

2003

## Between Here and There is Better Than Anything Over There: The Morass of *Sauvé V. Canada* (Chief Electoral Officer)

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### Citation Information

Haigh, Richard and . "Between Here and There is Better Than Anything Over There: The Morass of *Sauvé V. Canada* (Chief Electoral Officer)." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 20. (2003).

DOI: <https://doi.org/10.60082/2563-8505.1045>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol20/iss1/13>

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# BETWEEN HERE AND THERE IS BETTER THAN ANYTHING OVER THERE: THE MORASS OF SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER)

Richard Haigh\*

In 1993, the Supreme Court of Canada was asked to decide on the constitutional legitimacy of legislation prohibiting all prisoners from voting in federal elections.<sup>1</sup> Given that the case ended up in our highest court, the parties must have considered it a fairly thorny problem to resolve. Apparently they were mistaken. In a mere 95 words, fewer than the average grade two writing assignment, the Court pronounced that the solution should have been obvious. Here is the judgment in its entirety:

We are all of the view that these appeals should be dismissed.

The Attorney General of Canada has properly conceded that s. 51(e) of the *Canada Elections Act*, R.S.C., 1985, c. E-2, contravenes s. 3 of the *Canadian Charter of Rights and Freedoms* but submits that s. 51(e) is saved under s. 1 of the *Charter*. We do not agree. In our view, s. 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court.<sup>2</sup>

Cut to 2002, almost 10 years later, and the Court is faced with virtually the same problem. This time, however, the legislation has been tinkered with.

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\* Visiting Professor, Osgoode Hall Law School and Director of Programs, Osgoode Professional Development Program. Thanks to Jonathan Hood for helping out with some of the research for this paper, Michael Sobkin, Steve Haigh and Charlotte Davis for their excellent critical comments and suggestions. The title comes from a line in “Conduit for Sale” by Pavement.

<sup>1</sup> *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 [hereinafter “*Sauvé (No. 1)*”].

<sup>2</sup> *Id.*

Instead of applying to all prisoners, the new legislative provision denies the right to vote in federal elections only for prisoners serving sentences of two years or greater. The federal government maintains that the new version is valid. Again, it is Richard Sauvé who is the lead challenger.

The case is indexed as *Sauvé v. Canada (Chief Electoral Officer)*.<sup>3</sup> I imagine someone like Stephen Spielberg calling it *The Neverending Return of Sauvé*. Just like the plot in a movie sequel, the decision has mushroomed into something much more cumbersome and less likely to entertain. Two lengthy judgments, split 5-4, highlight the complexity. The Chief Justice, speaking on behalf of Arbour, Binnie, Iacobucci, and LeBel JJ., found the legislation remained unconstitutional. Justice Gonthier, carrying Bastarache, L'Heureux-Dubé, and Major JJ., thought it was now a reasonable limit and so saved by section 1 of the *Charter of Rights and Freedoms*.<sup>4</sup>

*Sauvé (No. 2)* provides an excellent example of how judgments are as much essays about our time as they are legal decisions.<sup>5</sup> Rather than concentrating on a critical diagnosis of the judgments, this paper, in the manner of Marshall McLuhan's "probes," instead makes a number of observations about the case: the growing rift amongst Court members that is played out both linguistically and rhetorically; the dialogue metaphor in a new guise; public opinion and media representation of the Court; the growing moral and ethical relativism of section 1 analysis; and finally, a look at broader questions about voting and the nature of rights-based litigation. Framing these discussions and providing a counterpoint to the gravitas of the Supreme Court decision are short excerpts from the Special Committee on Electoral Reform that was given the task in 1992 to deal with a number of electoral issues, including whether prisoners should have voting rights.

## I. SAUVÉ REDUX

Mr. Andre: I don't see how I could prevail on my kids to take their vote responsibly when we feel that anybody can vote. That someone could be imprisoned for torture and that person's vote is just as important as the vote of a responsible citizen, I just don't accept that view. I think the vote is very important and that we should be a

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<sup>3</sup> *Sauvé v. Canada (Chief Electoral Officer)* [2002] S.C.J. No. 66. [hereinafter "*Sauvé (No. 2)*"].

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "*Charter*"].

<sup>5</sup> There have already been articles that critically dissect the case and to which I could add little — see e.g., Weinrib, "The *Charter's* First Twenty Years: Assessing the Impact and Anticipating the Future," presented at the 2002 Isaac Pitblado Lectures, Winnipeg, November 2002. Copy on file with author.

little more selective, if you will. I find it incredible that such is our feeling about the act they have committed that we would throw them into prison, but yet say that we don't want to deny them the right to vote. That, to me, just isn't common sense.<sup>6</sup>

*Sauvé* (No. 2) began in 1996 at the Federal Court.<sup>7</sup> Parliament had responded to the ruling in *Sauvé* (No. 1) by enacting a new section 51(e) to the *Canada Elections Act*,<sup>8</sup> which denied the right to vote only to those inmates serving federal sentences of two years or more. At the trial, Wetston J., held that section 51(e) violated the Charter guarantee of the right to vote without being demonstrably justified, and was therefore void. In working through the section 1 analysis, he was persuaded that the government's objectives were pressing and substantial, but concluded that the legislation was overbroad and failed the minimal impairment test. Furthermore, he found that the legislation was disproportionate, as the negative consequences of the challenged provision outweighed any benefits it might have.<sup>9</sup> On appeal to the Federal Court of Appeal, Linden J.A., speaking for the majority, reversed the trial judge and upheld the denial of voting rights.<sup>10</sup> He found that Parliament's role in maintaining and enhancing the integrity of the electoral process and in exercising the criminal law power warranted deference. Denying prisoners the right to vote in appropriate circumstances fell within a reasonable range of alternatives open to Parliament and was not overbroad or disproportionate. Like Wetston J., Desjardins J.A. in dissent emphasized the absence of evidence of benefits flowing from the denial and would not have saved the legislation under section 1 of the Charter. The dissenting judgment paved the way for the return of *Sauvé* to the Supreme Court.

The bulk of both McLachlin C.J.'s majority and Gonthier J.'s minority judgments is centred on section 1 of the Charter. The government conceded that section 3 of the Charter — "every citizen has the right to vote in both federal and provincial elections and is qualified for membership therein" — is breached by the Act. The Court also dealt with a claim that the Act was contrary to section 15 of the Charter but the majority declined to address this aspect, given their finding that section 3 was breached.<sup>11</sup>

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<sup>6</sup> Special Committee on Electoral Reform, March 15, 1993.

<sup>7</sup> [1996] 1 F.C. 857, 106 F.T.R. 241, 132 D.L.R. (4th) 136 (T.D.).

<sup>8</sup> S.C. 1993, c. 19, s. 23. It is now found in substantially the same form at s. 4(c) of the *Canada Elections Act*, S.C. 2000, c. 9 (the "Act"). In fact, the amendments to the Act came prior to the S.C.C.'s decision in *Sauvé* (No. 1) but after the Ontario Court of Appeal decision in that case.

<sup>9</sup> [1996] 1 F.C. 857 (T.D.).

<sup>10</sup> [2000] 2 F.C. 117 (C.A.).

<sup>11</sup> Although the minority did spend some time on this aspect of the case, it will not form part of the discussion of this paper.

Both judgments agree that the government bears the burden of proving a valid objective and showing that the rights violation is warranted. They also reiterate the basic framework of the *Oakes* analysis: that legislation must be rationally connected, cause minimal impairment, and be proportionate to the benefit achieved.<sup>12</sup>

After this, the two judgments diverge. The first point of contention between the majority and minority arises over the classification of the section 3 right. The majority determines that the right to vote contained in section 3 is fundamental to Canadian democracy and the rule of law. It is a “cornerstone” of democracy. Moreover, because section 3 is not subject to the section 33 override, these rights are different, and cannot be lightly set aside. Just because the matter is one of “social and political philosophy” as was argued by the Crown, does not lessen the burden or give government added deference. The government must justify its position by logic and common sense (apparently a different common sense from that of Mr. Harvey Andre).

The minority, in contrast, views the majority as creating a new justificatory standard, to be applied whenever a right in question is exempted from the section 33 override. For them, the override section was never intended to carry such weight or alter the scope of section 1. The majority standard is problematic because it tends to permit only one plausible social or political philosophy. Instead, the minority uses a different textual analysis to reach the opposite effect: since section 3 rights are internally limited — it is only “citizens” who are guaranteed these rights, in contrast to other fundamental freedoms and the legal and equality rights — the right cannot be seen as being somehow more fundamental or different in quality from other rights. Having established this, the minority relies on existing section 1 jurisprudence where the Court has given Parliament a margin of appreciation in regard to legitimate objectives which may, nonetheless, be based upon somewhat inconclusive social science evidence.

Chief Justice McLachlin does not accept the argument that Parliament can breach fundamental values by picking and choosing from a range of acceptable alternatives. Although deference to Parliament may be allowed in certain situations where competing social and political policies prevail, it is not normally appropriate where limits are placed on fundamental rights. This is one of those cases. The majority’s view harkens back to the language of Dickson C.J. in the great Charter cases of old where the Court was seen as the guardian

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<sup>12</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

of our rights: “courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.”<sup>13</sup>

There is deep disagreement between the majority and the minority over the content for the requirements of a section 1 response. The majority holds that government justification must reasonably convince, but is not required to be scientifically proven. It can even include common sense and inferential reasoning as long as these are not based on stereotypes or do not substitute deference for reasoned demonstration. For the minority, the very nature of an issue that is sociopolitical makes the approach to the section 1 inquiry different. In such cases, judges should see that there are different social or political philosophies upon which justifications for or against the limitations of rights may be based. Approving or preferring one solution does not necessarily disprove the other, nor does it mean that another solution is outside the Charter requirements. To Gonthier J., where the social or political philosophy advanced by Parliament *reasonably* justifies a limitation of a Charter right, it should be upheld as constitutional.<sup>14</sup>

Justice Gonthier relies on some of the early Charter jurisprudence of Dickson C.J. which held that formalistic approaches to the application of section 1 must be avoided. Section 1 is a gauge, sensitive to the values and circumstances particular to an appeal, that should vary depending on the circumstances of the case and the nature of the interests at stake. This means that factual, social, historical, and political context are all part of an essential backdrop to proper analysis of what is at stake in the case of an alleged infringement of a right. Justice Gonthier also notes that the purpose of section 1 is to balance individual rights and communal values. To do so, courts must be sensitive to the competing rights and values that exist in our democracy. The minority does not accept the majority’s view that symbolism and philosophy are not relevant principles on which Parliament can order society. It contends that McLachlin C.J.’s ideas are equally vague and abstruse, but then accepts that it is impossible for anyone’s ideas not to be so when one looks at the “meaning” of the right to vote in a democracy. Since there is no way to assess the effectiveness of legislative enactments such as that contained in section 51(e) of the Act, symbolic and abstract arguments are really the only thing that the Court can go on. The minority relies on a passage from *Harvey v. New Brunswick (Attorney General)*<sup>15</sup> quoted by Linden J.A. at the appeal, where on

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<sup>13</sup> *Sauvé (No. 2)*, *supra*, note 3, at para. 15. Recall Dickson C.J. in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 that under the Charter judiciaries are the “guardians of the constitution” and shall zealously protect individual rights and freedoms at the same time as constraining governmental action.

<sup>14</sup> *Id.*, at para. 67.

<sup>15</sup> [1996] 2 S.C.R. 876.

behalf of the majority La Forest J. upheld similarly abstract objectives, noting that:

the primary goal of the impugned legislation is to maintain and enhance the integrity of the electoral process ... [S]uch an objective is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society.<sup>16</sup>

After the introductions to the *Oakes* analysis (Gonthier J.'s pre-*Oakes* remarks take up 69 paragraphs!), the decisions proceed through the *Oakes* test. For the majority, the legislation fails the test due to a lack of proportionality. There is no rational connection between denying the vote to penitentiary inmates and the goals of the legislation.

Even at the first stage of the *Oakes* inquiry, however, the majority has difficulty accepting the government's position. There is a high degree of condemnation for the objective:

At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. 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.<sup>17</sup>

Moreover, McLachlin C.J. takes issue with the fact that Parliament did not disclose why additional punishment was required for these serious offences, or what additional objectives they hoped to achieve that they did not get out of an imprisonment already imposed. In the end, as in virtually all section 1 cases, the government is given the benefit of the doubt and the analysis proceeds to the second stage of the *Oakes* analysis.

Contrast this with the approach of the minority towards the legislative objective. In Gonthier J.'s view, the government should not have been chastized at the initial stage of the *Oakes* test. As he concludes, "there was no error made by the courts below in identifying the objectives and in determining them to be pressing and substantial. I think that the importance of both objectives is obvious."<sup>18</sup>

At the second, rational connection stage of the inquiry, the government provides three reasons why restricting voting rights for certain prisoners is a reasonable limit on the right to vote: it educates inmates by showing them that obeying the law gives us certain rights; it maintains the integrity of the political system; and it acts as a legitimate form of punishment. Again, the majority and minority are at loggerheads.

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<sup>16</sup> *Id.*, at para. 38.

<sup>17</sup> *Sauvé (No. 2)*, *supra*, note 3, at para. 23.

<sup>18</sup> *Id.*, at para. 148.

The majority takes the position that any educational message obtained by denying the vote is more likely to be one that will increase criminals' contempt for the law, not teach them to respect the law. Law's legitimacy, via Rousseau's social contract, is found partially in the right of citizens to vote. Denying prisoners the right to vote removes an important means of teaching them core democratic values including the idea of social responsibility. Moreover, the argument that disenfranchisement is educative loses some of its punch when the prohibition on voting applies to an extremely diverse group such as all prisoners incarcerated for two years or more.<sup>19</sup>

To the minority, the temporary disenfranchisement of serious criminal offenders educates both prisoners and society — it reiterates society's commitment to basic moral values. To allow serious offenders to vote would undermine the rule of law and civic responsibility because when people commit crimes they indicate to the public that they have no respect for the community. In Gonthier J.'s words:

[s]ociety therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish those criminals and to insist that civic responsibility and respect for the rule of law...are prerequisites to democratic participation.<sup>20</sup>

The majority argues that the trend in the history of Western democracies has been towards universal enfranchisement and away from discrimination. Section 51(e) of the Act, in contrast, is a step backwards.<sup>21</sup>

To the minority, however, the process of universalizing the franchise has little to do with the provision in question here. Past exclusions were discriminatory but section 51(e) distinguishes persons only on the basis that they have committed criminal acts. In Gonthier J.'s words, "[r]esponsible citizenship' does not relate to what gender, race, or religion a person belongs to, but is logically related to whether or not a person engages in serious criminal activity."<sup>22</sup> Disenfranchisement for prisoners does not target specific groups and it is a temporary measure aimed at meeting penal goals.

The second Crown argument is that denying prisoners the vote enhances respect for law; in other words, giving people who flout the law a right to vote demeans the political system. The majority also makes short shrift of this argument. As it is now a constitutionalized right, voting is not simply a privilege the government can suspend at will. Moreover, the argument reiterates the view that certain classes of people are not morally fit to vote,

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<sup>19</sup> *Id.*, at para. 39.

<sup>20</sup> *Id.*, at para. 116.

<sup>21</sup> *Id.*, at paras. 33-4.

<sup>22</sup> *Id.*, at para. 70 (emphasis in original).



which is unacceptable.<sup>23</sup> The minority does not accept that this disenfranchisement affects a person's dignity. Justice Gonthier has difficulty understanding how the debate can even be linked to dignity and stereotyping: for him it is the criminal act and punishment that is condemned, pure and simple. The *Criminal Code*<sup>24</sup> protects certain Canadian values, and ensuring those who breach them are punished, in a range of reasonable ways, is neither stereotyping nor an affront to dignity.<sup>25</sup>

The final Crown argument under the rational connection component is that disenfranchisement is nothing more than an extension of punishment. The majority of the Court rejects this argument on two grounds: denying constitutional rights as a form of punishment is suspect practice, and it does not comply with the requirements for legitimate punishment established by Canadian jurisprudence. The Chief Justice refers to this as an attempt by the government to craft a new tool of punishment, calling it "denial of constitutional rights."<sup>26</sup> By applying it to certain people, Parliament effectively removes them from Charter protection. For the majority it is no different from taking away a prisoner's right to be free of cruel and unusual punishment or the right to free expression, neither of which are allowed. Failure to obey laws does not nullify a person's membership in society — otherwise convicted criminals could be exiled or not allowed to remain part of our citizenry. The fact that other Charter provisions are in place to ensure that criminals are treated as persons with rights (such as sections 11 and 12) further indicates the need to protect as many of the basic rights as are appropriate.<sup>27</sup> The other part of the argument that the majority relies on is that it is a fundamental principle of punishment that it must not be arbitrary, and must be tailored to the acts and circumstances of the individual. Disenfranchisement for all prisoners with two-year sentences or longer does not meet these conditions. It neither reflects the individual moral culpability of offenders nor sends them an appropriate message.<sup>28</sup> Chief Justice McLachlin summarizes the majority's view that there is no rational connection between the government's objective and section 51(e) of the Act:

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

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<sup>23</sup> *Id.*, at paras. 42-3.

<sup>24</sup> R.S.C. 1985, c. C-46.

<sup>25</sup> *Sauvé (No. 2)*, [2002] S.C.J. No. 66, at paras. 73-5.

<sup>26</sup> *Id.*, at para. 46.

<sup>27</sup> *Id.*, at para. 47.

<sup>28</sup> *Id.*, at para. 48.

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.<sup>29</sup>

The minority believes that disenfranchisement as a punishment has already been tailored to fit the crime. Prisoners to whom the provision applies have been convicted of a serious criminal offence, and punishment — guided by the goals of denunciation, deterrence, rehabilitation and retribution — is intended to be morally educative for incarcerated serious criminal offenders. Because the provision only applies for as long as a person is incarcerated, it is individually tailored. It reflects the nature of the criminal offence and this is linked by the application of section 51(e) to serious criminal activity only. In this sense, one of the goals of disenfranchisement is rehabilitation. Prisoners will regain the exercise of the vote on their release from incarceration; this is an official recognition of a renewed connection with the community that was temporarily suspended during the time of imprisonment.<sup>30</sup>

The next stage of the *Oakes* inquiry is whether the provision has a minimal impact on the right. The majority spends even less time on this part of the analysis. The provision is found to be too broad, catching those who conduct minor crimes and who cannot be said to have broken their ties to society. Defining serious offences by reference to the period of incarceration is found to be a tautology, and the legislation makes no correlation between the classification of serious versus minor offences and the entitlement to vote. The fact that voting rights are regained once a prison term is over is equally unpersuasive because it cannot be used to excuse the unconstitutional nature of the provision during its tenancy.<sup>31</sup> Again the minority is not convinced. The denial of voting rights is based exclusively on the serious criminal activity of the offender, which is not tautologous. And the disenfranchisement only lasts as long as the period of incarceration, which is part and parcel of the fact of incarceration and thus tied to the seriousness of the offence. This makes the situation in Canada very different from that of some American states which disenfranchise ex-offenders beyond their period of incarceration.<sup>32</sup>

At the last stage, the Court must look at the proportionate effects of the provision. The majority finds the negative effects of denying citizens the right to vote outweigh any benefits that might be found. Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It is more likely to detrimentally affect the social development and rehabilitation of prisoners and undermine correctional policies of rehabilitation and integration.

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<sup>29</sup> *Id.*, at para. 52.

<sup>30</sup> *Id.*, at paras. 71, 120.

<sup>31</sup> *Id.*, at paras. 55-6.

<sup>32</sup> *Id.*, at para. 71.

In other words, denying a fundamental right to any citizen is extremely harmful. The situation is exacerbated in the case of Aboriginals, whose over-representation in prisons reflects factors other than strict individual culpability.<sup>33</sup>

Justice Gonthier argues, citing Dickson C.J. in *Keegstra*,<sup>34</sup> that the government need not find the least intrusive way to infringe a Charter right. As section 51(e) only applies to serious offenders and only for the duration of the incarceration, it is not disproportionate or arbitrary. For him, Parliament was given permission to develop legislation after the Ontario Court of Appeal decided *Sauvé (No. 1)* and the Court should therefore show deference. "Line drawing, amongst a range of acceptable alternatives, is for Parliament."<sup>35</sup> Finally, in assessing the proportionality of the measure, Gonthier J. returns to the nature of the right affected:

If the objectives are taken to reflect a moral choice by Parliament which has great symbolic importance and effect and which are based on a reasonable social or political philosophy, then their resulting weight is great indeed. Over all, while the temporary disenfranchisement is clear, the salutary effects and objectives are ... of greater countervailing weight.<sup>36</sup>

Justice Gonthier accepts that it is difficult to demonstrate salutary effects because of the symbolic effect claimed by the Crown regarding disenfranchisement. In contrast, the negative effects — temporary loss of voting rights — only apply to the most serious offenders, and these may not even have any practical consequences due to the relative infrequency of elections. Finally, Gonthier J. notes that the provision does nothing to take away other political rights that prisoners have, such as rights to express themselves and act politically in other ways.<sup>37</sup>

In the end, the decision proves that there is a fine line between complexity and complication. Although prisoners in Canada are now assured of the right to vote in at least federal elections (and it is highly unlikely now that disenfranchising prisoners at a provincial level is constitutional) it is evident that the Court is not the guiding light of hope and clarity that it should be. Instead, the Court is very much divided on how properly to apply the Charter, especially on the role that section 1 plays in analyzing government justifications. As Professor Weinrib notes, this rift in the Court is becoming

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<sup>33</sup> *Id.*, at paras. 58-60.

<sup>34</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>35</sup> *Sauvé (No. 2)*, *supra*, note 25, at para. 174.

<sup>36</sup> *Id.*, at para. 178.

<sup>37</sup> *Id.*, at para. 185.

more severe as time goes on.<sup>38</sup> Luckily, the case is also a fascinating study of other aspects of legal decision making. In the next section, I explore a number of ideas about *Sauvé* (No. 2) that make it — not in a pejorative way — a legal morass.

## II. A SAUVÉ KALEIDOSCOPE

### 1. Rhetoric and Dissension on the Bench

Ms. McManus: The court decided that way, but I would not say that was the court's view.<sup>39</sup>

In Plato's dialogue in *Gorgias*, the Sophists argue that rhetoric is the art of persuading people about matters of justice and injustice in the State. This form of classical rhetoric does not aim at goodness or truth, but only at short-term success. Subsequent to Plato, a long line of philosophers have revised the classical idea of rhetoric to include more than simple persuasion.<sup>40</sup>

James Boyd White has argued that law is best seen as a branch of rhetoric because it is the art of establishing the probable.<sup>41</sup> This view of rhetoric fits neatly within a modern conception of law — that the truth in most legal cases is never really known, but the institutions of law, including judging and the courts, are set up so as to derive the most probable outcome from a given set of facts. This model, however, normally focuses on the rhetorical battleground of the lawyers. The judicial decision itself is usually seen as separate and apart.<sup>42</sup> In *Sauvé* (No. 2), the Supreme Court arguably forgets its role in the theatre of rhetoric and enters the fray where short term persuasion is of paramount importance.

Legal rhetoric is a struggle over meaning. There is always uncertainty in the law and this is especially true when it comes to interpreting fundamental texts such as a constitution. As White notes, the language of interpretation can either bring greater understanding to participants, or drive them further apart. When language helps aid community, it fulfills a positive role. As an example, he

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<sup>38</sup> Weinrib, *supra*, note 5.

<sup>39</sup> Special Committee on Electoral Reform, November 25, 1992.

<sup>40</sup> Cicero's *Topica*, Augustinians: see Crane, ed., *Critics and Criticism: Ancient and Modern* (Chicago, 1952).

<sup>41</sup> See *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1987). Also see White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52 U. Chicago Law Rev. 684.

<sup>42</sup> White, "Law as Rhetoric," *supra*, note 41, at 693.

cites Milton's *Paradise Lost* where in the early stanzas Satan and the angels try unsuccessfully to establish a community in Hell. In its rhetorical style alone, Milton attempts to show how a community cannot be built upon the language of selfishness and hatred used in the poem.<sup>43</sup> *Sauvé* (No. 2) is a dream case to use as a law school teaching tool because the Court seems similarly bent on exposing itself. I am not going to try and equate the language in *Sauvé* (No. 2) with that of Milton, but there are times when both the majority and minority speak in tones ill-befitting that of a shared community and thus do a disservice to the decision at hand.

A basic rule of rhetoric is that speakers must use the language, in a broad sense, of their audience.<sup>44</sup> Lawyers, for example, must be conversant in both the technical language of the law and everyday language. But to be successful, they should tailor their advocacy to the particular situation. In *Sauvé* (No. 2), it is not easy to tell exactly who the audience of each judgment is intended to be. The Chief Justice's opinion, being the majority, should let the decision stand for itself, without personalizing it in any way. However, instead of referring to the respondent more correctly as the "Crown," she uses the term "government" a hefty 26 times in her judgment. Of those, 19 times are in direct verb form, as in "the government argues..." or "the government advances ..." This is much more personal than more generic counterparts such as the "executive" or the "Crown." Sometimes the language describing the Crown is quite scathing: "Façade of rhetoric,"<sup>45</sup> and "neither the record nor common sense supports the claim."<sup>46</sup> Is she deliberately attempting to hold the current Chretien government accountable? Is this use of language due to the fact that the *Sauvé* case has returned? Or is it just a sloppy use of language? Her language stands in stark contrast to the minority's where Gonthier J. refers to the "Crown" a total of 26 times and only uses the term "government" once. Other than this aberration, McLachlin C.J. tries to maintain the familiar judicial style of the majority by keeping above the fray and dealing with the arguments, not the parties themselves. She only refers to Gonthier J.'s decision once, in a minor remark about the use of deference.<sup>47</sup>

Justice Gonthier, on the other hand, seems to consider his real audience to be the Chief Justice — not Richard Sauvé, the government, prisoners, or the public in general. He refers to her no fewer than 20 times, in a form similar to "the Chief Justice argues." There is a very personal approach used here, not

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<sup>43</sup> *Id.* at 694.

<sup>44</sup> The first formulation of this is Aristotle's *Rhetoric*, see Freese, *Introduction to Aristotle's The 'Art' of Rhetoric*, Loeb Classical Library (London, 1926), at xx-xxv.

<sup>45</sup> *Sauvé* (No. 2), *supra*, note 25, at para. 52.

<sup>46</sup> *Id.*, at para. 49.

<sup>47</sup> *Id.*, at para. 8.

frequently seen at the Supreme Court. Of course, it is in the nature of a dissent to respond to the argument of the majority, but there are a number of different ways of responding. In this case, it is as though Gonthier J. were a chastised schoolboy who finds the whole episode unfair.

In traditional Anglo-Canadian jurisprudence, judges do their best to maintain decorum. Rarely, if ever, do they signal discontent with their fellow judges. The language used by both judges in this case, however, indicates a departure from this norm. Frequently, the two warring parties let their emotions get the better of them.

On this point, both decisions begin appropriately, if not unremarkably. As befits the ultimate decision of the majority, McLachlin C.J.'s language is full of majesty. In her preliminary "essay," largely found in paragraphs 6 through 19, she sounds less judge-like than statesperson-like, on the order of Abraham Lincoln or Winston Churchill. It is hard to convey tone in short extracts, but note some of the language in the following excerpts:

The right of every citizen to vote ... lies at the heart of Canadian democracy. ... The right to vote, which lies at the heart of Canadian democracy, can only be trammelled for good reason. Here, the reasons offered do not suffice.<sup>48</sup>

*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. This is manifestly true of the right to vote, the cornerstone of democracy...<sup>49</sup>

The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion.<sup>50</sup>

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.<sup>51</sup>

Justice Gonthier's opening "essay" takes up paragraphs 65-134 of the judgment. It is an impressive exegesis, at times scholarly, at times practical, sweepingly historical and digressive. It is, however, much more plodding in its language than the majority's. Again, a quote or two cannot fully capture the true spirit, but the following should be taken as illustrative:

The flexible contextual approach to s. 1 of the *Charter* and the *Oakes* test necessitates that this Court keep in mind first principles. The right to vote for all citizens is clearly encapsulated in s. 3 of the *Charter* and, by the terms of s. 1 ...<sup>52</sup>

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<sup>48</sup> *Id.*, at para. 1.

<sup>49</sup> *Id.*, at para. 14.

<sup>50</sup> *Id.*, at para. 13.

<sup>51</sup> *Id.*, at para. 43.

<sup>52</sup> *Id.*, at para. 84.

The former approach, that accepted by the reasons of the Chief Justice, entails accepting a philosophy that preventing criminals from voting does damage to both society and the individual, and undermines prisoners' inherent worth and dignity.<sup>53</sup>

One aspect of the plodding approach is to drive home a point by repetition. In this vein, it is difficult to ignore the minority's deliberate attempt to fix on the transient nature of the government's limit. In his judgment of some 143 paragraphs, Gonthier J. uses the word "temporary" 24 times, "temporarily" nine times, and refers to the "period of incarceration" or an equivalent about five times. In one paragraph alone, he refers to the concept four separate times:

The reasons of the Chief Justice suggest that to be *temporarily* disenfranchised while incarcerated is to be severed from the body politic and silenced as an unworthy outsider. Above, I explained how *temporary* disenfranchisement does not undermine the "worth" or "dignity" of any offender but is instead focussed at criminal offences. I also have discussed how *temporary* disenfranchisement is to be seen as a dimension of punishment that is tailored towards rehabilitation and reintegration ... [W]hile being *temporarily* disenfranchised is clearly a significant measure, which is part of the reason why it carries such great symbolic weight, it does not amount to the complete extinguishment of all means of political expression or participation.<sup>54</sup>

These differences in writing approaches of the minority and the majority are good examples of traditional rhetorical technique. The majority's view, of the sanctity of the individual's right over the State, assumes a kind of absolutist moral fervour. It uses language that sits well with this form of decision, appealing, almost religiously, to a moral sense of right and wrong. It is the language of grandeur. By contrast, the minority is not so concerned with objective truth. It is pragmatic and utilitarian. Government has come up with a reasonable response to a social and philosophical conundrum and the minority's language acknowledges this sense of reasonableness.

The use of rhetoric illustrates another aspect, however — the growing sense of discontent between the majority and minority judges. What is obviously becoming an extremely divisive ideological battle over the concept and scope of section 1 of the Charter is also taking place at the level of rhetoric. In subtle but disturbing ways, the judges are beginning to show signs of frustration and, sometimes anger, with each other's views.

It starts off for the majority in paragraph 8. Chief Justice McLachlin indicates Gonthier J.'s approach, and with a few deft uses of italics, creates the picture that the minority's view is artificially created. As she notes:

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<sup>53</sup> *Id.*, at para. 93.

<sup>54</sup> *Id.*, at para. 85 (emphasis added).

My colleague Justice Gonthier proposes a deferential approach to infringement and justification. ... He further argues that ... we owe deference to Parliament because we are dealing with “philosophical, political and social considerations,” because of the abstract and symbolic nature of the government’s stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts.<sup>55</sup>

She then goes on:

The core democratic rights of Canadians do not fall within a “range of acceptable alternatives” among which Parliament may pick and choose at its discretion ... This case is not merely a competition between competing social philosophies. ... Public debate on an issue does not transform it into a matter of “social philosophy,” shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.<sup>56</sup>

Later:

... the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a “dialogue.” Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased ...<sup>57</sup>

Notice how, after the first example, the technique changes. Quotation marks can be used to attribute someone else’s remarks but they can also indicate ironic dismissal. Chief Justice McLachlin uses both these techniques. It is hard to resist the conclusion that she is indicating the unsoundness of the minority position.

This technique becomes clearer when compared with the minority’s use of quotes. While the majority depersonalizes the use of quotations, Gonthier J. links his quotations directly to the majority’s opinion by express reference to the Chief Justice. This lessens the risk of the quoted words sounding disdainful or ironic. Here are three examples:

The reasons of the Chief Justice express the view that the temporary disenfranchisement of serious criminal offenders necessarily undermines their inherent “worth” or “dignity.” I disagree.<sup>58</sup>

and:

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<sup>55</sup> *Id.*, at para. 8.

<sup>56</sup> *Id.*, at para. 13.

<sup>57</sup> *Id.*, at para. 17.

<sup>58</sup> *Id.*, at para. 73.



The reasons of the Chief Justice apply something seemingly more onerous than the “justification” standard referred to just above. She describes the right to vote as a “core democratic right” and suggests that its exemption from the s. 33 override somehow raises the bar for the government in attempting to justify its restriction ...<sup>59</sup>

and:

In her reasons, the Chief Justice claims at para. 16 that Parliament is relying on “lofty objectives,” and suggests at para. 23 that the presence of “symbolic and abstract” objectives is problematic.<sup>60</sup>

It is only where Gonthier J. is more overt in his displeasure that he achieves the same effect as McLachlin C.J. did through more subtle means. At paragraph 159 he relies on a method of sarcastic quotation: “Further, it can hardly be seen as ‘novel’, as stated in the Chief Justice’s reasons, at para. 41.” Even here, however, he still credits McLachlin C.J. with the reference.

Overall, however, the majority does try to remain apart from, and above, the minority’s decision. As noted, there is little attempt to personalize the minority — McLachlin C.J. only mentions Gonthier J. by name once and does not refer to any previous judgments rendered by him. There is nothing unusual about this; normal practice for a majority decision is to pay little attention to the dissent, except perhaps where it thinks it is being seriously mischaracterized. Instead, the focus is directed towards the government.

Justice Gonthier relies on somewhat different techniques, but in the end he shows even greater frustration with the other side. It takes a little time for him to wind up, however. At first, Gonthier J. relies on the time-honoured use of respectful disagreement. His first paragraph states that he is in “respectful disagreement” with the Chief Justice.<sup>61</sup> This is quickly followed by his noting that the disagreement is at a “fundamental level.”<sup>62</sup>

The dispute then becomes much more personal. In the next paragraph, Gonthier J. sets up the battleground — the majority’s absolutism versus the minority’s deference. “She [Chief Justice McLachlin] subscribes to a philosophy ... while I prefer deference...”<sup>63</sup> A number of rhetorical techniques are then used, which together give an overall impression of deep concern over the direction the majority is taking. The first is to cast the minority in the role of David against the majority’s Goliath. This is done in two ways: (i) by quoting the Chief Justice a number of times from earlier decisions, not to show that she

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<sup>59</sup> *Id.*, at para. 95.

<sup>60</sup> *Id.*, at para. 100.

<sup>61</sup> *Id.*, at para. 66.

<sup>62</sup> *Id.*, at para. 67.

<sup>63</sup> *Id.*, at para. 68.

is contradicting herself, but almost as a way to build up her stature; and (ii) by giving the impression that the majority is forming a powerful and exclusive bloc. Justice Gonthier cites Chief Justice (or Justice) McLachlin six times from three previous cases in which section 1 of the Charter was argued: *RJR-MacDonald*, *Mills*, and *Provincial Electoral Boundaries*.<sup>64</sup> In contrast, he cites only two of his own decisions: *Sharpe* and *Butler*.<sup>65</sup> Moreover, McLachlin C.J. relies on Arbour J.'s decision in *Sauvé (No. 1)* four times, whereas she does not cite any of the other prisoner voting cases;<sup>66</sup> Justice Gonthier himself twice points to this earlier decision.<sup>67</sup> There is little attempt to build up his own minority bloc by relying on judgments rendered by his colleagues L'Heureux-Dubé, Bastarache, or Major JJ.<sup>68</sup>

Once the opposition has been so characterized, the minority is forced to cut it down to size. This requires a degree of personalization that is rare at this level of court. Again, the language is subtle, as befits the decorum of the judicial arena, but not all that well hidden. A few examples should suffice. The first occurs about mid-way through Gonthier J.'s opening essay where he argues that the majority's determination that the lack of the section 33 override for section 3 voting rights in the Charter alters the section 1 justificatory standard. To Gonthier J., this alteration is "problematic"<sup>69</sup> and is "incorrect on a *basic* reading of section 1 which *clearly* does not constrain Parliament."<sup>70</sup> The use of terms such as "basic" and "clearly" are indicators of a rising sense of frustration with the members of the majority. He then accuses McLachlin C.J. of relying on "equally vague concepts"<sup>71</sup> to those of the minority with which she earlier took issue. She is also found to be making statements that are "as symbolic, abstract and philosophical as the government's claim..."<sup>72</sup>

<sup>64</sup> *Id.* The citations are made in *Sauvé (No. 2)*, *supra*, note 25, at paras. 90, 107, 150, and 160 (*RJR-McDonald*), [1995] 3 S.C.R. 199; para. 86 (*Mills*), [1999] 3 S.C.R. 668), and para. 78 (*Provincial Electoral Boundaries*, [1991] 2 S.C.R. 158).

<sup>65</sup> *Id.* Citations are found at paras. 11, 113 (*Butler*, [1992] 1 S.C.R. 452) and para. 182 (*Sharpe*, [2001] 1 S.C.R. 45).

<sup>66</sup> *Id.*, at paras. 23, 35, 36 and 43.

<sup>67</sup> *Id.*, at para. 70.

<sup>68</sup> Bastarache, L'Heureux-Dubé and Gonthier JJ. are referenced from *R v. Sharpe*, *supra*, note 65 (*Sauvé (No. 2)*, at paras. 78, 82 and 182); Bastarache J. is cited from *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (*Sauvé (No. 2)*, at para. 180) and L'Heureux-Dubé J. is cited from *Haig v. Canada*, [1993] 2 S.C.R. 995 (*Sauvé (No. 2)*, at para. 121).

<sup>69</sup> *Sauvé (No. 2)*, [2002] S.C.J. No. 66, at para. 95.

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *Id.*, at para. 100.

<sup>72</sup> *Id.*, at para. 100.

Further along, Gonthier J. notes that McLachlin C.J. “apart from one philosopher, ... provides no support for this contention; she simply replaces one reasonable position with another, dismissing the government’s position as ‘unhelpful’.”<sup>73</sup> The Chief Justice’s reasons are, moreover, not convincing, but simply “suggest” an answer,<sup>74</sup> make “quite a leap” in logic<sup>75</sup> or are “particularly inappropriate.”<sup>76</sup> It all seems to bother Gonthier J., as does the way in which the majority characterizes his line of reasoning, so that he feels compelled to state that his view can “hardly be seen as ‘novel.’”<sup>77</sup> Words such as “particularly” and “hardly” change the tone of the Gonthier J.’s decision. Read the same passages without those words and see how they differ.

There is also some stinging sarcasm. In response to McLachlin C.J.’s statement that losing the right to vote impairs prisoners’ ability to reintegrate, Gonthier J. wryly states:

I note as well, however, it is possible to argue that incarceration itself may make rehabilitation and reintegration more difficult, but it is still, in some cases, an important dimension of punishment and indeed a step towards rehabilitation.<sup>78</sup>

Finally, as he ends his judgment, Gonthier J. drops the pretense of respect and simply states twice that he “disagrees” with the Chief Justice.<sup>79</sup>

The Court should be above all this; as Edmund Burke said, manners are of more importance than laws. A question worth pondering is whether some of this antagonism is a result of the Chief Justice’s determination to bring harmony to the Court. One of the goals of the Chief Justice when she took over was to try to get the Court to speak generally with fewer voices, by reducing the number of concurring opinions, and also trying, where possible, to find unanimity. Statistics over the last few years bear this out. There have been far fewer concurring decisions during the McLachlin era than during the Lamer Court. To take some arbitrary examples: in 2000 and 2001, there were eight and nine judgments where concurring opinions were rendered whereas in 1995 there were 31 concurring opinions rendered and in 1990, there were 44.<sup>80</sup> This begs the question of whether it is possible to paper over differences in opinion so easily. Obviously, dissenting views will surface, and the Chief Justice is not

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<sup>73</sup> *Id.*, at para. 157.

<sup>74</sup> *Id.*, at para. 185.

<sup>75</sup> *Id.*, at para. 204.

<sup>76</sup> *Id.*, at para. 174 (emphasis added).

<sup>77</sup> *Id.*, at para. 159 (emphasis added).

<sup>78</sup> *Id.*, at para. 183.

<sup>79</sup> *Id.*, at paras. 158, 183.

<sup>80</sup> I must thank again my research assistant, Jonathan Hood, who trolled through the S.C.R.s to determine these statistics.

so naïve to think that the Court can always be unanimous. The role of concurring opinions, however, is downplayed. One purpose served by allowing concurring opinions is to provide a forum for slightly different opinions to be voiced. These surely are cathartic. Enforced conciliation, on the other hand, can mask deeper divisions. So, when a case such as *Sauvé* (No. 2) arises, where there is no question that the Court is divided, it is possible that a much less respectful tone is adopted. It will bear close observation over the next few years to see if this unfortunate trend continues.<sup>81</sup>

## 2. Renewed Dialogue

Ms. McManus: The judgments don't speak on what the legislation should be. There seems to be a common thread that runs through all the judgments. What they say most definitely is that they would like to speculate. They would like to rewrite, but they can't and they won't. It's not their job to do so. All they can do is to speak on the validity of a section.

Mr. Prud'homme: We will solve it for them...We may be helping the Supreme Court by passing a law right away, so they will see that it's already been dealt with by Parliament...That's my conclusion but others may differ. If we do that, there's no more reason to go to the Supreme Court. They can have their fun there, but are we allowed?<sup>82</sup>

The Supreme Court has been one of the biggest supporters of the notion of a Charter "dialogue" between the legislatures and the courts ever since the 1997 article by Peter Hogg and Alison Bushell publicized the idea.<sup>83</sup> Since that time the Court has specifically referred to the article in six different cases<sup>84</sup> and the general concept of dialogue in eight.<sup>85</sup> It now must be taken as accepted that the

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<sup>81</sup> While one case does not make a trend, the Court has not been on friendly terms in other recent cases. A very good example is *Lavoie v. Canada*, [2002] S.C.J. No. 24, a 6-3 split, where even those agreeing in the result were in strong disagreement with each other in the approach of s. 15 analysis and the language used was again sometimes lacking in subtlety. Also, in *R. v. Hall*, [2002] S.C.J. No. 65, Iacobucci J. in dissent, was quite scathing in his condemnation of the majority (McLachlin C.J.'s) arguments, portraying the decision as abdicating the role of guardian of the Constitution.

<sup>82</sup> Special Committee on Electoral Reform, November 25, 1992.

<sup>83</sup> Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75.

<sup>84</sup> The cases in addition to *Sauvé* (No. 2) are: *Vriend v. Alberta*, [1998] 1 S.C.R. 493, *M. v. H.*, [1999] 2 S.C.R. 3, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, *R. v. Mills* [1999] 3 S.C.R. 668 and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

<sup>85</sup> The Court has lately been referring to a "dialogue" with Parliament without citing the Hogg/Bushell article, whereas the article was previously cited every time: see *Bell ExpressVu*

Court sees one of its functions as maintaining an ongoing Charter conversation with Parliament. This principle has infiltrated other levels of the court hierarchy — in making its way up to the Supreme Court, Linden J.A. at the Federal Court of Appeal noted that *Sauvé (No. 2)* was “another episode in the continuing dialogue between courts and legislatures.”<sup>86</sup> Given this background, and the very nature of the relationship between the first and second *Sauvé* cases, it was inevitable that the dialogue metaphor would again be raised at the Supreme Court in *Sauvé (No. 2)*.

Both the minority and majority refer to dialogue. The minority does not see dialogue as implying some kind of absolute acceptance of Parliament’s response to the original problem. Justice Gonthier cites McLachlin C.J.’s admonition in *RJR-MacDonald* to the effect that dialogue does not relieve the government of its justificatory burden, as the Court must always fulfill its mandate to review. For the minority, however, the concept of dialogue means that when undertaking a section 1 analysis, the Court needs to be flexible and aware of the different requirements and demands placed on the government, especially where values of a philosophical and social nature are concerned. The very process that gave rise to *Sauvé (No. 2)* being in front of the Court means for Gonthier J. that dialogue is working. Referring to Iacobucci J.’s decision in *Sauvé (No. 1)*, Gonthier J. declaims:

[his] reasons seem to imply that, while Parliament’s complete ban of prisoner voting in the old provision was unconstitutional, Parliament was free to investigate where an appropriate line could be drawn. This is exactly what it was in the process of doing at the time the first *Sauvé* case was heard. It has drawn a line in the form of s. 51(e) of the Act.<sup>87</sup>

This is an indication that dialogue is of utmost importance where fundamental values are at stake and choices between competing philosophies need to be made. In this vein, it is worth recalling the last words of Hogg and Bushell in their article:

But, the decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished... Judicial review ... [is] the beginning of a dialogue as to how best to reconcile the

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*Limited Partnership v. R.*, [2002] S.C.J. No. 43 and *R. v. Hall*, [2002] S.C.J. No. 65, where in the latter both McLachlin C.J. for the majority (para. 43) and Iacobucci J. for the minority (paras. 123-27) rely on the notion of dialogue to bolster their arguments.

<sup>86</sup> *Sauvé (No. 2)*, [2000] 2 F.C. 117 (C.A.), at para. 56.

<sup>87</sup> *Sauvé (No. 2)*, *supra*, note 69, at para. 161.

individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.<sup>88</sup>

Justice Gonthier's decision reflects this view completely. He believes that in its very structure the *Charter* sets up a value-determining mechanism via dialogue in which neither the courts nor Parliament have a monopoly.<sup>89</sup> This dialogue is meant to continue until Parliament meets a full and rigorous section 1 analysis and satisfies the Court that it has established a reasonable justification. But the last word is left with Parliament. Given the legislative changes, and the long line of cases litigated in various courts and at various levels, it would be difficult to contend that there had not been some rudimentary form of dialogue in this case.<sup>90</sup>

For the Chief Justice, dialogue is also obviously a relevant point for discussion, given that the Crown argued that changes to the Act were made in response to *Sauvé (No. 1)*. She reiterates the view that dialogue can be a good thing, referring to it as "healthy and important."<sup>91</sup> But the simple fact that dialogue has occurred does not warm her to the idea of slavishly following Parliament's lead. For her, the bare fact of Parliament responding with new legislation does not guarantee constitutional success. The government's attempt to meet the complaints leveled at it in 1992 is insufficient to save the legislation even though the provision is less restrictive than it was before.

Both views are full of irony. For the minority it is ironic that their own understanding of the nature of dialogue belies actual events. In *Sauvé (No. 1)* the Supreme Court gave such little indication of what Parliament could do to rectify the law. One would think that if the metaphor of dialogue were accurate, a certain amount of give-and-take is required in order for the other actor to participate in a meaningful exchange. Never mind that Parliament was already working on new legislation before *Sauvé (No. 1)* reached the Supreme Court —

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<sup>88</sup> Hogg and Bushell, *supra*, note 83, at 105.

<sup>89</sup> *Sauvé (No. 2)*, *supra*, note 69, at para. 104.

<sup>90</sup> Justice Gonthier cites, as evidence of dialogue, the Lortie Commission Report and the following cases: *Re Jolivet and The Queen* (1983), 1 D.L.R. (4th) 604 (B.C.S.C.); *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124; affg [1984] 1 F.C. 1133 (C.A.); revg [1984] 1 F.C. 1119 (T.D.); *Lévesque v. Canada (Attorney General)*, [1986] 2 F.C. 287 (T.D.); *Badger v. Attorney General of Manitoba* (1986), 30 D.L.R. (4th) 108 (Man. Q.B.); affd (1986), 32 D.L.R. (4th) 310 (Man. C.A.); *Badger v. Canada (Attorney General)* (1988), 55 Man. R. (2d) 211 (Q.B.), revd (1988), 55 D.L.R. (4th) 177 (Man. C.A.); leave to appeal refused, [1989] 1 S.C.R. v; *Sauvé v. Canada (Attorney General)* (1988), 66 O.R. (2d) 234 (H.C.J.); revd (1992), 7 O.R. (3d) 481 (C.A.), *Belczowski v. Canada*, [1991] 3 F.C. 151 (T.D.); affd [1992] 2 F.C. 440 (C.A.).

<sup>91</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, at para. 17 [hereinafter "*Sauvé (No. 2)*"].

its very short decision did not even mention that fact as a reason for the brevity, instead relying on a reference to minimal impairment without elaboration.

On the other hand, McLachlin C.J.'s view on the role of dialogue would be compelling if it were not for the disturbing precedents set in *Mills*<sup>92</sup> and *Hall*.<sup>93</sup> In *Mills*, decided only four years ago, McLachlin C.J. accepted as constitutionally valid a legislative response that was vastly inferior to the response Parliament crafted in *Sauvé* (No. 2). Parliament in *Mills* had responded to a prior unfavourable ruling in *O'Connor*<sup>94</sup> over the *Criminal Code* provisions dealing with access to complainants' records in sexual assault cases by enacting "in your face" legislation — effectively legislation that mirrored the dissenting, not majority, decision in *O'Connor*. The Chief Justice in *Mills* showed great deference to this response, remarking that wherever possible, the Court should "presume that Parliament intended to enact constitutional legislation."<sup>95</sup> The irony is that in *Mills*, Parliament was given a good deal of guidance from the Court as to how to proceed. Nevertheless, when it proceeded in a manner opposed to that required by the Court, it was still rewarded:

[I]t does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved.<sup>96</sup>

Similarly, in *Hall*, McLachlin C.J. sees a legislative response as an "excellent example" of the use of dialogue.<sup>97</sup> The reality was that the bail provisions were buried in a criminal law omnibus bill that had no debate in Parliament or in Committee.

Compare these with the outcome in *Sauvé* (No. 2). Here the majority decides to forego dialogue in favour of a Dicksonian pledge to uphold the sanctity of the Charter above all else. Granted, it is true that in *Mills* Parliament was able to build upon a fully outlined argument that the Court had given it in *O'Connor*, unlike the black hole of *Sauvé* (No. 1) where the Court gave nothing for Parliament to go on. But is it still not a bit rich for the majority to refuse to

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<sup>92</sup> *R. v. Mills*, [1999] 3 S.C.R. 668.

<sup>93</sup> [2002] S.C.J. No. 65.

<sup>94</sup> [1995] 4 S.C.R. 411.

<sup>95</sup> *Mills*, *supra*, note 92, at para. 56.

<sup>96</sup> *Id.*, at para. 55. For commentary on *Mills* see, e.g., Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed., (Toronto: Carswell, 2001) at 7-10; Roach, "Mills" (2000) 43 *Crim. L.Q.* 145.

<sup>97</sup> *Hall*, *supra*, note 93, at para. 43.

show any deference especially given that it was the Court's lack of guidance that led Parliament to draft legislation along the lines of that found in section 51(e) of the Act? One only needs to examine the Electoral Reform Commission debates to see how the members floundered in the dark over what to do with prisoner's voting rights.

If dialogue is to mean anything, the Court should, to the extent possible, expressly indicate whether Parliament is able to restrict prisoners' voting rights or not. At the Federal Court, Trial Division, Wetston J. indicated that Parliament could meet the minimal impairment test by making disenfranchisement an aspect of individual sentencing, that is, by including disenfranchisement as a sentencing option in the *Criminal Code*. The majority at the Supreme Court refused to comment directly on this suggestion.

What the Court did find, however, is that section 51(e) of the Act fails because it is not rationally connected to its objective. The Crown's final argument under this section — that section 51(e) furthers legitimate punishment — is the one area that might be exploited. In a somewhat cryptic passage, McLachlin C.J. notes that:

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.<sup>98</sup>

This may offer a small glimmer of hope that properly tailored legislation could be saved under section 1. It is unfortunate that the majority did not go as far as Wetston J. in the Federal Court in suggesting concrete approaches to the problem. Unlike in *O'Connor*, where Parliament was given a clear indication of what could be done (only to ignore it), *Sauvé (No. 2)* neither provides guidance for future dialogue, nor closes the door permanently on it. Of course this is not the ideal way to conduct a discussion. The lack of direction will almost certainly lead to another round of litigation if the federal government tries to tamper with prisoner voting rights again.

Where does this leave the embattled metaphor of dialogue? At its best, dialogue is a useful way of illustrating how both courts and legislatures conceive their respective roles. It shows how the two institutions form part of a recursive process that in turn is part of a larger, more chaotic process of human decision-making. On this basis, we should embrace the Court's lack of finality. Unpredictability in a complex and dynamic system makes it more robust and

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<sup>98</sup> *Sauvé (No. 2)*, *supra*, note 91, at para. 51.



flexible, and perhaps better able to maintain legitimacy.<sup>99</sup> At its worst, however, “dialogue” simply seems to be another rhetorical tool wielded by judges to justify their own subjective views. Deconstructing the different dialogical approaches employed in *Mills*, *Hall*, and *Sauvé* leaves one bemused. In this sense, dialogue is no more than a convenient label.<sup>100</sup>

As a postscript, it is interesting to note that dialogue is not just a metaphor that the courts now use, but government too is beholden to the idea. Following immediately on the *Sauvé* (No. 2) decision, press reports stated that Liberal House Leader Don Boudria claimed that the Supreme Court had not closed the door on Parliament drafting another response. The same reports quoted Canadian Alliance justice critic Vic Toews countering that the absence of the section 33 override in this case meant that the only alternative was constitutional amendment.<sup>101</sup>

### 3. Media Representation and Public Perception

Mr. Prudhomme: You are changing your own fine speech. If you don't like [the cut-off number of years of incarceration before disenfranchisement] we will put more in. We can put nine. We might want to move five [years] in the House. They might come around to five in the House, so we'll move seven here.

....

Mr. Milliken: I think five might find wider acceptance, and I feel the issue ought to be dealt with there too. So that's why I changed it to seven here... There are some biblical references to seven years. Wasn't Noah in the ark for seven years or

<sup>99</sup> See Harlan Reynolds, “Chaos and the Court” (1991) 91 Colum. L. Rev. 110.

<sup>100</sup> See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 where Iacobucci J. for the minority provided elaborate guidance for Parliament to determine whether a book could be banned, while Binnie J. for the majority thought that the Court should not tie Parliament's hands.

<sup>101</sup> He subsequently stated that he would bring a motion before the House of Commons to trigger a constitutional amendment removing voting rights for prisoners — see Gamble, “MP Wants Con Votes Cut,” *Calgary Sun*, Dec. 11, 2002, at 18. A number of papers commented on the possibility that Parliament could pass new legislation prior to the next election which arose from a spokesperson for Don Boudria, Government House Leader, who said the government would look into the ability to introduce new legislation — see *Chronicle Herald*, “Court Gives Prisoners Vote,” *Prince George Citizen*, Nov. 1, 2002, at 6; “Supreme Court Strikes Down Law Barring Federal Prisoners from Voting,” *The Sault Star*, Nov. 1, 2002, at A1; “Court Rules Inmates Have Right to Vote,” *Fredericton Daily Gleaner*, Nov. 1, 2002, at A7; “Prisoners Voting Disgusts Some MPs,” *Ottawa Citizen*, Nov. 2, 2002, at A5; “MPs Cool To Currying Captive Voters,” *Montreal Gazette*, Nov. 2, 2002, at A16; Duffy, “Alliance MP Won't Seek Inmates' Votes,” *Edmonton Journal*, Nov. 2, 2002, at A2.

something, or was it longer than that? Forty years, was it? I knew it was 40 days and 40 nights he sat on Ararat.<sup>102</sup>

The sharp divide between majority and minority, and the seeming simplicity of the issue of prisoners' voting rights, makes *Sauvé* (No. 2) a compelling case in which to examine the nature and interaction of public opinion, the Charter, and the Supreme Court. The academic literature on the Court and public opinion is favourable. A detailed survey by Fletcher and Howe has established that the Charter is widely known and respected by the vast majority of Canadians,<sup>103</sup> most of whom would prefer courts to have the final say on the constitutionality of legislation because they have great trust in the judicial system.<sup>104</sup> In other words, Canadians trust the Supreme Court to make better decisions than legislatures about rights. It would, indeed, be difficult to imagine a court deciding an issue in a manner comparable to that of the Committee on Electoral Reform quoted above.

The Fletcher and Howe survey notes that it is important to obtain the opinions of a random selection of the population in order to get accurate data on public attitudes towards the courts. The editors contrast this more scientific approach with attempts to gauge opinion by noting media response. As the study makes clear, those who create the most noise are mistakenly taken to represent public opinion.<sup>105</sup> What I propose to do in this segment, however, is to examine in detail how the media portrayed the Supreme Court in this particular case, and to draw some preliminary conclusions about the media representation of the Court. Although this approach is not intended to give an accurate representation of public opinion, it is an instructive exercise in itself. The media is a public voice that often shapes and controls the boundaries of a debate.

It is no surprise that *Sauvé* (No. 2) generated its fair share of sensational newsprint. What might seem unexpected is the equally large number of reasonable responses. The headlines provide a first glimpse at the media's reaction. Some are purely descriptive and neutral. For example: "Imprisoned Criminals Gain Right to Vote";<sup>106</sup> "Inmates Win Right to Vote"<sup>107</sup> and "Prisoner Voting Ban Lifted."<sup>108</sup> Others signal some of the opposition to the decision: "Prisoners Voting Disgusts Some MPs";<sup>109</sup> "MPs Cool to Currying

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<sup>102</sup> Special Committee on Electoral Reform, March 9, 1993.

<sup>103</sup> Fletcher and Howe, "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective" (2000) 6(3) Choices 4, at 11, 15.

<sup>104</sup> *Id.*

<sup>105</sup> Russell and Howe, "Editors' Note" (2000) 6(3) Choices 2.

<sup>106</sup> *Ottawa Citizen*, Nov. 1, 2002, at A1.

<sup>107</sup> *Montreal Gazette*, Nov. 1, 2002, at A11.

<sup>108</sup> *Toronto Star*, Nov. 1, 2002, at A8.

<sup>109</sup> *Ottawa Citizen*, Nov. 2, 2002, at A5.

Captive Voters”;<sup>110</sup> “Victims’ Groups Angered by Ruling”;<sup>111</sup> and “The Court Erred Mightily in Giving Lawbreakers the Vote.”<sup>112</sup>

The main newspaper reports are surprisingly well-balanced. A piece in the *Canadian Press* cites a critic of the decision (Vic Toews, the Canadian Alliance Justice Critic) and one who was not against it (Don Boudria, Government House Leader).<sup>113</sup> The *Globe and Mail* was also fair, giving equal time to Alan Manson (counsel for two of the prisoner groups in favour of the decision) and to Canadian Alliance MP Randy White and a number of victims rights groups, who were against the decision.<sup>114</sup> Southam news service was also reasonably balanced overall, although papers used a very provocative opening line: “All federal inmates — including serial killers Paul Bernardo and child murderer Clifford Olson — have the right to cast ballots...”<sup>115</sup> The pieces that were less pure “news” tended to allow dissenting views more print space. The *Moncton Times and Transcript*, for example, gave a forum to Charles Hubbard MP, who aired his strong stance against letting prisoners have the vote.<sup>116</sup> The *Toronto Star* offered a parody of a new election: a campaign strategist tells a candidate that bringing back the death penalty may “hurt us with people at Millhaven and Collins Bay,” so the candidate decides to give out free DVD players to those who are convicted of a major crime.<sup>117</sup>

Editorial content is probably the most revealing. Major newspaper editorials seem to reflect the same divergence of opinion as the Court. The *Globe and Mail* presented a strong editorial voice in favour of the majority decision, finding McLachlin C.J.’s vision of constitutional rights compelling: “Let us state our view upfront: we believe federal prisoners should have the right to vote.”<sup>118</sup> The *Vancouver Province* was also on the side of the majority,<sup>119</sup> as

<sup>110</sup> *Montreal Gazette*, Nov. 2, 2002, at A16.

<sup>111</sup> *Globe and Mail*, Nov. 2, 2002, at A6.

<sup>112</sup> *Vancouver Sun*, Nov. 5, 2002, at A14.

<sup>113</sup> See Brown, “Will Federal Prisoners Get to Vote?; Supreme Court Strikes Down Law, Parliament Could Fight Ruling,” *The Chronicle Herald*, Nov 1, 2002, at B4; “Supreme Court Gives Inmates Right to Vote,” *Winnipeg Free Press*, Nov. 1, 2002, at B1; “Court Rules Inmates Have Right to Vote,” *Fredericton Daily Gleaner*, Nov. 1, 2002, at A7. See also Brown, “Prisoners Have Right to Vote, Top Court Rules,” *St. John Telegraph Journal*, Nov. 1, 2002, at A10, whose view was also even-handed.

<sup>114</sup> See “Top Court Gives Inmates the Right to Vote,” *Globe and Mail*, Nov. 1, 2002, at A1; “Victims’ Groups Angered by Ruling,” *Globe and Mail*, Nov. 2, 2002, at A6.

<sup>115</sup> See *Victoria Times Colonist*, Nov. 1, 2002, at A11; “Imprisoned Criminals Gain Right to Vote,” *Ottawa Citizen*, Nov. 1, 2002, at A1; “Inmates Win Right to Vote,” *Montreal Gazette*, Nov. 1, 2002, at A11 (emphasis added).

<sup>116</sup> See “N.B. MP Sees Red Over Top Court Ruling,” *Moncton Times and Transcript*, Nov 1, 2002, at A2, Canadaeast News Service.

<sup>117</sup> “Politicians Court New, Vital Inmate Role,” *Toronto Star*, Nov. 9, 2002, at L02.

<sup>118</sup> “Even Prisoners May Cast a Ballot,” *Globe and Mail*, Nov. 1, 2002, at A18.

was the *Halifax Daily News*, employing the headline, “Removing a Right creates a Wrong.”<sup>120</sup> Under its “national” editorial policy, papers in the CanWest Global stable took the lead in defending the decision of the minority. *The National Post* and *Vancouver Sun* ran editorials that were strongly against the decision.<sup>121</sup> The *Calgary Herald* was also vehemently against the ruling. It claimed that other democratic societies and Canadian opinion polls show overwhelming support for restricting prisoners’ voting rights, “[y]et the Supreme Court [has] its own theories about how best to treat prisoners.”<sup>122</sup> It refers to the ruling as “meddlesome” and asks Ottawa to think about a constitutional amendment to reflect the views of the Gonthier J.’s minority.<sup>123</sup> Smaller presses were also more likely to be against the decision — two examples are the *Niagara Falls Review* (“Prisoners Don’t Deserve the Vote”)<sup>124</sup> and the *Sudbury Star* (“The Right to Vote: Canada’s Top Court Ruling that Criminals can Vote Demeans our Precious Electoral System”).<sup>125</sup>

Some of the articles also pick up on the anger and open dissension at the Court. Kirk Makin notes that the ruling “sizzles with indignation,”<sup>126</sup> and the *Globe* editorial euphemistically reports that the decision is replete with some “impressive philosophical jousting.”<sup>127</sup> Another has the Chief Justice as being “scathing in her critique of the government’s case.”<sup>128</sup>

It is in the contrasting language between those favouring the decision and those against it, however, where media representation of the Court is troublesome. Media siding with the minority decision are harsh in their criticism of the Court. The Court has “gone far beyond its mandate,” “ignores” much of the evidence from other countries and instead, in its “appalling decision,”<sup>129</sup> “wades in with its own theories.”<sup>130</sup> It has, in sum, “erred, and

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<sup>119</sup> “No Vote; No Lesson,” *Vancouver Province*, Nov. 4, 2002, at A18.

<sup>120</sup> *The Daily News*, Halifax, Nov. 4, 2002, at 20.

<sup>121</sup> “They Are Not Worthy,” *National Post*, Nov. 4, 2002, at A15; “The Court Erred Mightily in Giving Lawbreakers the Vote,” *Vancouver Sun*, Nov. 5, 2002, at A14.

<sup>122</sup> “Court Oversteps Limits: Giving Inmates the Right to Vote Debases Democracy,” *Calgary Herald*, Nov. 1, 2002, at A12. Other papers reprinted the *Calgary Herald* editorial: see “Feds Must Do Everything to Stop Convict Votes,” *North Bay Nugget*, Nov. 5, 2002, at A6; “Criminals Can’t Be Allowed to Vote,” *Kamloops Daily News*, Nov. 4, 2002, at A4.

<sup>123</sup> *Id.*

<sup>124</sup> *Niagara Falls Review*, Nov. 2, 2002, at A4.

<sup>125</sup> *Sudbury Star*, Nov. 4, 2002, at A6.

<sup>126</sup> “Top Court Gives Inmates Right to Vote,” *supra*, note 114.

<sup>127</sup> “Even Prisoners may Cast a Ballot,” *supra*, note 118.

<sup>128</sup> “Top Court Backs Prisoners,” *Hamilton Spectator*, November 1, 2002, at B02.

<sup>129</sup> “Morally Fit?,” *Law Times*, November 11, 2002, at 24.

<sup>130</sup> *Calgary Herald*, *supra*, note 122.

erred mightily.”<sup>131</sup> In contrast, those who side with the majority are much less glowing in their praise than the opponents are vitriolic in their condemnation. The media in favour of the decision are models of restraint. For example, in declaring themselves in favour of prisoner’s voting rights, the *Globe and Mail* refers to the decision as “difficult to appraise” and weakly concludes, “the court was right to stand up to Parliament.”<sup>132</sup>

What is the end result? According to Fletcher and Howe, long term diffuse legitimacy of the Court remains intact regardless of the outcome of individual decisions. Despite this surface optimism, however, it is hard not to find some of the media reports unsettling. Although legitimacy of the Court is the paramount concern in a properly functioning legal system, there is more to the institution of the Court than its legitimacy. The Court is an august body: respectful, reasonable, and rational. In a way, it deserves reciprocity. At the very least it would help if those in favour of the Court’s decisions champion it. In *Sauvé* (No. 2) for example, none of the reports were bold enough to compliment the Court for its “courage” in rendering a “landmark decision” that “makes the right to vote unimpeachable in our society.” It may be that those in favour of the decision were only marginally in favour, whereas those opposed were vehemently opposed. But it is difficult to accept that a paper such as the *Globe and Mail*, which begins its editorial so powerfully, does not strongly believe in the Court’s decision. In the end, it seems that those who disagree with the Court’s controversial decisions cast it in a disproportionately negative light. It deserves better.

It is difficult for the Court to remain apart from and outside of public opinion. The Court itself is recognizing the importance of public opinion and the media’s portrayal. In *Vriend v. Alberta*,<sup>133</sup> Iacobucci J., on behalf of the majority, recognized that courts cannot remove themselves from society at large: “hardly a day goes by without some comment or criticism to the effect that under the Charter courts are wrongfully usurping the role of the legislatures.”<sup>134</sup> In a very candid statement in *R. v. Burlingham*,<sup>135</sup> L’Heureux Dubé J. warned her colleagues that they were out of step with public opinion.<sup>136</sup> And in a published interview, Bastarache J. clearly identified the links between

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<sup>131</sup> “They Are Not Worthy,” *National Post*, November 4, 2002, at A15.

<sup>132</sup> “Even Prisoners may Cast a Ballot,” *supra*, note 118.

<sup>133</sup> [1998] 1 S.C.R. 493.

<sup>134</sup> *Id.*, at para. 133.

<sup>135</sup> [1995] 2 S.C.R. 206.

<sup>136</sup> *Id.*, at paras. 72-74.

public scrutiny, public opinion and legitimacy, reiterating that it is essential that the Supreme Court not be out of step with the general public.<sup>137</sup>

#### 4. Through Thick and Thin: Montaigne, Walzer, and Moral Relativism

Chairman Hawkes: [T]he testimony from Mr Kingley's predecessor is that of all western democracies, our system of absentee balloting is the most regressive. In other words, it's an administrative pattern denying the Charter of Rights...A better system of balloting...has been developed in all other western democracies...

Mr. Prud'homme: If you eliminate western democracies, what the hell are we being compared with?<sup>138</sup>

Meta-ethical relativism, as opposed to normative relativism, holds that moral truth and justifiability, if they exist, are relative to factors that are culturally and historically contingent. It can be contrasted with Thomistic absolutism or universality, which holds that there can only be one fundamental norm or truth.<sup>139</sup> The Court in *Sauvé (No. 2)* appears to be torn between these two views.

Michel de Montaigne, a philosopher who would have been useful to the minority in *Sauvé (No. 2)*, was a moral relativist. To him, customary beliefs in any given society are functionally necessary for that society, and *ipso facto*, these beliefs are valid, at least for that society.<sup>140</sup> The infinite variety of human practice and behaviour is enough to prove the point: "Each nation has many customs and practices which are not only unknown to another nation but barbarous and a cause of wonder."<sup>141</sup>

Relativism is not without its problems. Diversity in belief may be the result of varying degrees of wisdom, or it may be based on a limited perspective which is somehow distorted. There is no sure way of knowing. Part of the problem for the relativist is that moral judgments are not objective facts: there is no way of demonstrating their truth. For example, it is one thing to say that if half the world believed that the sun, moon, and planets revolved around the earth that this was proof of the lack of a single unique truth, quite another to say that there is only one right way to determine the voting franchise.<sup>142</sup>

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<sup>137</sup> Schmitz, quoting Bastarache J., "Justice: Top Court Goes 'Too Far'," *Ottawa Citizen*, January 13, 2001, at A7.

<sup>138</sup> Special Committee on Electoral Reform, November 25, 1992.

<sup>139</sup> See D. Wong, "Relativism" in *A Companion to Ethics*, Singer, ed. (1991) at chap. 39.

<sup>140</sup> See de Montaigne, *The Complete Essays*, translated by Screech, (1991), Book III, Essay 13, at 1226.

<sup>141</sup> *Id.*

<sup>142</sup> An idea based on Wong, *supra*, note 139.

Moreover, the existence of different ethical views does not prove a lack of objective truth or absolutism. Different views may not arise because of fundamental ethical differences, but by virtue of the fact that values are implemented in different ways in heterogeneous societies. On the other hand, one of the more dangerous effects of absolutism is the belief that no other way is pure or righteous. Montaigne gave the example of the Spanish who butchered North American Indians without remorse because they had “reasoned” that Indians were abnormal. He despised this form of inductive logic:

Every man calls barbarous anything he is not accustomed to; we have no other criterion of truth or right-reason than the example and form of the opinions and customs of our own country. There we always find the perfect religion, the perfect polity, the most developed and perfect way of doing anything!<sup>143</sup>

In order, therefore, to accommodate both relativist and absolutist concerns, Montaigne developed a more subtle ethical theory. Not an exaggerated form of moral relativism, where every form of morality is equally acceptable which therefore precludes determining any truth. For him, relativism meant that virtues are not to be *based* on place or nation — nationality and familiarity were not proper criteria by which to decide the good. A more reasonable, constrained moral relativism is one where morality can take a variety of forms, but is always bounded by the basic requirements for having morals in the first place.

Another way to explain this in more contemporary terms is using Michael Walzer’s thick/thin version of morality.<sup>144</sup> Thick morality is indigenous and unique, comprising a dense web of social and cultural norms. It is not easily transplanted from its origins. It has no necessary relation to objective truth, but it is valid and necessary in that it serves to make a community coherent and viable. Without these thick traditions, a given society would — at least to some extent — unravel. Thin morality, on the other hand, is universalizable. It transcends the tribe, the group and the nation. It is not some sort of overlay, grafted on top of the thick from outside. It is meant to apply to all human beings, *qua* humans. Its core is found in all thick societies, and can be teased out and applied more widely. Most articulations of human rights are broadly understood as thin in this way. But thick morality is not just an addition to the pre-existing thin morality. In Walzer’s terms, the local thick morality transforms the universal thin.<sup>145</sup>

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<sup>143</sup> de Montaigne, *supra*, note 141, Book I, Essay 31, at 231.

<sup>144</sup> Walzer, *Thick-Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994).

<sup>145</sup> *Id.*, at chap. 1-2.

This puts a modern gloss on Montaigne's philosophy. If he were alive today, Montaigne would acknowledge the legitimacy of the thick as both constitutive of and essential to community. But because he also believed that virtues should be based on more than just place or nation, he would insist on Walzer's thin morality as well. Thus, sampling a number of countries' practices could make one reasonably confident that a correct ethical approach would be found within their parameters.

In a way, the two judgments in *Sauvé* (No. 2) can be read as reflecting, respectively, Walzer/Montaigne's relativistic and a Thomistic absolutist conception of morality. The majority is absolutist: persons are not to be treated as "means" and as such, every adult person, prisoners included, should have the right to vote in a democratic society. Individual rights, in effect, are paramount, despite the addition of a limitation section 1 in our Charter. The minority, in contrast, are relativists: the range of human good is too diverse to be determined in a single moral ideal. The minority's moral stance is that the common good, expressed in the form of legislation temporarily prohibiting prisoners from voting, in which many other admirable countries participate, is an ethical one that should prevail.

Chief Justice McLachlin has little time for arguments about the policies of other nations. The Court need only turn to the Charter to determine its answers. In her sole reference to other countries (described somewhat strangely as "self-proclaimed democracies") she simply states that their examples are unhelpful when trying to unearth what a Canadian vision of democracy is.<sup>146</sup>

Justice Gonthier relies heavily on what other liberal democracies do; for him their practices are "highly relevant."<sup>147</sup> He sounds like Montaigne, as modified by Walzer:

The examination of other liberal democracies simply demonstrates that there is a range of reasonable and rational balances that have been struck. The promotion of civic responsibility does not hinge on there being a single theory for liberal democracy. The lack of there being a unified political theory is, so to speak, the *point* of the overview. Reasonable and rational persons and legislatures disagree on the issue of prisoner disenfranchisement.<sup>148</sup>

This is the kind of constrained relativism he first established in *Butler*,<sup>149</sup> whereby pluralist societies recognize that a number of different conceptions of the good do exist, but that there is an untouchable core of values or conduct, transgression of which reasonable minds will agree are reprehensible. For

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<sup>146</sup> *Sauvé* (No. 2), [2002] S.C.J. No. 66, at para. 41.

<sup>147</sup> *Id.*, at para. 142.

<sup>148</sup> *Id.*, at para. 141 (emphasis in original).

<sup>149</sup> *R. v. Butler*, [1992] 1 S.C.R. 452.



Gonthier J. in *Sauvé (No. 2)*, our collective disapproval is largely contained in the *Criminal Code*. He then works backwards from this to argue that because much of the Code contains infringements on rights, section 1 of the Charter must operate in the background to sanction these diverse and wide-ranging limitations on rights for inappropriate behaviour. Of course, if the Court is to be consistent then similar values not specifically addressed in the Code should be upheld by the Court as if they were. For Gonthier J., prisoners' rights is a case in point.

Relativism is the minority's ethical flagbearer. As Gonthier J. states: "[t]he issue is therefore identifying what amounts to a fundamental *enough* conception of morality."<sup>150</sup> He builds an impressive array of statistics on prisoners' voting rights in the U.S., Europe, and elsewhere. As might be imagined, there is as broad a range of legislative responses as there are countries. Most of the American states place harsher restrictions on prisoner voting than Canada. Eighteen European countries, including Macedonia, Slovenia, and Ukraine, have no form of electoral ban for incarcerated offenders. Greece has automatic disqualification for only the most serious offences — prisoners serving life sentences or indefinite sentences — leaving it to the discretion of the court for other offences. Other European countries have laws similar to the one set out in section 51(e) of the Act: Austria, Malta, and San Marino withhold the vote from all prisoners serving more than one year; Belgium disqualifies all offenders serving sentences of four months or more; Italy bases its decision on the crime committed and/or the sentence length; Norway ties prisoner voting rights to specific offences; and in France and Germany, the sentencing court can expressly provide for disenfranchisement. The harshest European countries are Armenia, Bulgaria, the Czech Republic, Estonia, Hungary, Luxembourg, Romania, Russia and the United Kingdom, all of whom have more or less complete bans for sentenced offenders. Finally, the minority compares our situation to that in Australia and New Zealand. Both restrict prisoner's voting rights to some extent. In Australia, prisoners serving sentences of five years or more are disqualified from voting in federal elections. In New Zealand, prisoners in preventative detention, and those serving sentences for three years or more, may not vote.

After reviewing individual country responses to voting rights, the minority concludes by noting that a number of international instruments allow restrictions on the right to vote amongst prisoners: the United Nations Human Rights Committee, for example, expressly allows disenfranchisement of criminal offenders in a comment on Article 25 of the ICCPR.

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<sup>150</sup> *Sauvé (No. 2)*, *supra*, note 141, at para. 113 (emphasis added).

If you believe, as I do, in Montaigne's and Walzer's view of ethical relativism, Gonthier J.'s arguments are attractive. How else can we get a more rounded and complete understanding of morality than by comparison with others? Is it not a hallmark of wisdom that virtue can only be learned from someone else? As long as we understand the necessity for basic moral underpinning, then comparison with other countries should be very helpful. Indeed, even the very structure of the Charter makes a nod towards relativism when it is noted that rights are subject to reasonable limits. By putting that caveat first, we have given paramountcy to the idea that rights are not boundless.

The majority, on the other hand, leaves little, if any, room for such notions. Moreover, some of the judges are seriously inconsistent. In *United States of America v. Burns*<sup>151</sup> a unanimous Court spent a large portion of the judgment examining death penalty jurisprudence in a number of locations including Canada, the United States and, Europe. The Court did this to show how global abhorrence to the death penalty and wrongful convictions are both on the rise. To the entire Court, it was important to know what the rest of the world was doing and how others could affect its determination.<sup>152</sup>

Is it important to look to other countries only when it suits one's argument? It is hard not to see this as another example of results-oriented decision making. As far as prisoner's rights go, when most other countries are much less certain about what is appropriate, it makes one wonder why the majority of our Supreme Court is so self-assured.<sup>153</sup>

## 5. The Nature of Voting in the 21st Century

Mr. Andre: The problem is this. We teach our kids in school...Certainly I was taught that the right to vote is something special we have in a democracy. It's

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<sup>151</sup> [2001] 1 S.C.R. 283.

<sup>152</sup> *Id.* The Court examines other jurisdictions mainly at paras. 79-93; 105-117 and 126-132. See also Haigh, "A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the Need For a Principled Approach to Overruling" (2001) 14 S.C.L.R. (2d) 139, at 152ff.

<sup>153</sup> In an interesting twist, although it was said in another context and is not really relevant to this discussion, the "Oncomouse" case sees some of the judges adopting almost diametrically opposed positions to *Sauvé* (No. 2) on the idea of relativism. Binnie J., speaking in dissent on behalf of McLachlin C.J., Major and Arbour JJ., accepts the wisdom of using the laws in other jurisdictions as an aid to interpreting Canadian legislation. Justice Bastarache, speaking on behalf of the majority of L'Heureux-Dubé, Gonthier, Iacobucci and LeBel JJ. only examines domestic legislation and sees no need to review laws of other countries. See *Harvard College v. Canada (Commissioner of Patents)*, [2002] S.C.J. No. 77, especially at para. 13.

something responsible citizens do, and they care about their society and they exercise their franchise.

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Mr. Prud'homme: Are they ready to say that someone else could vote for a total mental case? That's contrary to the principle of one person, one vote. Someone who votes for a mental person actually has two votes, because that mental person is in no position to express who they want to vote for.<sup>154</sup>

While the final decision in *Sauvé (No. 2)* was obviously a great personal victory for Richard Sauvé (he was said to be jumping up and down with joy upon hearing the result)<sup>155</sup> and for prisoners' rights advocates, it is impossible not to read the case without thinking about broader issues related to the nature of democracy and voting in contemporary society. The final "probe" in this paper discusses the limitations of relying on litigation and the adversary system. By showcasing a very particular debate over voting rights, *Sauvé (No. 2)* ends up partially deflecting attempts to revitalize broader public debate about voting and to make real changes to our democratic system to deal with more systemic voting problems. The lack of discussion about voter turnout in all of the Electoral Committee hearings bears this out.

It is the nature of litigation to declare winners and losers. When this happens at a country's highest appeal level, it is usually as if a competition has ended. The appeal judges themselves often view the appearance in court and the subsequent judgment as the final, if not only, chapter in the saga (although the "dialogue" metaphor is slowly changing this view). Lawyers and legal theorists show a similar tendency to overstate the importance of legal challenges and court decisions.<sup>156</sup> In *Sauvé (No. 2)*, this notion was also embodied in the media reports, which portrayed the decision as an "odyssey,"<sup>157</sup> "capping Richard Sauvé's 18 year battle"<sup>158</sup> with prisoners' voting rights. The decision handed down on October 31, 2002 was seen as a high point in a struggle for rights. Concentrating on the success and failure of legal cases, and equating that with the only struggle for rights, however, sometimes misses the point. Legal disputes tend to create the boundaries of a debate; more complex issues can sometimes be marginalized, at best, or ignored completely, at worst.

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<sup>154</sup> Special Committee on Electoral Reform, March 15, 1993 and November 25, 1992.

<sup>155</sup> Reported by Rob Tripp in the Kingston *Whig Standard* — see "Federal Inmates Win Right to Vote: It Took 18 years for Kingston Lawyer to Make his Case," November 1, 2002, at 1.

<sup>156</sup> See Cain, "The Symbol Traders" in Cain and Harrington, eds, *Lawyers in the Post-modern World* (Open University Press, 1994), at 15-48.

<sup>157</sup> "Inmates Win Right to Vote," *supra*, *Montreal Gazette*, Nov. 1, 2002, at A11.

<sup>158</sup> See, e.g., "MPs Cool to Currying Captive Voters," *Montreal Gazette*, Nov. 2, 2002, at A11.

The question of whether convicts should be entitled to vote is obviously important. And as a result of *Sauvé (No. 2)*, there will be approximately 14,000 more eligible voters in Canada at the next federal election. Of potentially more significant concern, however, is the drastic reduction in voter turnout in the last decade. Issues involving rights, focused as they are on Charter provisions and therefore more easily litigated, seem to disproportionately engage our attention. Broader concerns such as voter turnout may not get the notice they deserve.

A few statistics will put the discussion in context.<sup>159</sup> Voter participation in the November 2000 federal election declined for the third straight time. The number of registered voters who cast a ballot in that election was 12.86 million, which meant that approximately 8.25 million registered voters (39 per cent of registered voters), did not vote at all. This was the lowest ever recorded turnout in Canada. Given these numbers, it is estimated that only 55 per cent of Canada's total voting age population turned out for the 2000 election. (The number compares favourably with the U.S., which has about 50 per cent total voter turnout, and for this reason is often described as the worst democracy in the world.) The downward trend is also mirrored in other democracies that do not have compulsory voting: Japan, the U.K., Ireland, Netherlands, and Portugal, for example, have all had extremely low voter turnouts for their last elections.

A number of reasons have been cited for this low voter turnout in Canada in 2000. First, the election was said to be devoid of important issues, and many felt the result was a foregone conclusion. Second, we moved to a permanent voters' list, from our previous system of door-to-door enumeration. This change arguably removed some of the built-in incentives to vote that existed in Canada. Thirdly, there is a more generalized public apathy and scepticism. This is manifest in a number of ways:

- changing times and changing values, such as declining church attendance and lack of interest in party politics, have reduced civic commitment. The result is an indifference to the entire process of voting;
- changing attitudes towards authority and a heightened sense of personal autonomy are said to lessen the chances that people will follow tradition and vote;
- a general political disaffection in today's society. Surveys show that average trust in politicians has diminished while the political system in

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<sup>159</sup> The information in the next few paragraphs comes from a recent Canadian study: "Voter Participation in Canada: Is Canadian Democracy in Crisis?" (Centre for Research and Information on Canada, October 2001, CRIC papers No. 3).

- general is less responsive to citizens' concerns. Governing from the centre also tends to reduce citizen's expectations in what MPs can do; and
- the increasing importance of youth. Younger voters (18-30) are not showing up at the polls because they are less patient, more likely to see the issues of the day in global, rather than national terms and less interested in basic civics and political science. This erosion of state power and the concomitant rise in power of non-state actors (NGOs, international organizations) and the perception of corruption and hypocrisy that leave a bad taste in voters' mouths are all reflected in lower voter turnout.

Voter malaise is symptomatic in Canada of dwindling civic literacy.<sup>160</sup> Democracy is stronger in communities that promote an ideal of high civic literacy because political participation rates are higher and interest in the operation of the government is more genuine and heartfelt. The relation between the two is mutually reinforcing. The dividends in these countries extend beyond citizen participation. Ultimately, policy decisions in robust democracies improve as a result of better input. As Professor Henry Milner states, only high civic-literacy societies, institutionally arranged so that a substantial majority of their citizens can count on meaningful maps to guide them through the complex decisions that their community faces, can hope to avoid large majorities of people paralyzed by inaction and unable to make their society better.<sup>161</sup>

At the same time as voters turn away from the polls and traditional forms of participatory democracy fall out of favour, new fora come to fill the void. In Canada, one of these has been the courts which operate in a new rights-based environment. Both *Sauvé* cases can be seen as examples of people using the courts as a forum for a different kind of participation in the democratic process: a small band of dissatisfied prisoners petition for the right to vote in federal elections. Both cases are thus about one of the most fundamental of democratic acts. And both cases make a nice contrast with the doom and gloom of the political scientists who worry about the lack of civic literacy, and call for greater newspaper reading campaigns and improvement in adult and civics education throughout the school curriculum. It should be cause for celebration amongst those who fear further declines in participation in our civil society.

That argument is fine as far as it goes, but there is a darker side to it. *Sauvé* (No. 2) places into stark relief one final reason for declining levels of civic

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<sup>160</sup> See Milner, "Civic Literacy in a Comparative Context: Why Canadians Should be Concerned" July 2001, Vol. 2(2) Policy Matters, IRPP.

<sup>161</sup> *Id.*

literacy — a belief that litigation is a legitimate pathway for determining the kind of community we wish to live in. The Charter has exacerbated this trend by making the Court a site for debating matters that would formerly have been debated elsewhere. I do not mean to downplay the gains made by some as a result of the Charter. The point being made is that these gains most likely come at some cost to the old-fashioned notion of what was meant by participation in a democratic community.

Have the Charter and the Court contributed to voter disaffection because litigation is now seen as a better way to participate in real democratic change? A cynical view would be that the prisoners who participated in *Sauvé (No. 1)* and *(No. 2)* are not as interested in voting in the next election as they are in asserting a right to determine their right to vote.

Obviously the Charter has created a massive new awareness of rights; it has also, less intentionally, created an industry of rights. Richard Sauvé's case is little different from other individuals who have used the Charter for personal advantage. Championed by lawyers for prisoners' rights who distrust the effectiveness of lobbying government on policy matters such as his, the cause gets framed into a legal issue, which must have a right answer and a wrong one, a winner and a loser.

In the end, the result is not entirely satisfying. On the one hand, when comparing the Court with alternative venues, such as Parliamentary committees, it is impossible not to have a high degree of respect for the level of discussion at the Court. On the other hand, however, the Court's purview is both necessarily restricted and overblown. The larger problem of declining voter turnout, for example, seems to be left unaddressed, perhaps because it is not able to be described in a way that can be framed as a Charter right, where an arbiter can decide an answer.

### III. CONCLUSION

Next federal election, thanks to Richard Sauvé and the Chief Justice of our Supreme Court, there will be approximately 14,000 newly eligible voters. A common stereotype of prisoners holds that they have no time for authority figures, and are guided by their own moral code. If this is true, will they want to vote? Will voter cynicism and apathy among the general public be even more exaggerated among the prison population?

Or, could it be treated as an opportunity for an educational lesson in civics? Chief Justice McLachlin held that voting is one way to educate citizens of their democratic responsibilities.<sup>162</sup> Civic duty could thus be actively encouraged

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<sup>162</sup> *Sauvé (No. 2)*, [2002] S.C.J. No. 66, at para. 38.

among prisoners. The government could make a big show of setting up voting booths in prisons and capitalizing on an opportunity to inculcate positive values in the rest of us regarding the importance of voting.

Which will it be? Will the percentage of voter turnout decline even further because the new pool of voters have even less desire to engage in the basic act of citizenship? Or will this be the beginning of a rise in our voter turnout? Who knows?

One thing is true. No matter whether you favour the majority or minority decision in *Sauvé (No. 2)*, the government argument — that allowing prisoners to vote demeans and depreciates the electoral system — would be much more palatable if more Canadians exercised their “fundamental” right to vote. Our 50 per cent voter turnout rate means a significant percentage of the population ignores the voting process. It makes one wonder whether the voting record of non-prisoner Canadians indicates a great deal less than McLachlin C.J. and the majority of the Supreme Court believe the right to vote is worth. Despite it all, however, the morass that is the great human invention called democracy, soldiers on.

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