non discriminatory reasons...” and

…the application of [the *Voting Rights Act*] to state felon disenfranchisement statutes would at least as clearly undermine the constitutional balance between the federal and state governments. The states have the primary responsibility for regulating the times, places, and manner of conducting federal elections...

Even evidence of that criminal disenfranchisement laws could make a real difference in the outcome of a presidential election did not compel the court to reconsider prompting a change to these policies on the basis of their discriminatory effect.

The approach of the court with regards to the *Voting Rights Act* ignores the fact that many current disenfranchisement policies, whether directly or indirectly, carry on the legacy of racist electoral policy of the past. Once again, the court exercised a great degree of deference to the monopoly that state legislators enjoy with regards to creating penal policy. In this sense, challenges based on the Fourteenth Amendment and the *Voting Rights Act* were inherently weak as the judiciary was powerless to question the power of state legislators.

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272 Wesley, *infra* note 269, para 17 “…only the commission of a pre-ascertained, proscribed act warrants the state of Tennessee to foreclose a certain individual from the voting process. Nor are felons disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment.”


274 Ibid. para 36 and 41.

275 See *Johnson v. Bush* 546 U.S. 1015; 126 S. Ct. 650 (2005) and See Jeff Manza and Christopher Uggen. *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006). Florida was a state where the numbers were close in the 2000 Presidential election, and is known for its restrictive disenfranchisement provisions. Many people questioned that if the state’s disenfranchisement policies had been different, the outcome of the election would have been affected. The winning margin was a mere 537 votes.

276 Demleitner, *infra* note 81, p. 85 To their credit, state legislators have made an effort to minimize the disproportionate racial effects of criminal disenfranchisement; “…several states have expanded the rights of convicted felons to vote…a few states have re-enfranchised offenders who are on probation or on parole…others have limited waiting periods for the automatic restoration of voting rights or excluded certain categories of offenders from automatic post-sentence disenfranchisement...”

277 Barkow, *infra* note 263.
3.3.1.c Challenging Disenfranchisement on the Basis of the Eighth Amendment

Contemporary challenges to criminal disenfranchisement laws have been based on the Eighth Amendment restriction on cruel and unusual punishment.²⁷⁸ For one to show that their Eighth Amendment rights have been violated, it must be proven, among other things, that the measure in question is contrary to societal norms and values.²⁷⁹ This standard is ever-evolving and has been used widely in American courts as a tool of judicial interpretation.²⁸⁰ Courts are open to consider a variety of sources in addition to domestic law, including international jurisprudence.²⁸¹ In the case of Green v. Board of Education, using the Eighth Amendment to challenge a disenfranchisement law was denied on the basis that the disqualification was considered to be non-punitive in nature, and even if it was punitive, the practice was not contrary to the evolving standards of society at that time.²⁸²

Green was decided in 1967 and its reasoning may be difficult to replicate in a contemporary criminal disenfranchisement challenge.²⁸³ This is because criminal disenfranchisement is accepted as a punitive practice; the reasons justifying it as a non-penal

²⁷⁸ Cornell University, supra note 85, The Eighth Amendment reads, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

²⁷⁹ Determining whether the Eighth Amendment has been violated in a four stage test determined in Furman v. Georgia 408 U.S. 238, (1972). It is as follows; “…a punishment must not by its severity be degrading to human dignity”, and “…courts should consider whether the punishment is arbitrarily imposed; whether the punishment is excessive in the sense that it is unnecessary; and whether contemporary society would find the punishment unacceptable” at paras 281, 274, 279, 277.

²⁸⁰ The scope of the provision was expanded in American law with Weems v. United States 217 U.S. 349 where the Supreme Court stated:”… [t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions... In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be” at para 551 and in Trop where the court determined that the proportionality standard was to be in line with the “evolving standards of decency that mark the progress of a maturing society” . To determine when a punishment does not conform to evolving standards of decency the “… Court looks not to its own subjective conceptions, but, rather, to the conceptions of modern American society as reflected by objective evidence…the primary and most reliable evidence of national consensus (is) the pattern of federal and state laws.” Trop v. Dulles, 356 U.S. 86, para 101.


²⁸² 380 F. 2d 445, 450 (2d Cir. 1967) at 451 to prove this assertion, the Court relied on the fact that 42 states disenfranchised ex-felons at the time of judgment.

²⁸³ Ibid.
measure in previous case law are no longer good law. Additionally, modern American society has shown signs that criminal disenfranchisement does not conform to its ‘evolving standards of decency’. While disqualifications are still widely practiced in many states, there has been a tendency post Richardson to limit their scope and to make it easier to regain the right to vote after serving a prison term. Public opinion also favours less severe disqualifications. The United States also faces a mass incarceration crisis, which also highlights the discriminatory and widespread reach of disenfranchisement laws. Further evidence is illustrated by the international trend towards criminal enfranchisement as seen in the surveyed cases. The United States is an anomaly in this trend.

The success of an Eighth Amendment challenge depends on the extent to which judges allow international jurisprudence to have persuasive force in American courtrooms. This would allow them to overrule state penal policy, recognizing that there is a new standard towards freer prisoner franchise. Through an Eighth Amendment challenge, the American judiciary has the opportunity to make a progressive decision while not being strictly bound by a state legislator’s policy making monopoly. This monopoly is a significant factor in the failure of challenges based on the Fourteenth Amendment and on the Voting Rights Act.

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284 Karlan supra note 235, Karlan explains how criminal disenfranchisement is no longer acceptable as a non-penal measure because i) denying the right to vote to a group of persons engaging in a certain practice as was found in Davis v. Beason (133 U.S. 333; 10 S. Ct. 299) is no longer accepted based on the reasoning of Justice Friendly in Green ii) the long-held belief that prisoners lacked sufficient capacity or moral character to vote is no longer accepted as a justification to limit the right to vote and iii) she argues that there is evidence to suggest that the constitutionality of criminal disenfranchisement laws need to serve a valid purpose as per the reasoning in Hunter v. Underwood 469 U.S. 878 See p.7-10.

285 Ibid. A 2004 public opinion poll “…found that 80 percent of Americans support re-enfranchising those who have completed their sentences, 68 percent support voting rights for probationers, and 60 percent support voting rights for parolees.”

286 Ibid. A 2004 public opinion poll “…found that 80 percent of Americans support re-enfranchising those who have completed their sentences, 68 percent support voting rights for probationers, and 60 percent support voting rights for parolees.”

287 See Schmitt, Warner and Gupta supra note 216 and Appendix Table 14 from Paul Guerino, Paige M Harrison, and William J Sabol. “Prisoners in 2010” US Department of Justice, Bureau of Justice Statistics. Revised February 2012. <http://bjs.ojp.usdoj.gov>. The estimated rate of sentenced prisoners under state and federal jurisdiction based on origin is listed as follows for 2011: 904 Aboriginals/Hawaiians/Asians/ Multiple Race inmates per 100,000 US residents, 449 White inmates per 100,000 US residents, 1220 Hispanic inmates per 100,000 US residents, 3457 Black inmates per 100,000 US residents.
3.4 The Role of a Transnational Judicial Dialogue

A transnational judicial dialogue occurs in courtrooms when the reasoning and judgment of an international court has persuasive but not binding force, on its own case with related facts. Morgan-Forrester defines the phenomenon in these terms: “...to make use of ideas raised by foreign and international courts, without importing their constitutional tests.” Slaughter calls this phenomenon ‘judicial globalization’, and ‘transjudicial communication’. The phenomenon occurs at different levels, and with varying effects. In terms of the debate over criminal disenfranchisement, the form that the transnational behaviour takes is dialogical. In this way, “a court engages in [a dialogue] with the other jurisprudence while respecting constitutional boundaries...”

This was evident during the detailed review of cases in Part II. Each case referred to the others in an attempt to better understand its own constitutional position and to get a sense of the international standard. For example, in Sauvé, Justice McLachlin makes reference to ECtHR jurisprudence in an attempt to better understand how the right to vote is qualified in other jurisdictions. In NICRO, there was a considerable emphasis placed on the reasoning in Sauvé, especially in regards to what was the appropriate level of justification by a government in disenfranchising prisoners. Finally, in Hirst the case law upon which the NICRO judgment


291 Forrester, supra note 288, p. 297.

292 The European Court of Human Rights addressed the issue in Mathieu-Mohin and Clerfayt (Judgment of 2 March 1987, Series A No. 113). The court found, that Art. 3 of the First Protocol conferred the right to vote and to stand for election, despite the wording of the Article, which, on its face, seems not to confer such rights. para 29, 153.

293 Sauvé, supra note 103, para 65 “In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. In so far as the government relies upon policy considerations, there should be sufficient information to enable the Court to assess and evaluate
was based *August and Another v. Electoral Commissioner and Others*, was used as evidence to support the idea that the right to vote imposed positive and negative obligations on the government. The following section will consider the role of transnational judicial dialogue within the trend towards criminal enfranchisement, and specifically how it could operate to strengthen this trend.

### 3.4.1 Strengthening a Weak Trend through Dialogue

While there is a discernible trend towards freer prisoner franchise, the trend suffers from being tentative. That is to say, there is enough judicial will to recognize that criminal disenfranchisement can be disproportionate in a blanket ban format. Yet, calls have only been made to tailor disqualifications to a more restricted group of prisoners. Combined with the increasingly common practice of transnational judicial dialogue, even this weak trend towards criminal franchise may be strengthened. Take for instance the case of the United States. Widely held to be the exception to the trend towards prisoner enfranchisement, it would appear that international jurisprudence may offer a compelling reason to rethink disenfranchisement laws. The use of comparative case law has gained some support from some prominent American judges. At the same time, there have been judges who strongly oppose such an exercise.

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294 (CCT8/99: 1999 (3) SA 1).
296 Ziegler, *supra* note 225.
297 In the case of *Atkins v. Virginia* (536 U.S. 304; 122 S. Ct. 2242 2002) the majority judgment refers to the international consensus in addition to American legislation, to support their argument against the imposition of the death penalty for mentally retarded offenders; “… within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved” at para 324 footnote 21.
298 *Ibid.* The joint dissenting opinion of Justice Rehnquist, Scalia, and Thomas in *Atkins* is indicative of the disapproval of the use of international jurisprudence to establish a societal standard; “I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination. While it is true that some of our prior opinions have looked to “the climate of international opinion,” to reinforce a conclusion regarding evolving standards of decency, we have since explicitly rejected the idea that the sentencing practices of other countries could “serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people” at para 324.
Generally international jurisprudence will at least be looked at in contentious cases.\textsuperscript{299} Recall that a challenge to a disenfranchisement provision under the Eighth Amendment requires, among other things, showing that the practice is offensive to societal standards of decency. Should international jurisprudence be allowed to play any significant role in a future Eighth Amendment based challenge, the court would be hard-pressed to ignore the trend towards freer prisoner franchise to support the decline of such laws in American states.

\subsection*{3.4.2 The Basis of Transnational Judicial Dialogue: Human Dignity}

A possible role that international jurisprudence could play in an American constitutional challenge would be with reference to the notion of human dignity. The direct application of international jurisprudence has been continually ruled as inadmissible in the United States, owing to the lack of a constitutional basis for such a practice.\textsuperscript{300} The indirect use of comparative jurisprudence through the application of the principle of human dignity may be a promising way forward. There was a significant emphasis placed on maintaining a degree of human dignity in both \textit{Sauvé} and in \textit{NICRO}.\textsuperscript{301} Human dignity is a concept widely used in comparative jurisprudence.\textsuperscript{302} Beginning with the \textit{Charter of the United Nations} and the \textit{Universal

\textsuperscript{299} For example in the case of \textit{Roper v. Simmons}, 125 S. Ct. 1183, 1200 (2005), there was the use of international legislation to determine whether or not sentencing of juveniles was contrary to the Eighth Amendment. Justice Scalia, an open advocate against the use of international sources noted in dissent that “[i]t is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War- and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists -a legal, political, and social culture quite different from our own” at para 1228.

\textsuperscript{300} \textit{Atkins}, supra note 297. The dissenting opinion of Justice Scalia echoes this limitation; “…[w]e must never forget that it is a Constitution for the United States of America that we are expounding. … Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution” at para 347-348.

\textsuperscript{301} \textit{Sauvé}, supra note 103 at para 44: “[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the \textit{Charter},” and \textit{NICRO}, supra note 104 at para 17: the often cited passage by Justice Sachs ”[t]he vote of each and every citizen is a badge of dignity Quite literally, it says that everybody counts.”

\textsuperscript{302} Paul G. Carozza. “Human Dignity in Constitutional Adjudication” in Tom Ginsberg & Rosalind Dixon, eds. \textit{Comparative Constitutional Law} (Northampton, MA: Edward Elgar, 2011) p.459.Carozza notes that “[s]ince the mid-twentieth century, the idea of human dignity has emerged as the single most widely recognized and invoked basis for grounding the idea of human rights generally, and simultaneously as an exceptionally widespread tool in judicial discourse concerning the content and scope of specific rights. It has become a pervasive part of the fabric of constitutional law worldwide.”
Declaration of Independence, it has enjoyed a renewed importance in the judicial treatment of fundamental human rights.\textsuperscript{303} The concept itself is on one hand general and clear, and on the other hand ambiguous when applied too specifically.\textsuperscript{304} Further difficulty arises when one considers that “…dignity’s roots are not just highly diverse but emerge from traditions of thought that represent deeply divergent ideas about why human persons have any inherent value that demands the respect of others…and what it entails to respect the moral worth of another.”\textsuperscript{305} Despite the varying meanings and uses human dignity throughout the ages, its current use does follow similar patterns which afford it a degree of legitimacy.\textsuperscript{306}

The concept of human dignity as the basis of a constitutional challenge is, of course, dependent upon the willingness of a given court. Human dignity has enjoyed only limited attention in the American courts, especially where disenfranchisement was challenged.\textsuperscript{307} While somewhat complicated by the federal structure of the nation,\textsuperscript{308} it seems that the addition of the notion of human dignity would add a missing dimension in cases involving complex


\textsuperscript{304}Carozza, supra note 302, Carozza points out the concept reflects two ideas: “…an ontological claim that all humans being have an equal and intrinsic moral worth, and a normative principle that all human beings are entitled to have this status of equal worth respected by others…” and further that “[t]he difficulties and controversies that arise in constitutional adjudication…arise where the requirements of human dignity are more contested and uncertain, and where the broad universal principle needs to be specified concretely in a given social, political, and cultural context.” p.460.

\textsuperscript{305}Ibid, p. 462.

\textsuperscript{306}Ibid, p.462-3 For example, Corozza identifies three main categories where human dignity is used; dignity in cases dealing with the protection of life as well as the physical and mental integrity of human beings, dignity as a basis to challenge the death penalty, and dignity as a basis to challenge socio-economic conditions affecting basic standards of living.

\textsuperscript{307}Vicki Jackson. “Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse” (2004) 65 Montana Law Review 15, p. 21, 26 “[a]lthough some members of the U.S. Supreme Court in the postwar period have embraced human dignity as a motivating principle for the U.S. Bill of Rights the role of the concept of “human dignity” in the Court’s jurisprudence is episodic and underdeveloped.”p.17.

\textsuperscript{308}Ibid, p. 19, Individual American states are vested with their own constitution and mode of constitutional interpretation but are still required to follow federal law. For example the Constitution Restoration Act 2004 HR 3799 IH. 108th CONGRESS. 2d Session, stipulates that “[i]n interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.”
constitutional issues like criminal disenfranchisement where the United States enjoys a notorious reputation of exceptionalism:

...U.S constitutional jurisprudence...sets outer boundaries on the types and levels of punishment that can be inflicted without offending constitutional protections. As a result, the United States asks whether a certain measure, practice, or deprivation violates the personal dignity interests protected by the Constitution, rather than asking whether the overall legislative scheme is consistent with a robust belief in human dignity generally. In the United States the concept of dignity is an end point that cannot be passed; it is invoked only in response to the most egregious laws or government conduct. Other countries use dignity as the starting point for interpretation, from which rights flow...offering much more robust protection of dignity interests than the United States.

An American court more open to international jurisprudence and its approach to human dignity, would benefit from a more comprehensive constitutional analysis, one that privileges the rights protection model over rigid constitutional boundaries. This idea is not intangible. Human dignity has been a feature of American jurisprudence in the past, and there are indications that state constitutions are increasingly open to human dignity as an entrenched principle.

It remains to be seen whether American courts will indeed embrace a broader approach to human dignity, and whether an Eighth Amendment challenge to criminal disenfranchisement will ever be successful. There is hope that the presence of an international trend towards greater felon franchise may impact even the most restrictive disqualification regimes like those in the United States.

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308 Pinard, supra note 14, p. 520-521. Jackson also comments on this particular approach to rights protection “‘in the United States...notions of affirmative obligations to individuals on the part of the government have been rejected, not so much for lack of textual tools, but out of a set of constitutional commitments developed over time.” Jackson, supra note 307, p. 18.

310 Jordan J Paust. “Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content”, (1984) 27 Howard Law Journal 145. “[t]he recent judicial use of the concept of human dignity has occurred in one hundred and thirty-six Supreme Court cases, the fact that most of these cases have occurred in the last fifteen years, and the fact that human dignity has been related to several constitutional rights and principles as either a primary or supplemental justifying factor for decision demonstrate that an increasingly vital and vibrant constitutional precept has grown before our eyes.” p. 148.

311 Jackson, supra note 307. Article II, section 4 of the Montana Constitution reads: “[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.” This provision was inspired by the Puerto Rican constitution and replicates its wording.
Conclusion

The current status of human rights protection is unparalleled. Not only are new types of rights being recognized by jurisdictions across the world.\(^{312}\) Within this framework of greater rights recognition and reinforcement, long-held assumptions about rights entitlement are being questioned. There has been somewhat of a revolution in international regulations and overseeing bodies protecting prisoners’ rights in international law.\(^{313}\) Related to this push for greater protection of prisoners, is the reconsideration of the issue of criminal disenfranchisement. Within the past two decades, constitutional courts around the world have seriously reconsidered the constitutional value of such disqualifications for prisoners.

This paper considered the recent trend towards criminal enfranchisement. The roots of disenfranchisement policies were traced back in history in Part I. In its original form, criminal disenfranchisement was linked to base concepts in ancient Greek society like belonging, social order, crime, punishment, shame, and justice. Vengeance was a determining factor in the criminal process during this time. Citizenship was the ultimate privilege of belonging. Its revocation was justified if one’s criminal act so deeply insulted the polis. Citizenship was intimately tied to the belonging of law abiding citizens and the ostracizing of criminals. The Greek conception would prove to be very influential in the development of punishment. Nowhere was this more apparent than in the medieval English period. During this time, punishments like attainder and outlawry were based upon the idea of civil death. This was the complete exclusion from all civil participation and any rights afforded to them as a citizen. With the rise of personal property, criminal disenfranchisement took on a new dimension. Punishment became a lucrative state business through the imposition of fines and the appropriation of land. Criminal disenfranchisement laws would prevail as English policy throughout the eighteenth and


\(^{313}\) See Steve Foster. “Prison Conditions and Human Rights: The Development of Judicial Protection of Prisoners’ Rights” (2009) 1 Web Journal of Current Legal Issues, “[b]oth the UN and the Council of Europe have passed Prison Rules establishing the minimum standards of the detention of prisoners (UN Standard Minimum Rules for the Treatment of Prisoners (1955), including the Basic Principles for the Treatment of Prisoners (1990), and the European Prison Rules 2006). Both sets of Rules seek to prohibit certain practices, such as the detention of young offenders with adult prisoners, and lay down basic principles based on respect for human dignity and the prisoner’s rehabilitation.”
nineteenth centuries. Part I also considered how criminal disenfranchisement came to enjoy widespread use around the world through this colonial legacy, and the manifestations that it took in Canada, Australia, South Africa, and the United States.

Part II of this paper considered modern day criminal disenfranchisement laws. There has been a marked occurrence of international jurisprudence grappling with the constitutionality of criminal disenfranchisement laws. To investigate this occurrence, a series of representative cases was examined. This included looking at the Sauvé judgment from the Canadian Supreme Court, the NICRO judgment from the South African Constitutional Court, and the Hirst judgment of the ECtHR. Many commonalities emerged. On the basis of the judicial treatment of the chosen cases in their representative jurisdictions, a trend was identified. Many of the same arguments arose among these cases. There was a similar pattern of judicial treatment of the issues. In all three cases, it was found that the given disenfranchisement regime disproportionately violated the right to vote. A final synthesis section considered how criminal disenfranchisement endured through the ages, with a discussion of the role of politics, and public opinion in formulating penal policy.

Part III built on the analysis from Part II by looking at the nature, scope, and effects of this trend. One characteristic of this trend is the judicial treatment of the issue. A second characteristic was the argumentation cited by the respective governments, and prisoners challenging the laws. The important distinction in interpretation between disenfranchisement as a punishment, and disenfranchisement as a regulation was considered. Generally, the interpretation of disenfranchisement as regulation was dominant. It was shown that the courts in the representative cases followed a ‘guarding of human rights protection’ approach in their judgments. In terms of the scope of the trend, it was shown that while the representative cases favoured rights protection, the trend was not particularly strong because criminal disenfranchisement regimes were still in practice in a limited form. When considering the effects of the trend, it was shown that there is some promise that it can be strengthened through the use of a transnational judicial dialogue. This sort of dialogue was present in the representative cases. The possibility of extending the transnational judicial dialogue was considered using an American case study. It was seen that if the American Supreme court be more open to considering international jurisprudence, there may be hope for the trend towards greater criminal franchise to extend. This idea was pursued by looking at the increasingly popular concept of
human dignity as a basis for challenging the constitutionality of disenfranchisement laws, under the Eighth Amendment of the American constitution.

Criminal disenfranchisement is a concept deeply rooted in historical notions of shame and belonging. So long as the unworthy status of prisoners is the norm, notions which attempt to equate prisoners to other citizens seem controversial and profane. Society has been able to shed moral worthiness criteria in relation to race, gender, and class. Yet, the stigma of criminal conviction remains. Constitutional courts have been taking progressive steps in recognizing greater rights protections for prisoners. However, the fundamental human rights of prisoners are still vulnerable, and will remain so until sociopolitical approaches towards punishment undergo radical change. The trend towards greater criminal franchise ultimately speaks to the bigger issue of the infringement of constitutionally protected rights by governments. Related to this is the ability of the judiciary to act within their own powers to mitigate, to the greatest extent possible, the presence and effects of these infringements. The bold pronouncements of judges working together to form an international consensus on contentious constitutional issues is promising. Human rights are more than words in constitutional documents. They are fundamental principles worth protecting for all equally.
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