Punishment, Penal Policy and Citizenship
Kara, polityka kryminalna, prawa i obowiązki obywatela

Cormac Benham
University of Sheffield, England

Abstract: This chapter reviewed the legal and political debates on punishment, penal policy and citizenship, with particular reference to voting rights for prisoners. With universal adult suffrage taken for granted in liberal democracies, prisoner enfranchisement remains one of the few contested electoral issues in twenty first century representative government. It is at the intersection of democracy and punishment. The objective of this chapter is to examine the debates surrounding prisoners and the franchise. Attempts to restrict prisoners from voting - the foundation of modern citizenship - have been an issue of some controversy in a number of jurisdictions in recent decades. This chapter begins by setting out the historical antecedents of prisoner disenfranchisement, usually associated with civil death statutes and based on a social contract argument. It then examines the rationale/s for and against disenfranchisement and how these have been utilized by politicians, policymakers and the judiciary to remove or confirm the right to vote. It concludes by considering if the decision to enfranchise or disenfranchise prisoners indicates something deeper about penal policy in different jurisdictions. Whether the debates were conducted in the serene surrounds of the courtroom or the hothouse of the parliamentary chamber, the decision to enfranchise or disenfranchise prisoners gives us an insight into the impact of imprisonment on citizenship, but can also give an indication of a jurisdiction’s penal policy and wider attitudes towards the treatment of its confined citizens. Uggen et al. concluded that ‘it seems likely that more punitive nations devalue and stigmatise those convicted of crimes and are hence more likely to deprive them of citizenship rights’.

Keywords: punishment • penal policy • citizenship • imprisonment • prison regulations

Streszczenie: Niniejszy rozdział przedstawia analizę prawnych i politycznych aspektów kary, polityki kryminalnej i obywatelstwa, ze szczególnym uwzględnieniem prawa wyborczego osób osadzonych. W liberalnych krajach demokratycznych posiadanie powszechnego prawa wyborczego uważane jest za oczywiste. Jednak nadanie prawa wyborczego osobom osadzonym pozostaje jedna z niewielu zakwestionowanych przez przedstawicieli rządu kwestii w dwudziestym pierwszym wieku, ponieważ znajduje się na skrzyżowaniu dróg demokracji i kary. Celem tego rozdziału

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Introduction

Despite advances in human and civil rights over the last two centuries, prisoners’ rights remain contested in many societies. Prisoners (and former prisoners) carry legal sanctions that prevent them from engaging in activities associated with modern notions of citizenship. One area of particular disagreement is prisoners’ access to the franchise. In some jurisdictions, legislation has been enacted specifically to prevent prisoners from voting and in others, it is considered a secondary punishment that accompanies the deprivation of liberty. Certain jurisdictions preclude those it imprisons from voting, even after they have completed their sentence.

The objective of this chapter is to examine the debates surrounding prisoners and the franchise. Attempts to restrict prisoners from voting - the foundation of modern citizenship - have been an issue of some controversy in a number of jurisdictions in recent decades. This chapter begins by setting out the historical antecedents of prisoner disenfranchisement, usually associated with civil death statutes and based on a social contract argument. It then examines the rationale/s for and against disenfranchisement and how these have been utilized by politicians, policymakers and the judiciary to remove or confirm the right to vote. It concludes by considering if the decision to enfranchise or disenfranchise prisoners indicates something deeper about penal policy in different jurisdictions.

It is widely accepted that even in the most advanced liberal democracies there are limitations on the right to vote, depending on citizenship, age, mental competency and residency. Prisoner disenfranchisement remains one of the few contested electoral issues in twenty first century democracies. It is at the intersection of democracy and punishment. The arguments for and against the disenfranchisement of prisoners have been widely examined in academic...
literature and political discourse. These have considered whether prisoners should be denied the franchise and if so, should the denial of the right to vote be a collateral consequence of imprisonment or part of the penalty for breaking the law. The outcome of the deliberations on prisoners' access to the franchise can yield a number of insights, not just into the impact of imprisonment on citizenship, but also give some indication of a jurisdiction's penal policy and wider attitudes towards the treatment of its confined citizens.

Origins of Prisoner Disenfranchisement

Disenfranchisement has its roots in the ancient concept of civil death based in Greek, Roman, Germanic and Anglo-Saxon legal traditions. In ancient Greece, 'civil death' meant that certain offenders forfeited all their civil rights, including the right to property and possession, the right to inherit and bequeath, the right to bring suit, the right to vote and the right to appear in court. In Roman law, an individual pronounced 'infamous' was prohibited from serving in the army, appearing in court, making speeches, attending assemblies, and voting. Being declared infamous could be for a criminal or immoral act. In later times, Germanic tribes used 'outlawry' to punish those who committed serious crimes. The outlaw was expelled from the community, their property confiscated and they were denied all rights. During the Middle Ages, the outlaw was deprived of legal existence. Ultimately, in extreme cases, the outlaw being outside society and therefore beyond protection from the realm, could be killed with impunity.

English law created its own punishment of attainder. In feudal England, the Crown seized the property of felons as part of their punishment. The attained, for a felony or crime of treason, was liable to three penalties: forfeiture – the confiscation of chattels and goods; 'corruption of the blood' – they were unfit to inherit, possess or leave their estate to heirs, and their land was forfeited to the local lord; and finally, the attained was 'dead in law' – they could not bring suit or appear as a witness in court. The convicted could not perform any legal function, including voting. While most civil death statutes have been abolished in liberal democracies, one of the few which remains as a direct result of conviction and sentence to imprisonment is loss of the right to vote.

Social contract discourse has been employed in the debates on prisoner enfranchisement with reference to Hobbes, Locke, Rousseau and Kant. In social contract theory, the stripping of any citizen of political rights is problematic. But for those who break the social contract, there must be a sanction. Hobbes argued that whoever 'breaketh his Covenant ... cannot be received into any Society.' Locke believed that a murderer has 'declared War against all Mankind, and therefore may be destroyed as a Lyon or Tyger.' Rousseau believed that 'since no

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man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority over men'. However, there were exceptions, as 'every malefactor by attacking social rights, becomes on forfeit a rebel and a traitor to his country; by violating its laws he ceases to be a member of it; he even makes war upon it'. For Kant, those who transgress the criminal law are unfit to be citizens. They have lost their citizenship by their own criminal act, in which case, although he is allowed to stay alive, he is made into a mere tool of the will of someone else, either of the state or of another citizen'. Some or all of these arguments are used by modern advocates of disenfranchisement of prisoners.

International policy and practice

Individuals bring rights with them to prison. These include the right to a safe living environment, legal representation, healthcare, education, etc. While courts have generally taken a "hands off" approach to the day to day running of prisons, leaving prison authorities a wide level of discretion, they have nevertheless ruled that despite the limitations on their liberty, prisoners retain certain rights. In Wolff v McDonnell, the US Supreme Court noted that 'though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country'. Lord Wilberforce concluded that: 'under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'.

Rights has ruled that: 'Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed'. In relation to citizenship rights, especially the right to vote for prisoners, the issue is considered more complex. In 2001, the UK High Court rejected an application from three prisoners that the denial of their right to vote contravened the European Convention on Human Rights. The Court refused to interfere with the powers of the legislature, which, it believed, should retain the ultimate authority on deciding the limitations on those who could vote. Lord Justice Kennedy believed that 'there would seem to be no reason why Parliament should not, if so minded, in its dual role as legislator in relation to sentencing and as guardian of its institutions, order that certain consequences shall follow upon conviction or incarceration without transgressing in any way the philosophy expounded'. Justice Denham in the Irish Supreme Court ruled that a prisoner 'had no absolute right to vote under the Constitution'. She concluded that the 'inequality as between a free person and a person lawfully in prison arises as a matter of law. It is a consequence of lawful custody that certain rights of the prisoner are curtailed, lawfully. Many constitutional rights are suspended as a result of the lawful deprivation of liberty'. In the US Supreme Court in Richardson v Ramirez, the majority recognised the disagreement on prisoner enfranchisement but regarded the question as one for the legislature and ultimately the people, not the courts.

Pressed upon us by the respondents, and by amici curiae, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon

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10 Ibid. p. 209.
11 Cited in Plantic, above n 1, p.157.
15 Hirst v. United Kingdom, (No.2) [GC], Application no. 74025/01 (judgment of 6 October 2005), at para 69.
16 R (Pearson and Martinez) v. Secretary of State for the Home Department, EWHC Admin 239 [2001], at para 18.
that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But 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. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.\(^{18}\)

International human rights conventions have been considered in the arguments over citizenship rights for prisoners, and although they do not explicitly state prisoners have a right to vote, they can have legal and moral authority. Some declarations or more significantly conventions may become *de facto* laws, requiring adherence by virtue of treaty obligations.\(^{19}\) The International Covenant on Civil and Political Rights (ICCPR) states: ‘Every citizen shall have the right and opportunity…without unreasonable restrictions…To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors’\(^{20}\) The European Convention on Human Rights has particular bearing in European jurisdictions which have enacted it into domestic legislation. Under Article 3 of Protocol no.1 of the European Convention on Human Rights countries must ‘hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’.

Globally, policy and practice differ widely around prisoners’ access to the franchise. Electoral law is complex. In some countries it varies from state to state or province to province. It is rarely straightforward and therefore documenting the official voting rights of prisoners and ex-prisoners is difficult because many constitutions and electoral laws are not explicit on the rights of these individuals.\(^{21}\) A 2003 study found that of the 54 countries examined which either totally barred or had restrictions on prisoner voting, 4.3 million were not allowed to exercise their franchise because of their incarceration – three quarters of these were in the US and the Russian Federation.\(^{22}\) The United States and the United Kingdom have attracted most attention because of their prolonged and intense debates over prisoner enfranchisement.\(^{23}\) The US stands as an ‘an outlier in the world scene\(^{24}\) with over 5.8 million of its citizens disenfranchised,\(^ {25}\) the majority of whom are no longer incarcerated. For nearly a decade, successive UK governments have resisted a ruling from the European Court of Human Rights which found that its blanket ban on convicted prisoners from voting contravened the European Convention on Human Rights.\(^ {26}\)

Throughout Europe there are wide variations on prisoner enfranchisement. Some countries allow all prisoners to vote; others limit this right and some have blanket disenfranchisement. In 2005, the situation was reviewed by the European Court of Human Rights in the Hirst (No. 2) case. Eighteen countries allowed prisoners to vote without restrictions. They included Albania, Azerbaijan, Croatia, the Czech...
Republic, Denmark, Finland, the Former Yugoslav Republic of Macedonia, Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland and the Ukraine. In the 2000 elections in Kosovo, registered prisoners who had not been convicted of a felony were permitted to vote. In 13 states prisoners were barred from, or were unable to vote. These were Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey and the United Kingdom. In Belgium, the period of disqualification may extend beyond the prison term. According to Section 32 of the Russian constitution, adopted in 1993, ‘Deprived of the right to elect and be elected shall be citizens recognised by court as legally unfit, as well as citizens kept in places of confinement by a court sentence’.

Twelve states limited voting for prisoners. These included Austria, where the vote was removed from prisoners sentenced to terms exceeding one year ‘if they committed the crime with intent’. Reflecting the history and politics of Bosnia and Herzegovina, restrictions applied to those accused of serious violations of international law or who had been indicted before the International Tribunal. In France, prisoners were allowed to vote if given this right by the court. In Italy, serious offenders and bankrupts who were sentenced to more than five years lost the right to vote. Minor offenders debarred from holding public office lost the right at the discretion of the judge. In Luxembourg, prisoners retained the vote unless the court removed it as part of sentencing. In Norway, the right was rarely revoked by a court, and was usually restricted to treason and national security issues. In Poland, prisoners sentenced to three or more years could lose the vote. In Romania, prisoners could be debarred from voting if the principal sentence exceeded two years.

After the Hirst (No. 2) judgment in 2005, which ruled in favour of allowing some prisoners to vote, a number of European countries introduced legislation to enfranchise prisoners. In 2006, the Irish government enacted legislation to allow all prisoners to vote. Cyprus, which had previously banned prisoners from voting, enfranchised all prisoners, with polling stations set up inside prisons. In Belgium new legislation was passed in 2009 removing the automatic link between conviction and disenfranchisement. The sentencing judge was now required to rule explicitly on whether persons convicted of a crime or a misdemeanour should be deprived of their voting rights as an additional punishment. In Moldova, prisoners were able to vote following legislation in 2010. In Austria, following the Frodl judgment on prisoner voting in the ECtHR, discussions took place to respond to the judgment. In Slovakia, after a Constitutional Court ruling in February 2009 annulled enactments banning prisoners from voting as unconstitutional, a measure was introduced to ban prisoners serving a custodial sentence for a serious offence from voting. All other prisoners are allowed to vote.

Even among the countries of the Council of Europe who adhere to or have signed into domestic legislation the European Convention on Human Rights there is no unified established position. This was recognised by the European Court of Human Rights when it stated that under Article 3 of Protocol no.1 rights ‘are not absolute’ and that states must be ‘allowed a wide margin of appreciation in this sphere since there are numerous ways of organising and running electoral systems and a wealth of differences, 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’. With the legal and political positions contested, the next section considers the rationale(s) employed in the debates on whether to enfranchise or disenfranchise prisoners.

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27 Hirst v. United Kingdom (No. 2) 2005, at paras 32–3; Rottinghaus, above n 22, p. 32.
28 Hirst v. United Kingdom (No. 2) 2005, at paras 32–3.
29 Hirst v. United Kingdom (No. 2) 2005, at para 33.
30 Frodl v. Austria, Application no. 20201/04 (judgment of 8 April 2010), at para 23.
To Enfranchise or Disenfranchise Prisoners

There are a number of substantive arguments around whether prisoners should be allowed to vote or alternatively denied access to the franchise. This section will examine some of the principal justifications put forward on both sides of the argument. Those in favour of allowing prisoners to vote usually make the case around a number of themes: the nature of citizenship, democratic legitimacy, rehabilitation and inclusion. They believe that without consent being given by all citizens, the social contract is eroded and the polity is undermined. Allowing prisoners to vote sends a message of inclusion, encourages them to maintain their connection with society inside and prepares them better for life on the outside. Advocates of enfranchisement believe that participation in the electoral process will inspire prisoners towards a sense of community spirit and assist in their becoming pro-social and law-abiding citizens. Others argue from an egalitarian perspective – prisoners are in greater proportion from poorer areas and therefore their communities are under-represented and subsequently, become more marginalised. Removing the right to vote becomes another form of invisible punishment, ‘that is accomplished through the diminution of the rights and privileges of citizenship’.

The arguments advocated in favour of disenfranchising prisoners usually begin with the ancient concept of ‘civil death’, believing that prisoners (and in some cases ex-prisoners) should be stripped of their rights of citizenship. Those who have committed a crime have broken the social contract, put themselves outside the law voluntarily, and therefore, should be denied the opportunity to decide who will make the law. Disenfranchisement should be used to remind prisoners that citizenship is a privilege and must be earned, by adherence to the laws, communally agreed. For supporters of prisoner disenfranchisement, imprisonment should not merely deny liberty. It should be used for, not just as, punishment. Removing the right to vote will deter others from committing a crime if they see this right taken away because of a conviction and sentence. Disenfranchisement expresses a symbolic denunciation with moral condemnation to accompany the denial of liberty. Some or all of these arguments have been used in political and legal deliberations over prisoners’ right to vote. We will begin by considering prisoner voting and the social contract.

Social Contract

Social contract discourse had been used by advocates on both sides of the argument in the debates over prisoner enfranchisement. Voting is ‘the most tangible manifestation of the social contract’, the single most significant feature underpinning the modern democratic polity. To remove that right is a very serious diminution of citizenship, a decision that should not be taken lightly. Advocates of disenfranchisement argue that if an individual breaks the law, they voluntarily remove themselves from the social contract and subsequently the rights associated with it, particularly the right to vote. Conversely, advocates of prisoner enfranchisement believe that the polity is undermined because some members of the community are denied their right to participate in collective decisions that will impact on all citizens, whether inside or outside prison.

One modern advocate of prisoner disenfranchisement believes that prisoners have ‘themselves repudiated their democratic citizenship rights by the implicit denial of citizenship entailed in their offence’. Allowing prisoners to vote, according to

Peter Ramsay, undermines the polity and is ‘faking democracy’ because while incarcerated they are not part of the process of ‘collective self-rule’. The democratic process is eroded by allowing those who have cannot contribute to collective self-government to vote. Finally, rather than undermining democratic legitimacy, ‘[p]risoner disenfranchisement, by ensuring that the political playing field is formally equal and free of executive control, is one of the institutional forms of political equality’. Similar arguments were advocated in the late 1990s when the citizens of Massachusetts debated whether prisoners should be allowed to vote. Until the right was removed, Massachusetts was one of the few states in the US that allowed convicted felons to vote. The leader of the Republicans in the state senate, Francis Marini made the case that the practice of allowing prisoners to vote turned the social contract on its head. ‘It makes no sense,’ he argued, ‘[w]e incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives.’ The United Kingdom government in the European Court of Human Rights argued disenfranchisement was legitimate because, ‘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’.

On the other hand, those who would allow prisoners to vote believe that depriving any person of the right to vote negates the social contract as power is wielded without the authority to do so. The stripping of the right to vote undermines the social contract that should always be mutual and undermines the polity, not just for prisoners, but for all citizens. These topics were raised in perhaps the most extraordinary case concerning prisoners’ access to the franchise. In 1995, Yitzhak Rabin, the Prime Minister of Israel was killed by Yigal Amir. Under Israeli law all prisoners were allowed to vote. The Israeli courts refused to revoke Amir’s citizenship, which would have prevented him voting in the election to replace Rabin. The court declared that disenfranchisement would hurt not just Amir, but Israeli democracy. Imprisonment was his punishment, the Supreme Court ruled, and ‘without the right to vote, the infrastructure of all other fundamental rights would be damaged ...’ In a democratic system, the right to vote will be restricted only in extreme circumstances enacted clearly in law. The court found that the right to vote and be elected are the infrastructure of democracy. In the subsequent election, Amir was allowed to vote.

**Citizen or Subject?**

Those who seek to disenfranchise prisoners argue that only citizens have a right to vote and ‘it would not be reasonable to consider criminals as citizens’. Abiding by the law is as important a part of good citizenship as voting. To disobey the law, communally created, undermines the right to the benefits of that mutuality. Citizens should only be allowed to vote if the rest of society is ‘reasonably sure that they will exercise that right in good faith - that they share a common commitment to our nation, our government and our laws’. Indeed, disenfranchisement can communicate to prisoners that ‘the rights of liberal citizenship entail a responsibility to avoid conduct harmful to other citizens’. Plannic argues that disenfranchisement adds to and ‘promotes the use of punishment to form character by supporting the moral norm-setting of criminal law.’ Participation in civil society on an equal basis should be
only open to citizens and the person who commits a crime ‘disqualifies himself from participating in the formation of new laws. Society does not bar criminals when it imprisons them; criminals excluded themselves from society’.\textsuperscript{43} A prisoner ‘remains subject to the laws that he had previously accepted, just as he remains protected by them, but he no longer has the right of political participation. During the time of his imprisonment a criminal is a subject not a citizen’.\textsuperscript{44} Coming from a different perspective and making the case to preserve prisoners’ access to the franchise, Reiman agrees. ‘In a democratic policy the right to vote is a very special right…To deny the right to vote…reduces people from citizens to subjects’.\textsuperscript{45}

**Limits of Democratic Liberty**

Disenfranchising a section of the population based on their actions, even if they are illegal, tests the limits of liberty in a democracy. It leads to those who vote making a judgment on who has the right to the franchise, which will subsequently impact on who will become legislators and ultimately, the executive. Cheney concluded that ‘the issue of votes for prisoners goes to the heart of those who are given the power to participate in the political process and those who are dis-empowered’.\textsuperscript{46} Those arguing in favour of stripping prisoners of voting rights have historically drawn on similar arguments that have been used to restrict voting rights of women, the working class, people of no property, and minority communities.\textsuperscript{47} In Sauvé, the majority concluded that: ‘The government’s novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation’.\textsuperscript{48} Similar sentiments were elaborated by in *Hirst v. United Kingdom*, that to deny the vote to prisoners is ‘tantamount to the elected choosing the electorate’.\textsuperscript{49}

In the Grand Chamber of the ECtHR the UK government argued that under the ECHR the right to vote was not absolute and furthermore, ‘the finding of a violation was a surprising result, and offensive to many people’. The government claimed that disenfranchisement would achieve the aims of preventing crime, punishing offenders, 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’. While the Court accepted that each signatory to the ECHR must be allowed a margin of appreciation in this sphere:

the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle.\textsuperscript{50}

The ECtHR believed that the automatic blanket ban lacked proportionality and encompassed those who served from one day to life in prison and those who were convicted of minor to the most serious offences. Rejecting the UK government’s argument that parliamentary approval had been given for this measure, the Grand Chamber also offered some advice to European parliamentarians: ‘It cannot be said that

\textsuperscript{43} Plannic, above n 1, p. 154.
\textsuperscript{44} Ibid., p. 154.
\textsuperscript{49} Hirst v. United Kingdom (No.2), at para 46.
\textsuperscript{50} Hirst v. United Kingdom (No. 2), at para 59.
there were any substantive debates by members of the legislature on the continued justification in light of modern-day penal policy and human rights standards for maintaining such a general restriction on the right of prisoners to vote.\textsuperscript{51}

When confronted with the choice of whether or not to enfranchise prisoners, there is a sometimes stifling concern on the part of politicians to avoid being seen as soft on crime or prisoners for fear of losing electoral support. Politicians claim to be following the public mood in resisting enfranchisement, perhaps reflecting a more embedded ‘populist punitiveness’, which conveys ‘the notion of politicians tapping into, and using for their purposes, what they believe to be the public’s generally punitive stance’.\textsuperscript{52} In 2010, the UK Prime Minister, David Cameron set out his new government’s position on the enfranchisement of prisoners: ‘It makes me physically ill even to contemplate having to give the vote to anyone who is in prison. Frankly, when people commit a crime and go to prison, they should lose their rights, including the right to vote’.\textsuperscript{53}

The South African judiciary echoed this sentiment in the 1990s when the government tried to prevent prisoner voting. The government argued that making provision ‘for convicted prisoners to vote would in these circumstances…send an incorrect message to the public 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’.\textsuperscript{55}

\textbf{Inclusion and Reintegration}

Those who believe in prisoner voting argue that prisoners’ maintaining a link with society outside and in particular with their local community can act as spur towards reintegration. To remove the right to vote - one of the most significant aspects of citizenship – adds to the dislocation from, and disconnection with, civic society. It creates another layer of punishment beyond the denial of liberty, becomes an instrument of social exclusion, and can have significant longitudinal consequences in terms of voting among ex-prisoners. To deny the right to vote not only undermines an individual’s citizenship, it can weaken the fabric of communities that have greater proportions of their citizens incarcerated. Permanent disenfranchisement (as can happen in some US states) suggests that an individual will never change and indeed is incapable of so doing. Engaging in the political process, advocates for prisoner voting argue, can encourage more respect for laws and lawmakers. The vast majority of those incarcerated will return to society and exclusion from the political process may be counter-productive for the purposes of reintegration.

Reintegration and inclusion were significant themes during the discussions that led to the Irish government introducing legislation to allow prisoners to vote in 2006. Prior to this, prisoners were in an anomalous position. There was not law on the statute books that prevented them from voting, but there was no facility for them to exercise their

\textsuperscript{51} Hirst v. United Kingdom (No. 2), 2005, at para 79.
\textsuperscript{53} David Cameron: Hansard, HC Debates, 3 November 2010, Vol. 517, col. 921.
\textsuperscript{54} Concurring judgement of Judge Caflisch in Hirst v. United Kingdom (No.2), 2005, at para 4.
franchise.\textsuperscript{56} In 2001, the Supreme Court concluded that on imprisonment, citizens lose certain rights, and one of these was the right to vote.\textsuperscript{57} Nevertheless, five years later, the government introduced legislation to allow prisoners to vote by postal ballot. Introducing the bill, Minister for the Environment, Heritage and Local Government, Dick Roche claimed that to enfranchise prisoners would encourage them to behave responsibly and appreciate the implications of citizenship. He believed that a prisoner has not ‘ceased to be a citizen or to enjoy the rights of the franchise. We should facilitate that person’s exercise of the franchise and encourage responsibility as part of the education process…There are rights and responsibilities of citizenship.\textsuperscript{58}

In \textit{Sauvé v. Canada (No. 2)} the majority of the Supreme Court found that the denial of the right to vote would not promote civic responsibility as the government had argued but it was ‘more likely to send messages that undermine the respect for the law and democracy than messages that enhance those values’. The court rejected the government’s argument that denying prisoners the vote because of some ‘vague and symbolic objectives’ of enhancing civic responsibility and respect for the rule of law. It refused to accept the position that certain categories of prisoner should receive additional punishment by denying them the right to vote. It also rejected the lack of proportionality in the exclusion of all prisoners sentenced to over two years to vote in federal elections. Denying ‘prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and undermines correctional law and policy towards rehabilitation and integration’. The Supreme Court ruled that the government had ‘failed to identify particular problems that require denying the right to vote, making it hard to conclude that the denial is directed at a pressing and substantial purpose’. The court concluded that to ‘deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility’.\textsuperscript{59}

\textbf{Disproportionate Impact}

Some law-breakers are more likely to be imprisoned than others and the bias evident in prison populations throughout the world indicates that a disproportionate number of poorer people and those from minority communities will be arrested for wrong-doing, prosecuted, end up before the courts, and be imprisoned. Internationally, ‘the marginalised groups in any society are invariably over represented in prisons’.\textsuperscript{60} Advocates of allowing prisoners to vote present a strong case that imprisonment – and if the removal of the right to vote is an intended or unintended consequence, subsequent disenfranchisement – disproportionally affects minority and poorer communities. This is particularly acute in the United States of America, where critics of prisoner disenfranchisement point out that while ‘disenfranchisement policies are theoretically race-neutral in their intent, in practice they produce a severely disproportionate racial effect’\textsuperscript{61}

While it has the highest imprisonment in the world, at over 707 per 100,000 and over 2.2 million people incarcerated,\textsuperscript{62} imprisonment in the United States is not evenly distributed. In 2007, for White men 18 years or over, one in every 106 was incarcerated; one in every 36 Hispanic men 18 years or over and one in every 15 Black men 18 years or over was behind bars.\textsuperscript{63} By 2012, the situation had become

\textsuperscript{56}See Behan above n 1, pp 61-90.
\textsuperscript{57}See Breathnach v. Ireland (2001).
\textsuperscript{58}Dick Roche, Minister for Environment, Heritage and Local Government: Address to Select Committee on Local Government, November 2, 2006.
\textsuperscript{59}Sauvé v. Canada (No. 2), 2002, at section 50. For an analysis of the majority and minority judgments in this case, see Manfredi, above n 1, passim.
so acute that to one commentator argued that the ‘mass incarceration of African-Americans is the civil rights issue of the day’. One consequence of this hyper incarceration among certain communities in the US was highlighted by the National Association for the Advancement of Colored People (NAACP). They pointed out that of the 5.3 million disenfranchised in 2008, nearly two million, or 38 per cent of the disfranchised were African American, and more than 10 per cent were Latino.

The disproportionate imprisonment of minority communities and the subsequent impact on citizenship rights has also been an issue in court cases in other jurisdictions. In the case of Sauvé v. Canada ((No. 2) which considered the federal government’s attempts to restrict voting among Canada’s prisoners, the majority held that the court must be mindful of its impact on minority populations. ‘In light of the disproportionate number of Aboriginal people in penitentiaries, the negative effects of the government’s proposals on prisoners would have a disproportionate impact on Canada’s already disadvantaged Aboriginal population’. In 2007, Aboriginal people comprised 17 per cent of federally sentenced offenders although the general Aboriginal population was only 2.7 per cent of the Canadian adult population. In August 2007, the Australian High Court struck down new legislation which would have disenfranchised all prisoners. While the court found that there were circumstances in which limitations could be placed on the right to vote, there was not enough evidence in this case. It should only be for a ‘substantial’ reason. The court emphasised the centrality of the franchise to the concept of representative government and ‘the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic’. The court continued: ‘the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship.’ The solicitor for Vickie Roach, the prisoner who took the case noted that: ‘with Aboriginal Australians incarcerated at a rate of almost 13 times that of their fellow Australians, it is also a vindication of Aboriginal rights.’

Proponents of disenfranchisement agree that even if most prisoners come from socially deprived areas and this may skew electoral contests in favour of wealthier classes, the victims of crime are predominately from poorer socio-economic categories and more marginalised areas. So instead of empowering the poor by allowing law breakers to vote, enfranchisement will take rights from poorer law-abiding citizens and give them to law-breakers. They are eager to point out that there is also popular support for the stripping of the right to vote from prisoners. In October 2005, in the wake of the Hirst judgment, the Manchester Evening News found that 74 per cent of respondents in their poll were against giving prisoners the right to vote. Five years later, 76 per cent of respondents believed that prisoners should not be allowed to vote. Only 17 per cent believed that they should retain the right to exercise their franchise. While there may be competing rights in this philosophical and political debate, the victims of crime and those who obey the law must win out over prisoners who have disobeyed the law, breached the social contract and hurt their fellow citizens.
Electoral Outcomes

The denial of the right to vote to any section of the electorate sends not just a symbolic message; it has undoubtedly very real impact on electoral outcomes. With so many felons and ex-felons disenfranchised in the US this not only excludes millions from voting but has a direct impact on election results. Data prepared for the 2012 presidential election estimated that disenfranchisement of felons and ex-felons had increased to some 5.85 million citizens, one in every 40 adults. During the 2000 presidential election, 537 votes separated George W. Bush and Al Gore in Florida when the US Supreme Court decided the outcome. Over 600,000 Floridians were disenfranchised because of a prior felony conviction. Analysis of voting patterns and political preferences found that, even with a conservative estimate of the numbers of ex-felons voting, Al Gore would have won the state by over 30,000 votes, thus changing the outcome in the Electoral College. The disenfranchisement of these former prisoners was a crucial factor enabling George W. Bush to carry the state and win the 2000 presidential election. It is not an exaggeration to say that the dis-enfranchisement of ex-felons in Florida and other states changed the course of American, and arguably world history.

Conclusion

Prisoner enfranchisement rarely enters mainstream political discourse, nevertheless, denying any citizen the right to vote, either temporarily or permanently, is a symbolically serious matter, as marking one’s temporary or permanent exclusion from the rank of full citizen, and thus from full membership of society.

While many countries constitutions or statutes do not specifically mention prisoners’ access to the franchise, in the jurisdictions that allow some or all prisoners to vote, this was usually allowed after court rulings rather than through initiatives by the legislature or executive. Although the courts have not been absolutist in terms of prisoners’ citizenship rights, more often than not, it has been the judiciary rather than politicians who have examined the philosophical, legal and constitutional issues in greater detail. In many cases, politicians – either for political expediency or because of deeply held beliefs - have reduced the issue to a zero sum equation: to enhance prisoners’ rights equates with reducing victims’ rights, and few want to be seen to side with the former.

Whether the debates were conducted in the serene surrounds of the courtroom or the hothouse of the parliamentary chamber, the decision to enfranchise or disenfranchise prisoners gives us an insight into the impact of imprisonment on citizenship, but can also give an indication of a jurisdiction’s penal policy and wider attitudes towards the treatment of its confined citizens. Uggen et al. concluded that ‘it seems likely that more punitive nations devalue and stigmatise those convicted of crimes and are hence more likely to deprive them of citizenship rights’. The United Kingdom and the vast majority of US states generally have come down against allowing prisoners to vote and this reflects a more punitive tone of their penal policies. However, the countries mentioned in this chapter that allow all or some prisoners to vote - Australia, Canada, Ireland, Israel and South Africa – have less in common in terms of their penal policies.

References:

76 Manza and Uggen, above n 1, p. 8.
81 See M. Cavadino and J. Dignan, Penal Systems: A Comparative Approach
As this chapter outlined, whether prisoners should be allowed access to the franchise remains contested. Those who argue for prisoner disenfranchisement are convinced that the rights of citizenship are inextricably linked with responsibilities and obligations. Failure to appreciate the responsibilities and obligations takes away the rights of citizenship, central to which, is the right to vote. Advocates of disenfranchisement believe that it sends the most powerful message, both real and symbolic, to both law-abiding and non-law-abiding citizens of the importance society places on obeying the rules created by representatives of the people. A belief in the democratic process means that those who have not been willing to accept the outcome of that process - the passing of laws - debar themselves from the right to participate in it. 'The disenfranchisement of criminals' according to Plannic 'is one of the surest signs of the political virtues of democracy'. Those who argue that allowing prisoners to vote is more egalitarian 'would be betraying its own principle and corrupting its political virtue with the 'spirit of extreme equality'.'  

The polity will be stronger - even for those who are currently denied the right to vote - by not allowing those who break the rules have a say on who will make the rules. 

Proponents of prisoner enfranchisement suggest the issue goes beyond the right to vote. It says something about a society's attitude toward those who break the law. 'Disenfranchisement is driven not by pragmatic realities or theoretical principles but rather by the atavistic and deep-rooted social need to define the boundaries of the community by stigmatising some persons as outsiders'.' Those who argue that prisoners and ex-prisoners undermine the democratic process for all tend to label prisoners as other, separate, deviant who act out of the ordinary, with distinct values who, given the opportunity, would vote differently than the rest of society. Mauer argues that disenfranchisement 'generally is premised on assumptions about people in prison that portray them as qualitatively distinct from citizens in the outside world'. If allowed to vote, prisoners will corrode the process for the rest of the law-abiding electorate. Based on the premise that they taint the electoral system, they can then be placed outside it, and disenfranchisement becomes another aspect of prisoners being 'othered'. Enfranchisement of prisoners rejects this 'othering' and sends out a powerful moral message that although their crimes are unacceptable, they as citizens, are not beyond the pale. Allowing prisoners to vote will, according to advocates of prisoner enfranchisement, encourage respect for laws and is a powerful incentive to embrace a citizen role. Prisoner enfranchisement affirms their membership in the wider society, strengthens community and social bonds, and is part of the rehabilitative process of re-connecting with the polity.

This chapter reviewed the legal and political debates on punishment, penal policy and citizenship, with particular reference to voting rights for prisoners. With universal adult suffrage taken for granted in liberal democracies, prisoner enfranchisement remains one of the few contested electoral issues in twenty first century representative government. It is at the intersection of democracy and punishment. With deeply held opinions on both sides of the argument, and symbolic and real issues at stake, it seems the debates over whether to enfranchise or disenfranchise prisoners will remain a source of controversy for some time to come.

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2. Plannic, above n 1, p. 162.
3. HLR Note, above n 2, p. 1301.
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Corresponding author C. Benham; University of Sheffield, England; e-mail: C.M.Behan@sheffield.ac.uk

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