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“SAUVÉ AND PRISONERS’ VOTING RIGHTS: THE DEATH OF THE GOOD CITIZEN?”

David M. Brown*

I. INTRODUCTION

“If at first you don’t succeed, try, try again:” traditional folk wisdom that Parliament applied with great success throughout the 1990’s.1 Parliament avoided the majority ruling in O’Connor2 by legislatively co-opting the minority’s reasons, which the Court duly upheld in Mills;3 so too the result in Seaboyer4 was reversed by legislation subsequently upheld in Darrach.5 So when, in 1993, the Supreme Court released its cryptic, 100-odd word decision in Sauvé v. Canada (Attorney General)6 striking down section 51(e) of the Canada Elections Act7 which disqualified from voting in federal elections “every person undergoing punishment as an inmate in any penal institution for

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1 The majority in Sauvé v. Canada (Chief Electoral Officer), [2002] S.C.J. No. 66 offers a contrarian view of judicial history: “The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of ‘if at first you don’t succeed, try, try, again.’” Sauvé, at para. 17. Tellingly, the majority avoids any reference to Mills or Darrach.


7 R.S.C. 1985, c. E-2 [hereinafter “the CEA”].
the commission of any offence” on the basis that the section was “drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test,”

Parliament duly enacted a new section narrowing the electoral restriction to persons “imprisoned in a correctional institution serving a sentence of two or more years,” and then, no doubt, sat back thinking that the Supreme Court would congratulate it for having engaged in such constructive “dialogue” with the Court.

Parliament was wrong. In a 5-4 decision released in October, 2002, the Supreme Court of Canada struck down the narrowed prisoner voting restriction in section 51(e) of the CEA and, in the process, elevated the democratic right to vote guaranteed by section 3 of the Canadian Charter of Rights and Freedoms to the status of a virtually absolute right, incapable of a justifiable infringement under section 1 of the Charter.

Professor Haigh, in his intriguing paper, “Between Here and There is Better than Anything Over There: The Morass of Sauvé v. Canada (Chief Electoral Officer),” probes several aspects of the Sauvé decision: the element of judicial rhetoric; the case as an example of the “dialogue” between the courts and the legislatures; the public perception of the case; and, the nature of voting in the 21st century. While I wish to engage Professor Haigh on his discussion of the moral dimension of the decision, I will focus on some other dimensions of the Sauvé case: (i) the impact on the section 1 analysis of the Court’s failure to explore the links between the two elements of section 3 — the right to vote and the right to be qualified for legislative office; (ii) the debate within the Court about the appropriate source from which to frame a section 1 analysis, and the associated dispute over the constitutional legitimacy of symbolic or abstract legislative objectives; (iii) the majority’s apparent rejection of the concept of citizen obligation under social contract political theory — have we seen the “death of the good citizen”?: and, (iv) the use, and misuse, of political philosophy by the Court in the Sauvé case and more generally.

8 Supra, note 6, at 439-40.
9 Supra, note 7, at s. 5.51(e).
II. THE RIGHT TO VOTE AND THE RIGHT TO STAND FOR OFFICE: FLIP-SIDES OF THE SAME COIN?

Section 3 of the Charter guarantees two rights to every citizen of Canada: the right to vote in a federal and provincial election, and the right “to be qualified for membership” in the House of Commons or a provincial assembly. In conducting its purposive analysis of section 3 the majority in Sauvé focused only on the right to vote; it treated the right to be qualified for office as a distinct, unrelated right. This was unfortunate and probably influenced the section 1 analysis engaged in by the majority. For while the majority described the right to vote in almost absolute terms, at the end of her judgment the Chief Justice acknowledged that Parliament might be justified in limiting the right to be qualified for office contained in the second half of section 3:

I leave for another day whether some political activities, like standing for office, could be justifiably denied to prisoners under s. 1. It may be that practical problems might serve to justify some limitations on the exercise of derivative democratic rights. Democratic participation is not only a matter of theory but also of practice, and legislatures retain the power to limit the modalities of its exercise where this can be justified. Suffice it to say that the wholesale disenfranchisement of all penitentiary inmates, even with a two-year minimum sentence requirement, is not demonstrably justified in our free and democratic society.12

Six years earlier, in the Harvey case, the Court appeared to accept that an infringement of either part of section 3 potentially could be justified under section 1 of the Charter.13 It therefore seems odd that in Sauvé the majority adopted an interpretive approach to a section of the Charter that would result in one part of the right contained in the section being virtually immune from infringement, while leaving the door open to limitations on the second part of the right.

Sauvé leaves unanswered the question as to what would have resulted from a purposive analysis which took into account both parts of section 3. Would a court conclude that both parts of section 3 advance and protect the same, or different, interests? What impact would such an analysis play on any resulting section 1 analysis of section 51(e) of the CEA? Unfortunately the Crown’s

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12 Sauvé, supra, note 1, para. 62 (emphasis added).

13 Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876, per La Forest, J. at para. 30:
In interpreting the right to vote under s. 3 this Court, and Canadian courts in general, have taken the approach that the justification for limitations on the right must be grounded in s. 1 of the Charter. As I have earlier noted, I do not believe the wording in the second part of s. 3 justifies taking a different approach to the right to stand for election and become a member of Parliament or a legislative assembly.
concession in the case of a section 3 infringement forestalled such a purposive analysis, a concession duly criticized by the minority because of the limits it placed on the interpretation of the right in question:

I would like to sound a cautionary note regarding the appropriateness of concessions of infringement. The specific problem with such a concession is that it may deprive the courts of the benefit of the fruitful argument which most often occurs at that initial phase of the analysis, in defining the scope of the right, particularly with regard to historical and philosophical context. The development of contextual factors examined with regard to the scope of the right is of great importance since they clearly “animate” the later stages of the test elaborated in *R. v. Oakes*, [1986] 1 S.C.R. 103; see McLachlin J. (as she then was) in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (“Saskatchewan Reference”), at p. 182.14

The utility that a more fulsome argument on the meaning of the rights and interests protected by section 3 found expression in several questions posed, but not answered, by Gonthier, J. who authored the minority decision: must a prisoner have the right to stand as a candidate? If an incarcerated offender were to be elected, would he or she have a right to be released from prison to take up that representative role?15 Answers to those questions could assist in bringing a more robust contextual approach to any section 1 analysis of a limitation on the right to vote. It is worth turning briefly to those unanswered questions and exploring whether any historical link existed between the right to vote and the eligibility for office.

Prisoner disenfranchisement has long roots in Canada.16 The *Constitution Act, 1791*,17 which established Upper and Lower Canada, specifically provided in section 23 for prisoner disenfranchisement: “no Person shall be capable of voting at any Election of a Member to serve in such Assembly, in either of the said provinces … who shall have been attained for Treason or Felony in any Court of Law within any of His Majesty’s Dominions …”. Section 41 of the *Constitution Act, 1867* preserved the status quo and authorized Parliament to establish the qualifications for membership in the House of Commons and for voters at elections.18

14 *Sauvé*, supra, note 1, at para. 78.
15 *Sauvé*, supra, note 1, at para. 88.
16 See the Federal Court of Appeal decision in *Sauvé (No. 2)* (1999), 180 D.L.R. (4th) 385, for the detailed history of the limitations.
17 (1791), 31 Geo. 111, c. 31.
18 Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at
Although the first federal electoral law, the 1885 *Electoral Franchise Act*, made no specific reference to prisoner disenfranchisement, subsection 3(1) of that Act required that voters be “of the full age of twenty-one years, and ... not by this Act or any law of the Dominion of Canada, disqualified or prevented from voting.”19 Justice Linden, writing for the majority of the Federal Court of Appeal in the *Sauvé* case, thought that the voter disqualification contained in the *Constitution Act of 1791* and preserved by section 41 of the *Constitution Act, 1867*, likely was the law in force in 1885. Then, in 1898, the *Franchise Act* enacted a limitation that denied the vote in federal elections to “[a]ny person who, at the time of an election, is a prisoner in a jail or prison undergoing punishment for a criminal offence.”20 The restriction remained virtually unchanged until it was struck down by the Supreme Court in *Sauvé v. Canada (Attorney General)*,21 and subsequently replaced with a restriction that applied only to those incarcerated serving a sentence for two or more years.

Turning to the eligibility to stand for election, the CEA historically linked one’s eligibility to vote in an election with the qualification to stand for election as a candidate. Prior to the passage of a new CEA in 2000, section 77(h) of the CEA provided that certain classes of persons were not eligible to stand as candidates at an election including “every person who is declared by section 51 to be not qualified to vote, during the time that pursuant to that section he is not qualified to vote.”22 Since section 51(e) of the CEA disqualified from voting prisoners serving a sentence of two or more years, the voting disqualification prevented a prisoner from running as a candidate in a federal election. This linkage was carried into the 2000 CEA.23

As observed by the Court in the *Reference Re Provincial Electoral Boundaries (Sask.)* case, the purpose of the right to vote enshrined in section 3 of the Charter is “effective representation,” which comprehends “the idea of having a voice in the deliberations of government as well as the idea of the
right to bring one’s grievances and concerns to the attention of one’s government representative …” Would allowing a prisoner to stand for electoral office impair the right of a voter to effective representation? The difficulty that an incarcerated member of Parliament would face in fulfilling crucial functions, including the member’s representative function, was recognized by the Royal Commission on Electoral Reform and Party Financing (the “Lortie Commission”) which recommended that "any prisoner who is serving a sentence that includes the period from nomination day to election day be ineligible to be a candidate" and that any member of Parliament sentenced to prison for six months or more resign his or her seat.

The Lortie Commission’s recommendation reflects a long-standing Parliamentary tradition. While the Parliament of Canada Act does not contain an express power of the House to expel a member who is convicted of a general criminal offence, it is well settled that the House of Commons enjoys the inherent power to expel a member for such reasons as it sees fit, including conviction for a criminal offence. Maingot cites English parliamentary precedent for the proposition that once elected, the jurisdiction of the House over its members, including the right to discipline within its own walls, is “absolute and exclusive.” The Court has found that the inherent privilege of a legislative assembly to exclude strangers enjoys constitutional status as part of the Constitution of Canada and cannot be abrogated by another part of the Constitution, including the Charter. No doubt the same would apply to the inherent power of the House of Commons to expel a member convicted of a crime, although whether a statutory power to expel would stand in the same position remains an open question.

None of this was considered by the Sauvé court in conducting its purposive analysis of the right to vote in section 3. Whether the interests protected by the

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26 Section 41 of the Parliament of Canada Act, R.S.C. 1985, c. P-1 does make it an offence for a member of the House of Commons to receive any compensation for services rendered in relation to any bill or other matter before the House, and on conviction the member becomes disqualified to sit in the House for five years.
29 See the debate contained in La Forest, J.’s majority opinion in Harvey, supra, note 13, at para. 20, and the concurring opinion of McLachlin and L’Heureux-Dubé JJ., at paras. 55 and 56.
right to vote are the same as, or may be influenced by, the interests underpinning the right to stand for election remains unanswered by the Court. A section 1 analysis requires the fullest possible understanding of the interests protected by the right in order to assess the reasonableness of any legislative limit. In Sauvé the Court not only side-stepped such a holistic purposive analysis, but it effectively forestalled any future consideration of the reasonableness of statutory limits on the right to stand for election. By striking down the electoral restriction on prisoners in section 51(e) of the CEA, the Court made prisoners eligible to run for Parliamentary office without any discussion of the implications of such a result. This indirect consequence of the Sauvé case could lead to an unanticipated constitutional “Catch-22.” Sauvé has removed the statutory bar to prisoners being qualified to stand for election; a prisoner can now run for office and be elected. Yet traditional parliamentary privilege (that the Charter likely cannot abrogate) would enable Parliament to expel a member convicted of a crime. Who would prevail? The Supreme Court à la Sauvé, or Parliament resting on its privilege? All of which points to the dangers of a court proceeding to interpret only part of the constitutional text at a time, without considering the interplay between the various interests protected by a section of the Charter.

III. THE DISPUTE OVER THE STANDARD OF JUSTIFICATION

At the heart of the difference between the majority and minority decisions in Sauvé, and partially obscured by the rhetoric surrounding the issue of judicial deference to the legislatures, lies an important debate about how to conduct a section 1 analysis. Two issues are engaged: (i) what is the controlling test — the language of section 1 or judicial glosses on the Oakes test? and (ii) what kinds of legislative objectives can survive judicial scrutiny under section 1 of the Charter.

1. The Text of Section 1 or a G lossed Oakes?

On the surface, both sides appeared to start their section 1 analysis from the same point. The Chief Justice wrote that “Parliament cannot use lofty objectives to shield legislation from Charter scrutiny.”30 The minority agreed that section 51(e) of the CEA must be justified under section 1. The Chief Justice stated that any limits on rights require “careful examination” with any justification “supported by logic and common sense.”31 Justification need not

31 Id., at para. 9.
be to the standard of empirical or mathematical precision, she wrote, but is sufficient if it is “convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations”.

Gonthier J. specifically agreed with this statement.

At this point, however, the consensus broke down, and the disagreement, in my view, results from differing views about the role of the text of the Constitution in constitutional analysis. Although it may seem trite, it is worth recalling that the text of the Charter sets out the test by which the government may justify laws that infringe guaranteed rights. Section 1 reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The constitutional text therefore permits limits that are (i) reasonable, (ii) prescribed by law, and (iii) demonstrably justifiable (iv) in a free and democratic society. In Oakes the Court interpreted the constitutional text and formulated a two-part test requiring demonstration, on a civil balance of proof, that the legislation (i) addressed a “pressing and substantial” objective and (ii) displayed a proportionality between its means and ends. Inevitably, when conducting section 1 analysis, courts began to neglect the actual language of section 1 and, instead, applied the language of the Oakes test, effectively substituting the judicial language in Oakes for the text of the Constitution. It is true that periodically the Supreme Court has reminded lower courts that the Oakes test is merely a set of “guidelines” to consider when applying section 1, and that the appropriate test in a section 1 analysis is that found in the section itself. However, the Court often seems to forget its own advice and continues to rely on the Oakes test in virtual substitution for the constitutional text.

Contrast the consequences in Sauvé between the minority’s textual approach to section 1 and the majority’s reliance on Oakes. Justice Gonthier, for the minority, stressed that section 1 did not require legislatures to design a “perfect solution,” but to ascertain whether “Parliament, in its attempt to reconcile competing interests, has achieved a rational and reasonable balance.” In critiquing the majority’s section 1 approach, Gonthier, J. emphasized the need for attention to the language of section 1 itself:

This case rests on philosophical, political and social considerations which are not capable of “scientific proof”. It involves justifications for and against the limitation.

32 Id., at para. 18.
33 Id., at para. 94.
36 Sauvé, supra, note 30, at para. 91.
of the right to vote which are based upon axiomatic arguments of principle or value statements. I am of the view that when faced with such justifications, this Court ought to turn to the text of s. 1 of the Charter and to the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the Charter. Particularly, s. 1 of the Charter requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive Charter scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional. I conclude that this is so in the case at bar.37

Relying on the language of section 1, Gonthier J. then develops the theme that the Charter does not limit legislatures to infringing rights only for a single “right reason,” but permits limitations for a variety of reasons as long as they fall within reasonable confines recognizable as a “free and democratic society.” A pluralism of legislative responses, based on a return to the plain language of section 1, echoes throughout the following passage in Gonthier’s decision:

There is a flaw in an analysis which suggests that because one social or political philosophy can be justified, it necessarily means that another social or political philosophy is not justified: in other words, where two social or political philosophies exist, it is not by approving one that you disprove the other. Differences in social or political philosophy, which result in different justifications for limitations upon rights, are perhaps inevitable in a pluralist society. That having been said, it is only those limitations that are not reasonable or demonstrably justified in a free and democratic society which are unconstitutional. Therefore, the most significant analysis in this case is the examination of the social or political philosophy underpinning the justification advanced by the Crown. This is because it will indicate whether the limitation of the right to vote is reasonable.

37 Sauvé, id., at para. 67 (emphasis added). Justice Gonthier continued in para. 95:

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 (paras. 13 and 14). This altering of the justification standard is problematic in that it seems to be based upon the view that there is only one plausible social or political philosophy upon which to ground a justification for or against the limitation of the right. This approach, however, is incorrect on a basic reading of s. 1 of the Charter, which clearly does not constrain Parliament or authorize this Court to prioritize one reasonable social or political philosophy over reasonable others, but only empowers this Court to strike down those limitations which are not reasonable and which cannot be justified in a free and democratic society.
and is based upon a justification that is capable of being demonstrated in a free and
democratic society. If the choice made by Parliament is such, then it ought to be
respected. The range of choices made by different legislatures in different
jurisdictions, which I will review below, supports the view that there are many
resolutions to the particular issue at bar which are reasonable; it demonstrates that
there are many possible rational balances.  

“Let a hundred flowers blossom; let a hundred schools of thought contend!”  

Justice Gonthier emerges as a pluralist: “The Charter was not intended to
monopolize the ideological space.” Instead, it leaves room for competing
social and political philosophies, with the proper role of the court, in the eyes of
the minority, serving to define “the parameters within which the acceptable
reconciliation of competing values lies.” The Chief Justice criticizes the
minority for showing an unwarranted deference to Parliament, but I think the
criticism misses the mark. Gonthier’s analysis does not excuse the government
from justifying an infringement, but it reminds courts that the constitutional
obligation on the government is to satisfy the requirements of the language of
section 1 and not some other standard erected by the Court.

The majority take a completely different approach to section 1, starting with
the elevation of the right to vote in section 3 into the pantheon of virtually
untouchable rights. Engaging in its own textual analysis, the majority
concluded that the “framers of the Charter signalled the special importance of
this right not only by its broad, untrammelled language, but by exempting it
from legislative override under section 33’s notwithstanding clause.” Later the
Chief Justice describes the right to vote as “one of the most fundamental rights
guaranteed by the Charter,” and then appears to suggest that no infringement
of the right is possible under section 1, stating that the ambit of the right

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38 Sauvé, supra, note 30, at para. 97 (emphasis added).
40 Sauvé, supra, note 30, at para. 96.
41 Sauvé, supra, note 30, at para. 98 (emphasis in original). See further, id., at para 98, “The decision before this Court is therefore not whether or not Parliament has made a proper policy decision, but whether or not the policy position chosen is an acceptable choice amongst those permitted under the Charter.”
42 The majority’s level of rhetoric surrounding s. 3 reaches some lofty heights: “Denial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law”: Sauvé, id., at para. 58. Given that legislative restrictions on prisoners’ rights to vote have existed in Canada in some form or the other since 1791, that would add up to 200 years of undermined and ineffective government!
43 Id., at para. 13
“should not be limited by countervailing collective concerns, as the government appears to argue.” Given that the government conceded that section 51(e) of the CAE infringed section 3 of the Charter, it appears that the Chief Justice is arguing that the nature of a right will influence the degree of scrutiny given to any infringing legislation under section 1. In other words, some rights enjoy greater protection from infringement than others. It is difficult to reconcile this position with the oft-repeated view of the Court that there is no hierarchy of rights under the Charter. Yet, the majority in Sauvé certainly is suggesting that that is precisely the case when it comes to the ability to justify legislation under section 1 of the Charter.

The majority then moves to a classic Oakes analysis. While characterizing the government’s symbolic objectives as “problematically vague,” the majority reluctantly accepted them as satisfying the first branch of Oakes. However, the abstract nature of the government’s objectives proved their fatal flaw under the majority’s proportionality analysis, for the “rhetorical nature of the government objectives … renders them suspect” and the fundamental nature of voting rights requires that the court apply “a stringent justification standard.”

Sauvé offers two competing views about the requirements to justify legislation infringing Charter rights. Resting its position on the text of section 1, the minority acknowledges the possibility of a plurality of legitimate policy choices by legislatures, and looks to gauge their reasonableness within the parameters of free and democratic societies. The majority stands on Oakes, and adds yet a new gloss to the test that “suspect” infringements attract “stringent justification standards.” With the battle lines drawn as they were, the differing results, and the levels of rhetoric that accompanied them, come as no surprise.

Yet, stepping back from the fray, one might ask why the issue of limiting the right to vote of convicted criminals while in a federal penitentiary evoked such heated division? Prisoner disenfranchisement hardly qualifies as the kind of political issue on which governments would rise or fall; and the practices in other free and democratic countries reveal that a wide variety of legislative approaches are taken to the issue of prisoners’ voting rights ranging from a complete denial of the right to vote to those convicted of a criminal offence to no denial of the franchise even while in prison, with section 51(e) of the CEA falling, in good Canadian fashion, somewhere in the middle. Why, then, the battle royale?

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44 Id., at para. 11.
45 Id., at para. 19.
46 Id., at para. 24.
48 Id., at paras. 14 and 24.
49 Id., at paras. 122–34.
Perhaps one should view the differences within the Court as one further manifestation of the Court’s ongoing struggle to reconcile its powers of judicial review with the principles of representative government. The majority seem sure of the primacy of the court, while the minority, reflecting on the text of the Charter, appear less certain. Consider, for example, the stark contrast between the majority and minority’s use of evidence of the practices in other jurisdictions regarding prisoner disenfranchisement. No reference was made by the majority to the practices of other “free and democratic societies,” while the minority reviewed the practices at some length. In so doing, is the majority suggesting that the “free and democratic society” referred to in section 1 need not be informed by the reasonable range of legislative practices outside Canada, but requires only a “made-in-Canada” solution? Yet, if the government cannot attempt to point to standards outside of Canada as an aid to measuring the reasonableness of its limitation, to what standards can it point? Is the majority suggesting that it alone creates the standards of reasonableness by which to measure legislation? The very language of section 1 would seem to call the court to consider any legislative restriction in the larger context of free and democratic societies; but a “stringent” application of Oakes, such as in Sauvé, pushes the justificatory analysis in a much more parochial and insular direction. Instead of a broad inquiry into the practices in free and democratic societies everywhere, the court attempts to craft a uniquely Canadian vision of what “this free and democratic society” should look like.


52 This parochial approach finds expression in another context in the majority decision in Lavoie v. Canada, [2002] S.C.J. No. 24 a case involving the constitutionality of preferences granted to Canadian citizens in certain stages of hiring for the federal civil service. Although ample evidence was placed before the court about the prevalence of civil service hiring preferences in other countries, in a remarkable passage the court discounted the utility of considering such practices when determining whether a state practice might demean a person’s dignity: “One must never lose sight of the overarching question, which is whether the law perpetuates the view that non-citizens are less capable or less worthy of recognition or value as human beings or as members of Canadian society; see Law, supra, at para. 99. It may be, in light of the above discussion, that a law defining the core rights and privileges of citizens is incapable of perpetuating such a view; indeed, such a law finds support in numerous international treaties and is accepted by almost every country in the world. In my view, however, this misses the point of the Law methodology; what is required is a contextualized look at how a non-citizen legitimately feels when confronted by a particular enactment.” (id., at para. 46) The message? The reasonable preferences employed by other free and democratic societies must yield to the uniquely Canadian Law analysis which is based on feelings. In fairness to the majority in Lavoie, the evidence of international practice did support a conclusion that the preference was rationally connected to the legislative objective.
a “free and democratic” society rests alone in the hands of the judges, then reference to any range of legislative practices becomes unnecessary, a position towards which the majority judgment in Sauvé seems inclined. In his judgment, Gonthier, J. ventured that “the Charter was not intended to monopolize the ideological space”; one could equally say that the language of section 1 of the Charter sought to ensure that the courts would not monopolize the ideological space by allowing for a pluralism of justifications, bounded only by the parameters of “reasonable” limits in a “free and democratic society.”

2. The Role of Abstract Values under Section 1: In or Out?

Sauvé engages another aspect of the issue of who should shape the vision of Canadian society by debating the constitutional legitimacy of Parliament pursuing abstract or symbolic legislative objectives. Before looking at the competing views expressed by the Court in Sauvé, it is worth reviewing the various legislative objectives advanced by the government in previous cases to justify limits on the prisoner franchise and how those objectives fared at the hands of the courts. Since the Reynolds case in 1982, courts have considered four objectives tendered by the government to justify denying criminals or prisoners the right to vote: (i) the administrative and security difficulties in arranging for voting in prisons; (ii) to affirm and maintain the sanctity of the franchise in Canadian democracy by excluding from the political community those who have disregarded its laws; (iii) to preserve the integrity of the voting process; and (iv) to sanction offenders.

In early prisoner voting cases in the 1980s Canadian courts largely rejected administrative and security concerns as a valid objective for section 1 purposes, leading the government to abandon advancing that objective in the cases heard during the 1990s. Preservation of the integrity of the voting process and the sanctioning of offenders fared little better. The real division of judicial opinion has arisen over the second objective, the affirmation and maintenance of the sanctity of the franchise in a democracy. In the 1984 British Columbia Court of Appeal decision in Reynolds, Craig J., in his dissent, reasoned that society could deprive a criminal of the civic right to vote because each citizen bears the

53 Justice Gonthier says as much in supra, note 51, at para. 104; “… the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values.”
55 Appendix “A” summarizes how courts have treated these objectives in the various prisoner voting cases that have been decided since the enactment of the Charter.
obligation to obey the law, a duty breached by committing a crime.\textsuperscript{56} Four years later in \textit{Grondin}, the Ontario High Court rejected as a legitimate objective the symbolic and practical exclusion from the political community of those who breach their duty to society.\textsuperscript{57} Yet later in 1988 Van Camp J., of the Ontario High Court, in \textit{Sauvé (No. 1)}, accepted that the state had a legitimate interest in preserving itself by the symbolic exclusion of criminals from the right to vote for the lawmakers. So also, the exclusion of the criminal from the right to vote reinforces the concept of a decent responsible citizenry essential for a liberal democracy.\textsuperscript{58}

This reasoning was adopted that same year by the Manitoba Court of Appeal in the \textit{Badger} case.\textsuperscript{59}

The 1990s brought a judicial change of view. The trial judge in the \textit{Belczowski} case stated that he was unable to see a legitimate objective in requiring a decent and responsible citizenry.\textsuperscript{60} The Federal Court of Appeal agreed, with the court holding that the symbolic and abstract objectives advanced by the Crown were not sufficiently important to justify the infringement of the right to vote.\textsuperscript{61} Justice Hugessen continued:

It is, of course, true that legislation may legitimately have a purely symbolic objective. The question on the first branch of the Oakes test, however, is not the legitimacy of the legislative purpose but rather its importance, that is to say whether it is “pressing and substantial”. For my part, I must say that I have very serious doubts whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental as to have been enshrined in our Constitution. To accept symbolism as a legitimate reason for the denial of Charter rights seems to me to be a course fraught with danger. Even on the lower test of a “desirable social objective” suggested in Andrews, I would have thought that such objective would have to translate into some real intended benefit and not merely some abstract or symbolic notion.\textsuperscript{62}

\begin{thebibliography}{9}
\bibitem{57} \textit{Grondin v. Ontario (Attorney General)} (1988), 65 O.R. (2d) 427, at 431-32 (H.C.), per Bowlby, J.
\bibitem{61} \textit{Id.}, [1992] 2 F.C. 440, at 456 (C.A.).
\bibitem{62} \textit{Id.}, at 456-57.
\end{thebibliography}
That same year Arbour, J.A., authored the Ontario Court of Appeal judgment in *Sauvé (No. 1)*, overturning the decision of Van Camp, J. Presaging the view of the majority in *Sauvé (No. 2)*, Arbour, J.A., agreed with Hugessen J.A. in *Belczowski*:

that the highly symbolic and abstract nature of this objective advanced by the respondents detracts from its importance as a justification for the violation of a constitutionally protected right.

She continued:

I would also add that the slow movement toward universal suffrage in Western democracies took an irreversible step forward in Canada in 1982 by the enactment of s. 3 of the *Charter*. I doubt that anyone could now be deprived of the vote on the basis, not merely symbolic but actually demonstrated, that he or she was not decent or responsible.63

Then, several months before the Supreme Court released its judgment in *Sauvé (No. 2)*, Arbour J. again voiced her scepticism about the legitimacy of abstract government objectives in *Lavoie*, a case involving the preference given to Canadian citizens in the public service hiring regime set out in the *Public Service Employment Act*:

Having moved quickly from a finding that s. 16(4)(c) of the PSEA makes a distinction on an enumerated or analogous ground to the conclusion that the claimants’ s. 15(1) rights were violated on the basis they felt subjectively discriminated against, Bastarache J. proceeds to find that the violation is justified under s. 1. For myself, I cannot accept that the violation of so sacrosanct a right as the guarantee of equality is justified where the government is pursuing an objective as abstract and general as the promotion of naturalization.64

Several months later, in her judgment in *Sauvé (No. 2)*, the Chief Justice built on Arbour J.’s views about abstract and symbolic legislative objectives. The majority concluded that only legislation “directed at a specific problem or concern”65 or “particular problems”66 can pass Charter muster under section 1. Legislation with “broad objectives” or “vague and symbolic objectives” likely will fail because “demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy”,67 under section 1 one must ascertain “what [legislation] is expected to achieve in concrete terms.”

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64 *Lavoie*, supra, note 52, at para. 85. Justice Bastarache, writing the plurality opinion, did not respond to this comment.
65 *Sauvé*, supra, note 51, at para. 21.
67 Id., at para. 23.
The majority went so far as to say that the “rhetorical nature of the government objectives … renders them suspect.”

Far from regarding symbolic objectives as problematic, the minority viewed symbolic legislative objectives as playing an important role in a democracy:

Symbolic or abstract arguments cannot be dismissed outright by virtue of their symbolism: many of the great principles, the values upon which society rests, could be said to be symbolic. In fact, one of the more important dimensions of s. 3 of the Charter is clearly its symbolism: the affirmation of political equality reflected in all citizens being guaranteed the right to vote, subject only to reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. The case at bar concerns debates about symbolism, as the arguments involved relate to abstract concepts such as democracy, rights, punishment, the rule of law and civic responsibility. To choose a narrow reading of rights over the objectives advanced by Parliament is to choose one set of symbols over another.

Intuiting that a vibrant and coherent democratic society relies on some use of the symbolic, the minority’s view about the constitutional legitimacy of symbolic or abstract legislative objectives finds support from two sources. Ironically, the first source rests in the majority’s judgment in Sauvé, for the majority itself relied on abstract values in concluding that the government’s reliance on abstract values, such as enhancing the respect for the law, failed the rational connection analysis. The Chief Justice wrote:

In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country’s boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited

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68 Id., at paras. 22 and 23.
70 The Court’s 1996 decision in Harvey, [1996] 2 S.C.R. 876, involved a consideration of the provisions of the New Brunswick Elections Act expelling a sitting member of the Legislative Assembly upon conviction of committing an “illegal practice,” defined as a set of election-related offences. In upholding the provisions under section 1 of the Charter, the Court had no difficulty in finding that the legislative objective of maintaining and enhancing the integrity of the electoral process was a pressing and substantial concern and capable of surviving a rational connection analysis. Perhaps the Court in Harvey regarded the legislative objective as more concrete in nature than that in Sauvé since the statutory provisions were designed to prevent interference in the actual election process.
from social contract theory and enshrined in the Charter, stands at the heart of our system of constitutional democracy.\textsuperscript{71}

At the level of the symbolic, the majority saw the rule of law promoted by an unlimited franchise, whereas the minority regarded the symbolism of the rule of law enhanced by the disenfranchisement of those who commit a serious breach of the law. Promotion of the symbolic or abstract played a role in both judgments.

A second source of support for the minority’s recognition of the importance of symbolic objectives lies in the Court’s recent jurisprudence concerning the “unwritten principles” of the Constitution. In \textit{Provincial Judges Remuneration Reference},\textsuperscript{72} the Court contended that “the Constitution embraces unwritten, as well as written rules,”\textsuperscript{73} resting this conclusion in large part on the preamble to the \textit{Constitution Act, 1867}. Finding that the preamble articulated the political theory embodied in the Constitution and elaborated the organizing principles in the institutional apparatus created by the Constitution, the Court stated that the preamble invited “the use of those organizing principles to fill out the gaps in the express terms of the constitutional scheme.”\textsuperscript{74} Later in \textit{Quebec Secession Reference}, the Court described these unwritten principles as the “vital unstated assumptions upon which the text is based”\textsuperscript{75} and identified “four foundational constitutional principles:” federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.\textsuperscript{76}

Each of these foundational principles contains elements of the abstract and the symbolic. The rule of law, for example, was styled by the Court as “a highly textured expression, importing many things … but conveying, for example, a sense of orderliness, of subjection to know legal rules and of executive accountability to legal authority.”\textsuperscript{77} While the Court acknowledged in the \textit{Quebec Secession Reference} that these principles might appear general or abstract, it emphasized that “these principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”\textsuperscript{78} The unanimous Court stated:

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\textsuperscript{71} \textit{Supra}, note 51, at para. 31 (emphasis added).
\textsuperscript{72} \textit{Id.}, at para. 92.
\textsuperscript{73} \textit{Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island}, [1997] 3 S.C.R. 3.
\textsuperscript{74} \textit{Id.}, at paras. 92-95, \textit{per} Lamer, C.J.
\textsuperscript{76} \textit{Id.}, at para. 49.
\textsuperscript{77} \textit{Id.}, at para. 70.
\textsuperscript{78} \textit{Id.}, at para. 54.
\end{flushright}
Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have “full legal force” as we described it in the Patriation Reference …) which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. 79

One is thus forced to ask: if the unwritten principles of the Constitution can give rise to “abstract” obligations, and such general principles form part of the warp and weft upon which our political institutions are built, why is it not legitimate for the government to enact legislation whose objective is to promote and achieve those general principles and abstract obligations? In Sauvé the government advanced enhancing respect for the rule of law as one of the objectives of the legislative restriction on the franchisement. If the rule of law carries sufficient political weight to receive judicial designation as an unwritten constitutional principle, it is very difficult to understand how the majority could conclude that a legislative objective designed to enhance the respect for that unwritten constitutional principle was “suspect.”

IV. PRISONERS AS “CITIZEN LAW-BREAKERS:” THE DEATH OF THE GOOD CITIZEN?

Depriving prisoners of the right to vote involves passing a moral judgment on prisoners that the majority in Sauvé regarded as unwarranted. Conviction for the commission of a crime does not signal that a person is morally unworthy, said the majority, and any such suggestion rests on an improper attribution of moral character. The majority offers several reasons why the government cannot find prisoners to be morally unworthy of the right to vote. Pointing to the language of section 3 of the Charter, the majority states:

… the government is making a decision that some people, whatever their abilities, are not morally worthy to vote — that they do not “deserve” to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. But this is not the lawmakers’ decision to make. The Charter makes this decision for us by guaranteeing the right of “every citizen” to vote and by expressly placing prisoners under the protective umbrella of the Charter through constitutional limits on punishment. The Charter emphatically says that prisoners

79 Id., at para. 54 (emphasis added).
80 “Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter …” Sauvé, [2002] S.C.J. No. 66, at para. 44.
are protected citizens, and short of a constitutional amendment, lawmakers cannot change this.”\(^{81}\)

Coining a new phrase, “citizen law-breaker,” the majority states that “denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy.”\(^{82}\) The Chief Justice describes as “untenable” the proposition “that the commission of a serious crime signals that the offender has chosen to ‘opt out’ of community membership.” But, one might respond, the rights in section 3 are subject to limitation under section 1 of the Charter, so does not the Charter leave open the door to Parliament to conclude that prisoners “are not morally worthy to vote”? The majority never answers that question, but repeatedly signals its displeasure that Parliament has passed a moral judgment on prisoners and found them wanting by linking prisoners with others who in the past were denied the right to vote.\(^{83}\) In the eyes of the majority the repugnance we feel today towards the historical disenfranchisement of blacks, women and aboriginal peoples must now be directed with equal force to prisoners, those who have been convicted of breaking the criminal law of the country.

Of course, the minority was having nothing of this. Disqualification of prisoners, in their view, differed qualitatively from other historical exclusions from the franchise because prisoners were deprived of the vote for what they did, not who they were:

The provision in question in the case at bar, however, is strikingly and qualitatively different from these past discriminatory exclusions. It is a temporary suspension from voting based exclusively on the serious criminal activity of the offender. It is the length of the sentence, reflecting the nature of the offence and the criminal activity committed, that results in the temporary disenfranchisement during incarceration. Thus, far from being repugnant and discriminatory, based on some irrelevant personal characteristic, such as gender, race, or religion, s. 51(e) of the Act distinguishes persons based on the perpetrating of acts that are condemned by the Criminal Code, R.S.C. 1985, c. C-46.\(^{84}\)

As Gonthier, J. concluded: “Responsible citizenship” does not relate to what gender, race, or religion a person belongs to, but is logically related to whether

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\(^{81}\) Id., at para. 37.
\(^{82}\) Id., at para. 40.
\(^{83}\) “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.” Id., at para. 43.
\(^{84}\) Id., at para. 69.
or not a person engages in serious criminal activity. Nor does the suspension of a prisoner’s right to vote adversely affect his or her sense of “dignity:”

…it could be said that the notion of punishment is predicated on the dignity of the individual: it recognizes serious criminals as rational, autonomous individuals who have made choices. When these citizens exercise their freedom in a criminal manner, society imposes a concomitant responsibility for that choice.

Several important issues are engaged by these differing moral perspectives. In the majority’s reluctance to regard incarceration for committing a criminal conviction as an indication of moral wrongdoing by a person, one sees the influence of the equality analysis that has evolved in recent years under section 15 of the Charter, especially with the post-Law focus on human dignity. The strain of moral neutrality permeating much of the section 15 analysis now appears poised to move into the one area of law based on community moral judgments, the criminal law.

A second, related implication, concerns the confusion the majority decision in Sauvé creates about the relationship between social contract theory that has underpinned modern liberalism (and of which the Charter is a direct progeny) and any conception of civic responsibility or morality. The Chief Justice acknowledges the link between social contract theory and the Charter, but with her use of the phrase “citizen law-breakers” leaves the suggestion that under the Charter the social contract is a one-way street, with little in the way of reciprocal obligations owed by the individual to the community. How else can one understand her assertion that it is “untenable” “that the commission of a serious crime signals that the offender has chosen to ‘opt out’ of community membership?”

By contrast, the minority regards social contract theory as imposing obligations as well as giving rise to rights, in particular imposing the obligation to obey the law:

The denunciation of crime and its effects on society is often explained by reference to the notion of the social contract. The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests.

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85 Id., at para. 70.
86 Id., at para. 73.
87 Id., at para. 31.
88 The Lortie Commission took a similar approach, rejecting as unwarranted the assumption that by violating the law a prisoner had demonstrated that he or she was unwilling to abide by the norms of responsible citizenship. The Commission did not regard violating the laws as equivalent to violating “the social foundations of liberal democracy.” Supra, note 25, at 43.
In my view, the social contract necessarily relies upon the acceptance of the rule of law and civic responsibility and on society’s need to promote the same...

Related to the notion of the social contract is the importance of reinforcing the significance of the relationship between individuals and their community when it comes to voting. This special relationship is inherent in the fact that it is only “citizens” who are guaranteed the right to vote within s. 3 of the Charter. This limitation of the scope of s. 3 of the Charter stands in stark contrast to the protections offered by the fundamental freedoms, legal rights, and equality rights in the Charter, which are available to “everyone” or to “every individual”. I am of the view that this limitation reflects the special relationship, characterized by entitlements and responsibilities, between citizens and their community. It is this special relationship and its responsibilities which serious criminal offenders have assaulted.

This view conforms with the position of the classical social contractarians, as succinctly summarized by Zdravko Planinc, in his article, “Should Imprisoned Criminals have a Constitutional Right to Vote?”

Hobbes, Locke, Rousseau and Kant would all consider it unreasonable, but perhaps not surprising, for a prisoner to argue that he did not consent to give up his citizenship upon entering a prison, and that he is therefore not a subject but a citizen entitled to vote. They would also all agree about why it is unreasonable. Men consent to live together in a society under the rule of law. The society’s form of government determines who is a citizen and who is simply a subject. In a democracy most subjects will be citizens, or will be eligible to become citizens. Now, when a man commits a criminal act, he acts against the nature of the commonwealth itself. His rights of citizenship are immediately forfeit because his participation in the commonwealth has been called into question. The irrationality of considering criminals to be citizens is stated succinctly by Kant:

In my role as colegislator making the penal law, I cannot be the same person who, as a subject, is punished by the law; for, as a subject who is also a criminal, I cannot have a voice in legislation.

Therefore, the only way for a criminal to become a citizen is by “the error of them that receive him,” in Hobbes’ words.

A similar approach was taken by the most prominent modern exponent of social contract theory, John Rawls, who acknowledged that in a well-ordered society the coercive powers of government are to some degree necessary for the

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90 Id., at para. 117 (emphasis added).
stability of social co-operation\textsuperscript{92} and that those who are punished for violating laws are normally regarded as having done something wrong. In \textit{A Theory of Justice} Rawls wrote:

\ldots the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults.\textsuperscript{93}

Under Rawls’ theory of justice as fairness, where persons have agreed to penalties to stabilize a scheme of social co-operation, they are recognizing constraints on self-interest and “it is rational to authorize the measures needed to maintain just institutions.” To those who cannot act justly (\emph{i.e.}, within the law), Rawls simply responds: “their nature is their misfortune.”\textsuperscript{94}

All of which raises a fundamental question: does the concept of citizenship under the Canadian Charter embody any notion that citizens owe responsibilities to the larger political community? One can point readily to sections of the Charter that identify rights that accompany citizenship — the right to vote (section 3), mobility rights (section 6) and minority language educational rights (section 23) — but the jurisprudence contains little discussion about the duties that Canadian citizens owe to their political communities. Two cases — \textit{Andrews}\textsuperscript{95} and \textit{Lavoie}\textsuperscript{96} — considered the constitutional adequacy of citizenship as a marker for entitlement to government benefits, but they included little discussion of the responsibilities of citizenship. In \textit{Andrews}, McIntyre, J. referred to the “obligations” of citizenship,\textsuperscript{97} without further elaboration. In the same decision, LaForest, J. described citizenship as a “very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity;”\textsuperscript{98} but he too offered no description of a citizen’s duties.

\textsuperscript{92} See, \emph{e.g.}, Rawls, \textit{A Theory of Justice} (Revised ed., Cambridge: Harvard University Press, 1999), at 10-11 and 14-15.
\textsuperscript{93} \textit{Id.}, at 276-77.
\textsuperscript{94} \textit{Id.}, at 504.
\textsuperscript{97} \textit{Id.}, at para. 60.
\textsuperscript{98} \textit{Id.}, at para. 70.
It is unfortunate that the majority in Sauvé dismissed the government’s evidence about civic virtues and civic responsibility as unhelpful “vague appeals.”\(^9\) By so doing it cut short the beginnings of a debate long overdue in Canadian constitutional law — the relationship between the Charter and civic responsibility. The neglect of the place of obligations in the contemporary discussion of legal rights has long been observed,\(^10\) and even John Stuart Mill, the political philosopher relied on by the majority in Sauvé, regarded the superiority of democracy as lying in the fact that it calls upon the citizen “to weigh interests not his [or her] own; to be guided, in case of conflicting claims, by another rule than his [or her] private partialities; to apply at every turn, principles and maxims which have for their reason of existence the common good . . .”\(^11\) With its conclusion that the political community cannot sanction the “citizen law-breaker” by suspending his or her political rights during incarceration, the Supreme Court may have left little room for the development of any notion under the Charter of a “civic responsibility” that involves the mutual interaction of political obligations and rights.

V. JOHN STUART MILL AS THE POSTER BOY FOR THE EXPANDED FRANCHISE, OR HOW SHOULD THE COURT USE POLITICAL PHILOSOPHY?

1. The Use of John Stuart Mill in the Sauvé Decision

Grudgingly accepting one of the government’s proffered objectives for section 51(e) — the enhancement of civic responsibility and respect for the rule of law — as “capable in principle of justifying limitations on Charter rights,”\(^12\) the majority concluded that the government had failed to demonstrate that a rational connection existed between the legislative limitation and the offered objective.\(^13\) The majority curtly rejected the government’s contention that depriving some inmates of the right to vote sends an “educative message” about the importance of respect for the law to inmates and to the citizenry at large:

The problem, here, quite simply, is that denying penitentiary inmates the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations

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\(^9\) *Sauvé*, note 89, at para. 37.


\(^12\) *Sauvé*, note 89, at para. 19.

\(^13\) *Id.*, at para. 28.
under the law, and it communicates a message more likely to harm than to help respect for the law.\footnote{104}{Id., at para. 30.}

Arguing that lawmakers act as citizens’ proxies, the majority stated that “the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote.”\footnote{105}{Id., at para. 31.} Noting the “vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it,”\footnote{106}{Id., at para. 31.} the majority contended that any disenfranchisement of inmates is both “anti-democratic and internally self-contradictory”\footnote{107}{Id., at para. 32.} because denying its citizens the right to vote denies the “truth” that voting is the basis of democratic legitimacy.

After briefly reviewing the history of progressive enfranchisement in Canada, the majority then stated that depriving at risk individuals of their sense of collective identity and membership in the community is unlikely to instil a sense of responsibility and community identity, “while the right to participate in voting helps teach democratic values and social responsibility.”\footnote{108}{Id., at para. 38.} The Chief Justice then immediately proceeded to quote from John Stuart Mill’s 1859 essay, “Thoughts on Parliamentary Reform:"

To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness, the first opening in the contracted round of daily occupations. … The possession and the exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind.\footnote{109}{Id., at para. 38.}

She concluded: “To deny a prisoner the right to vote is to lose an important means of teaching them democratic values and social responsibility.”\footnote{110}{Id.}

The passage from Mill’s essay was contained in the report of one of the government’s experts, Dr. Thomas Pangle, a professor of political philosophy at the University of Toronto.\footnote{111}{Sauvé v. Canada (Chief Electoral Officer), S.C.C. Court File No. 27677, Appellants’ Record [hereinafter “Appellants’ Record”], Vol. III, at 477.} While the majority did not quote further from Mill, they did make two further references to him. First, in rejecting that either the record or common sense supported the claim that disenfranchisement deters crime or rehabilitates criminals, the Chief Justice wrote: “… as Mill recognized...
long ago, participation in the political process offers a valuable means of teaching democratic values and civic responsibility.”¹¹² Then, in its analysis on the proportionate effect of the legislation, the majority contended that denying prisoners the right to vote imposed negative costs on prisoners and on the penal system: “[i]t removes a route to social development and rehabilitation acknowledged since the time of Mill, and it undermines correctional law and policy directed towards rehabilitation and integration …”¹¹³

As the following passage suggests, the minority appeared to accept that Mill’s thought stood for the extension of the franchise to prisoners:

Citing J.S. Mill as her authority, [the Chief Justice] states that “denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than message that enhance those values” (para. 41). However, apart from one philosopher, she provides no support for this contention; she simply replaces one reasonable position with another, dismissing the government’s position as “unhelpful” (para. 37 of the Chief Justice’s reasons).”¹¹⁴

Both the majority and minority thus proceeded on the basis that Mill’s thought generally supported the expansion of the franchise to teach democratic values and social responsibility and, more specifically, supported the extension of the franchise to prisoners. However, a fuller consideration of Mill’s political thought calls both suppositions of the Court into question.

2. The Dangers of “Proof-Texting”

Dealing first with the view that Mill regarded the expansion of the franchise as a means to teach democratic values and social responsibility, had the Court in Sauvé canvassed Mill’s general views on the franchise they might have reconsidered relying on his work. For in fact, in his quest to ensure an informed electorate, Mill proposed several restrictions on the franchise. Mill’s 1859 essay, Thoughts on Parliamentary Reform, quoted by the majority was followed two years later by his more famous essay, Representative Government.¹¹⁵ As the name suggests, in the essay Mill argued that the best form of government is “representative government.” After sketching out a plan for proportional representation that would ensure some representation of minorities in a representative government, Mill turned, in Chapter 8 of the

¹¹³ Id., at para. 59.
¹¹⁴ Id., at para. 157.
essay, to the question of the extension of the suffrage. After referring to de Tocqueville’s work, *Democracy in America*, showing the connections between the “potent instrument of mental improvement in the exercise of political franchise by manual labourers” and democratic institutions, Mill extols the virtues of the franchise in language that would appeal to the majority of the Court:

Independently of all these considerations, it is a personal injustice to withhold from anyone, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth, though not at more than its worth. There ought to be no pariahs in a full-grown and civilized nation …

… Everyone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate its destiny. … No arrangement of the suffrage, therefore, can be permanently satisfactory in which any person or class is peremptorily excluded; in which the electoral privilege is not open to all persons of full age who desire to obtain it.¹¹⁶

Nevertheless, certain caveats followed these expansive statements. To complete one of the passages just quoted, Mill wrote: “There ought to be no pariahs in a full-grown and civilized nation; no persons disqualified, except through their own default.”¹¹⁷ More broadly, Mill contended that there are “certain exclusions, required by positive reasons, which do not conflict with this principle, and which, though an evil in themselves, are only to be got rid of by the cessation of the state of things which requires them.”¹¹⁸ What then are these “exclusions required by positive reasons” from the suffrage? To vote, Mill wrote, one must at least have “… acquired the commonest and most essential requisites for taking care of themselves; for pursuing intelligently their own interests, and those of the persons most nearly allied to them.”¹¹⁹ Accordingly, the franchise should not extend to those who cannot read, write, or calculate.¹²⁰ A financial interest in the affairs of the community was also, in

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¹¹⁶ Representative Government, *id.*, at 382.
¹¹⁷ *Id.* (emphasis added).
¹¹⁸ *Id.*
¹¹⁹ *Id.*, at 382-83.
¹²⁰ In regard, however, to reading, writing and calculating, there need be no difficulty. It would be easy to require from everyone who presented himself [or herself] for registry that he [or she] should, in the presence of the registrar, copy a sentence from an English book, and perform a sum in the rule of three; and to secure, by fixed rules and complete publicity, the honest application of so very simple a test. This condition, therefore, should in all cases accompany universal suffrage; and it would, after a few years, exclude none but those who
Mill’s view, a requisite for the franchise. Building on this, Mill advocated that “taxation, in a visible shape, should descend to the poorest class” and that:

a direct tax, in a simple form of a capitation, should be levied on every grown person in the community … that so everyone might feel that the money which he assisted in voting was partly his own, and that he was interested in keeping down its amount.

Further, Mill advocated that those on welfare should not enjoy the franchise, at least while they are on the dole.

Isaiah Berlin once wrote of Mill’s “fear of ignorant and irrational democracy and consequent craving for government by the enlightened and the expert.” In light of Mill’s advocacy of these restrictions on the franchise, restrictions that would offend our current sensibilities of human dignity, there is a certain irony that shortly before the majority in Sauvé quoted Mill so approvingly, the Chief Justice had written:

cared so little for the privilege, that their vote, if given, would not in general be an indication of any real political opinion.

Id., at 383.

121 It is also important, that the assembly which votes the taxes, either general or local, should be elected exclusively by those who pay something towards the taxes imposed. Those who pay no taxes, disposing by their votes of other people’s money, have every motive to be lavish and none to economize. As far as money matters are concerned, any power of voting possessed by them is a violation of the fundamental principle of free government; as severance of the power of control from the interest in its beneficial exercise. It amounts to allowing them to put their hands into other people’s pockets for any purpose which they think fit to call a public one …

Id., at 383.

122 Id., at 383.

123 I regarded as required by first principles, that the receipt of parish relief should be a peremptory disqualification for the franchise. He who cannot by his labour suffice for his own support has no claim to the privilege of helping himself to the money of others. By becoming dependent on the reaming members of the community for actual subsistence, he abdicates his claim to equal rights with them in other respects. … As a condition of the franchise, a term should be fixed, say five years previous to the registry, during which the applicant’s name has not been on the parish books as a recipient of relief. To be an uncertified bankrupt, or to have taken the benefit of the Insolvent Act, should disqualify for the franchise until the person has paid his debts, or at least proved that he is not now, and has not for some long period been, dependent on eleemosynary support. Non-payment of taxes, when so long persistent in that it cannot have arisen from inadvertence, should disqualify while it lasts.

Id., at 383-84.

The right of citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament’s claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the bias of its right to convict and punish law-breakers.\textsuperscript{125}

A second element of Mill’s thought might have given the Court pause to advance him as the exemplar of the universal franchise. Mill was not a proponent of “one person, one vote.” Immediately following his discussion in \textit{Representative Government} of permissible restrictions on the suffrage, Mill proceeded to advocate “plural voting,” a system under which persons could cast different numbers of votes in an election. As Mill pithily explained: “but though everyone ought to have a voice — that everyone should have an equal voice is a totally different proposition.”\textsuperscript{126} In his view, some persons would have more than one vote “on the ground of greater capacity for the management of the joint interest” of the polity. Since the only thing “which can justify reckoning one person’s opinion as equivalent to more than one is individual mental superiority,” Mill proposed a system under which some persons would be allowed two or more votes depending upon whether they exercised a “superior function” based on their higher degree of education or the nature of their profession.\textsuperscript{127}

Section 3 of the Charter does not explicitly embody a principle of “one person, one vote,” and in the \textit{Saskatchewan Electoral Boundary Reference} the Supreme Court opined that “the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power \textit{per se}, but the right to ‘effective representation.’”\textsuperscript{128} In that case, however, the Court went on to describe “effective representation” as encompassing “relative parity of voting power,” so presumably Mill’s proposal for “plural voting” based on “superior function” would not meet that requirement and would run counter to the majority’s view in \textit{Sauvé} that franchise conditions tied to “virtue or mental ability or other distinguishing features” run counter to the legitimacy of Canadian democracy. As Planinc points out, Mill’s utilitarianism provides no support for arguments in favour of granting democratic rights to prisoners because Mill bases his


\textsuperscript{127} \textit{Id.}, at 385.

\textsuperscript{128} \textit{Reference Re Provincial Electoral Boundaries (Sask.)}, [1991] 2 S.C.R. 158, at 183, \textit{per} McLachlin J. (as she then was).
political arguments on an assessment of the relative worth of persons, an approach specifically rejected by the majority in Sauvé.\textsuperscript{129}

In fairness to the Court, in his affidavit Professor Pangle did not expressly point out Mill’s proposals for limitations on the franchise nor Mill’s advocacy of “plural voting.” Professor Pangle’s affidavit did include an historical section on how disenfranchisement had been used to exclude those “supposed to lack a minimal level of understanding or a minimal level of responsibility”\textsuperscript{130} (consistent with Mill’s position), but the professor did not directly reference Mill in that section.

Nevertheless, the majority’s use of Mill squarely raises the dangers of using statements from political philosophers to proof-text a judicial conclusion or policy choice. Political theories invariably are multi-dimensional and change over the lifetime of a philosopher, making it very difficult to extract a particular phrase or statement in any meaningful way without having regard to the overall corpus of the political philosopher. As the Court constantly emphasizes in its Charter jurisprudence, context is all-important; the same holds true when using political philosophy to support judicial conclusions.

3. Mill’s Specific Views on the Franchise for Prisoners

On the specific issue of prisoner voting, the Court proceeded on the basis that Mill’s political philosophy supported the extension of the franchise to prisoners. In fact, Mill did not support extending the franchise to all prisoners and that was made clear in the record before the Court.

Dealing first with Mill’s position, the quotation from Mill’s essay, “Thoughts on Parliamentary Reform,” which the majority used in its judgment is found in a paragraph that begins with the following sentence:

\begin{quote}
First, then, in every system of representation which can be conceived as perfect, every adult human being, it appears to me, would have the means of exercising, through the electoral suffrage, a portion of influence on the management of public affairs.\textsuperscript{131}
\end{quote}

The footnote indicated by the asterisk directly deals with the issue of prisoner voting, wrapping a distinctly moral character around the issue. Mill’s footnote, in its entirety, reads as follows:

\textsuperscript{129} Planinc, \textit{supra}, note 91, at 159.
I pass over the question whether insane persons, or persons convicted of crime, should be exceptions to this general provision. As far as the direct influence of their votes went, it would scarcely be worth while to exclude them. But, as an aid to the great object of giving a moral character to the exercise of the suffrage, it might be expedient that in the case of crimes evincing a high degree of insensitivity to social obligation, the deprivation of this and other civic rights should form part of the sentence.\(^{132}\)

In the case of serious crime Mill appears more than amenable to depriving a criminal of the franchise, and perhaps other “civic rights” as part of the sentence. (A proposal actually raised by Wetston, J., the trial judge in \textit{Sauvé (No. 2)}). As it turns out, the Supreme Court’s champion of the franchise for prisoners actually supported restricting the franchise in the case of serious crime.

Mill’s position was made clear in the record before the court. In his expert report Professor Pangle directly dealt with Mill’s footnote, writing:

It is in the light of these considerations that Mill takes up — to be sure, in a footnote — the question of the disenfranchisement of “persons convicted of crime.” “As far as the direct influence of their votes went, it would scarcely be worth while to exclude them,” Mill opines. He apparently means, not that their votes are without influence on the outcome of the elections, but that the expense or inconvenience of policing the exclusion would outweigh the small benefit, given the minuscule proportion criminals make up of the voting population, and therefore the relatively small danger they pose of affecting improperly the outcome. Yet this consideration is eclipsed, or indeed reversed, by a second, and far more important consideration — the effect on the education dimension of the voting process. For, once one attends to this dimension, one sees immediately that every single person’s vote must be taken seriously, and treated as a matter of moment, above all in the law and in every legal proclamation. To proclaim in law that any class or person’s vote is so insignificant that the abuse of it is a matter of little consequence is to take the first step in undermining respect for voting altogether.\(^{133}\)

After pointing to a research study performed for the Lortie Royal Commission on Electoral Reform which illustrated, in Dr. Pangle’s view:

how easy it is to begin to express open contempt for the votes of all individuals in a democracy once one becomes wedded to the idea that incarcerated criminals should not be disqualified\(^{134}\)

Dr. Pangle returned to Mill and his footnote in \textit{Thoughts on Parliamentary Reform}:

\(^{132}\) \textit{Id.}, at 322 (emphasis added).

\(^{133}\) Expert Report of Dr. Pangle, Appellants’ Record III, at 478, lines 10-34.

\(^{134}\) \textit{Id.}, at 478.
John Stuart Mill was too wise to slip into such irresponsible thinking. As he put it in his Westminster Election Address of 22 July 1868, “a vote for a member of Parliament is always a grave moral responsibility.” Accordingly, Mill proceeds to consider the question in the light of “the great object,” that is, the object “of giving a moral character to the exercise of the suffrage.” It is as “an aid to the great object,” that he argues that it might be expedient “that in case of crimes evincing a high degree of insensibility to social obligation, the deprivation of this and other civil rights should form part of the sentence.”

Dr. Pangle also dealt with Mill’s footnote in his trial testimony, which was reproduced in the appeal record before the Court:

Q.….As I understand it, sir, the actual issue of disenfranchisement with respect to inmates … is never specifically addressed by any one thinker or tradition except … in a footnote by John Stuart Mill; is that right?

A. Yes, that’s right. This particular or specific question of the enfranchisement or disenfranchisement of inmates or even more specifically inmates convicted for serious offences has, so far as I know, not been addressed in any — thematically, except in the footnote, but an important footnote in John Stuart Mill’s *Thoughts on Parliamentary Reform* where he does address it and declares quite emphatically his view …

Q. His view, just in passing, was what?

A. That prisoners convicted of serious offences should be disenfranchised.

Mill’s contention in *Thoughts on Parliamentary Reform* that those convicted of serious crimes could be deprived of the right to vote “and other civil rights” is consistent with his position two years later in *Representative Government* that there ought to be no persons disqualified from the franchise “except through their own default.”

It is therefore troubling that the Court, by whatever means, ended up relying on Mill’s political philosophy to support a conclusion evidently inconsistent with Mill’s own thinking on the matter.

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135 *Id.*, at 479 (emphasis added). Professor Pangle cites that the underlined quotation from Mill came from *The Collected Works of John Stuart Mill*, Vol. 19, at 322n, the same page from which he drew the passage quoted by the majority in *Sauvé* (emphasis added).

136 Appellants’ Record, Vol. IX, at 1146.


138 It strikes me that the culprit might lie in the process of distilling the record through bench memos or clerks’ draft opinions, with the members of the court not aware of the full context of a particular quotation.

139 Indeed, in his expert report Professor Pangle drew quite opposite conclusions from his review of Mill:

Following Mill’s thought further, we must note that in the light of the fundamental notion of the *social contract* underlying liberal democratic theory, incarceration for serious
4. Some General Observations on the Use of Political Philosophy in Constitutional Cases

Constitutional cases, especially those decided since the enactment of the Charter, have prompted the Court to wade into areas of social policy-making that raise issues outside of the traditional realm of judicial interpretation and decision-making. In the early days of the Charter the Court recognized that any proper interpretation of the provisions of the Charter would require an assessment of a right or freedom in the context of the broader traditions that had predated the Charter. As Dickson C.J. observed in *Big M Drug Mart*:

… it is important not to overshoot the actual purpose of the right or freedom in question but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court’s decisions in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 illustrates, be placed in its proper linguistic, philosophic and historical contexts.¹⁴⁰

Later, in *Reference re Public Service Employee Relations Act (Alta.)*, McIntyre J. put the matter in a slightly different way:

It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.¹⁴¹

In light of these admonitions and the Court’s use of the political philosophy of John Stuart Mill in *Sauvé*, one is naturally inclined to ask: What use has the court made of political philosophers? Who do they quote? How frequently? In what context? To explore these questions a search was conducted of reported crimes manifests yet another grave species of civil vice, in addition to and beyond the vices we have explained in the context of our discussion of civic virtue as conceived in classical republican theory. For in a society which conceives of itself as constituted by a universal social contract, the serious criminal has not only been proven flagrantly to have ignored and violated the requisite minimal concern and respect for fellow citizens, and has not only been proven to have flagrantly manifested disrespect for the law and thus reneged on the electoral process which culminates in the law; in addition, such an inmate has been proven to have flagrantly violated the social contract. For it is the first and leading article of the social contract that each and every party solemnly promises and commits him—or herself to abide by the future legal determinations, arrived at by due process, of the sovereign representative selected by the majority vote of the contracting parties.

Supreme Court of Canada Charter decisions using the names of selected political philosophers and legal theorists. The search parameters and results of this preliminary search are set out in Appendix “A” of this article.

The results are quite surprising. First, while the Court is engaging in deciding fundamental issues of moral and political philosophy, the judges make little use of political philosophers. The Court has quoted 14 political philosophers in only 24 cases since 1982, three of which involved either Mill’s famous definition of direct taxes or Jefferson’s definition of a patent. Legal theorists fare little better, with the court referring to four legal theorists in 25 cases.

Second, of the political philosophers John Stuart Mill is by far the Court’s favourite, referred to in 14 cases, with Aristotle and Plato ranking second and third. Putting to one side the two cases in which the Court quoted Mill’s definition of a direct tax, it is easy to see from its remaining use of Mill why he is such a court favourite. The Court quotes Mill to support two key themes that have emerged in its Charter jurisprudence: (i) there is no one concept of the good life, but we each must be free to pursue “our own good in our own way;”142 and (ii) since each age develops its own notion of right and wrong, the law must protect the importance of freedom to express contrary opinions143 and hence freedom of expression seeks to protect the marketplace of ideas.144


John Stuart Mill described it as “pursuing our own good in our own way.” This, he believed, we should be free to do “so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it”. He added:

Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.


However, as John Stuart Mill argued in On Liberty and Considerations on Representative Government (1946), at p. 16: “Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.”

Also quoted in R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; see also Cory, J. in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at para. 4, quoting “On Liberty”: If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if
At one level the reluctance of the Court to resort to the writings of political philosophers as an aid to its resolution of public policy questions under the Charter might stem from the discomfort the judges periodically express about being thrust into the role of the nine wise philosophers. Iain Benson offers another possible explanation for this infrequent use of political philosophers. He notes that the Court has been inconsistent in its approach to drawing on philosophic traditions, sometimes eschewing any proper role for philosophy in the courts, and then proceeding on other occasions to quote philosophers in support of their decisions. Benson terms this confusion as a “functional metaphobia” — an undue fear and avoidance of metaphysics by the Court. George Grant saw the matter in yet another light, as one involving judicial education. In an essay written shortly before his death Grant observed, in his own uncompromising way, that “the more contemporary judges quote philosophy or religious tradition, the less they appear to understand what they are dealing with … When society puts power into the hands of the courts, they had better be educated.”

Perhaps a further explanation can be found in one of the remarkable aspects of the Sauvé case: it could be called the “Case of the Disappearing Record.” Sauvé was commenced by way of action, not application. Consequently, it resulted in a trial in the first instance. The evidence led before the trial judge was extensive, especially on the section 1 issues, including the objectives of the legislation; the appeal record before the Supreme Court of Canada ran to 12 volumes. Yet the citation of the evidence significantly declined from the trial judgment to the decision of the Supreme Court. Whereas the trial judge cited the evidence 27 times, this was reduced to 10 citations by the majority of the Federal Court of Appeal, ending up with the majority of the Supreme Court citing the evidence only three times. (By contrast, the minority of the Federal Court of Appeal made 11 citations, and the minority of the Supreme Court made 12 citations). In both the Danson and MacKay cases the Supreme Court emphasized the needs for facts, both adjudicative and legislative, in Charter

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147 The decline can be observed in Appendix “C” of this article which records the judicial references made to the evidence.
cases. Counsel in *Sauvé* responded appropriately; yet the majority of the Court made little use of the evidentiary record.

A clue as to why the Court treated the evidence, especially the evidence on political theory, in this way may lie in Gonthier J.’s remarks about the utility of political theory evidence in determining Charter cases. In a passage that offers a telling insight into self-image of the Court, Gonthier noted the large volume of expert evidence before the Court and separated it into two categories: social science evidence in the field of criminology, and evidence on legal and political philosophy. As to the latter kind of evidence Gonthier J. wrote:

> I do not think that the Court need necessarily defer to this second type of expertise, or take into account the “skill” and “reputation” of the experts in weighing this evidence … First, most if not all of the philosophers or theorists on which these experts rely never in fact even addressed the specific issue of prisoner enfranchisement or disenfranchisement. Second, legal theory expert testimony in this context essentially purports to justify axiomatic principles. Therefore, these arguments are either persuasive or not. In this context, it is appropriate for courts to look not only to such theoretical arguments but also beyond, to factors such as the extent of public debate on an issue, the practices of other liberal democracies and, most especially, to the reasoned view of our democratically elected Parliament.

It is true that the only reference Professor Pangle could find amongst the political philosophers to prisoner disenfranchisement was Mill’s footnote discussed above (although Planinc found an additional reference in Kant), but Gonthier J.’s first reservation misapprehends the point of political philosophy. In large part political philosophers do not draw a detailed blueprint for every facet of political life; they offer a conceptual framework that, in turn, can guide the prudential consideration of specific political problems. This is actually what the majority tried to do when it used Mill’s expansive quotation in support of its advocacy of the prisoner franchise; its error lay in picking the wrong philosopher to quote.

More troubling is Gonthier J.’s second reservation about political theory: it doesn’t help a court because it simply contains axiomatic principles. With respect, this is to misunderstand the process of considering issues of political morality or civic organization such as those raised in *Sauvé*. Generally we speak of axiomatic principles as consisting of self-evident truths: the principle

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148 “Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. … Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.” *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at 361-62, as quoted by the Supreme Court in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at para. 29.

of non-contradiction, or the fact that one plus one equals two. Political philosophy entails a different type of exercise. In his classic essay, “What is Political Philosophy?,” Leo Strauss ventured the following definition of political philosophy:

Political philosophy will then be the attempt to replace opinion about the nature of political things by knowledge of the nature of political things … To judge soundly one must know the true standards. If political philosophy wishes to do justice to its subject matter, it must strive for genuine knowledge of these standards. Political philosophy is the attempt truly to know both the nature of political things and the right, or the good, political order.\footnote{150 Strauss, What is Political Philosophy? (Chicago: University of Chicago Press, 1988), at 11-12.}

Strauss hastens to add that political philosophy, like philosophy in general, is “not the possession of the truth, but quest for the truth.”\footnote{151 Id., at 11.} In striving for genuine knowledge, political philosophers reflect on human political experience and needs. Far from asserting a set of axiomatic principles, political philosophy offers a series of reasoned reflections across the ages on our collective political experiences, proceeding on the assumption that as the human race matures, its reflections on its political experiences will move it ever closer to a knowledge of the “nature of political things and the right, or the good, political order.”\footnote{152 Id., at 12.} Political philosophy thus offers the Court both a rich reflection on the key elements of the liberal traditions upon which the Charter rests, as well as critiques on the limitations of the liberal political experiment. It allows one to look at the Charter from both the inside and the outside, so to speak.

If the Court turns its back on political philosophy, it risks being sucked into that “vacuum” about which Dickson C.J. warned in Big M Drug Mart and transforming the Charter into the “empty vessel”\footnote{153 See supra, note 122.} which need only be filled with the opinions of the day. Sauvé, in my view, starkly illustrates the two possible outcomes of a rejection of a reflection on political philosophy and its traditions. In the case of the majority, the judges simply ignored whatever guidance the evidence on political philosophy might offer and, instead, fashioned their own political opinion: they replaced the “bad pedagogy” of prisoner disenfranchisement, with their own opinion of a proper pedagogy. The judge as ideologue was their solution. The minority also turned away from the advice of political philosophy, but with a more populist result. In its view the answer lay outside of philosophical reflection, and in the arena of public

\footnote{150 Strauss, What is Political Philosophy? (Chicago: University of Chicago Press, 1988), at 11-12.}
\footnote{151 Id., at 11.}
\footnote{152 Id., at 12.}
\footnote{153 See supra, note 122.}
opinion. It would find greater guidance in “... the extent of public debate on an issue, the practices of other liberal democracies and, most especially, to the reasoned view of our democratically elected Parliament.”

Of course, a final explanation may explain the Court’s limited use of political philosophy and it may rest closer to the truth. Perhaps the Court has already chosen its political philosophy and concluded that it need not refer to any others. Which brings us back to Mill and his overwhelming popularity with the Court. One could argue that the Court has concluded that the Charter rejects the possibility of any true standards or the “right, or the good, political order” sought by Strauss. In a famous passage in her judgment in Morgentaler, Wilson J. contended that “the basic theory underlying the Charter” is that “... the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.”

Mill’s pursuit of “our own good in our own good way,” often quoted by the Court, nicely supports this view of the Charter. Sauvé stands as an exemplar of this choice, with the Chief Justice characterizing the Charter as charging “courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good.” Mill is the philosopher who minimizes the restraints on choice, whether it be by the individual in the pursuit of personal happiness, or by the Court in its fashioning of public policy. Maybe that is why he tops the judicial popularity poll for political philosophers.

VI. CONCLUSION

In one sense, the Sauvé decision marks an end to the “dialogue” between Parliament and the Court on the issue of the prisoner franchise. Prisoners in federal penitentiaries now may vote in federal elections and, as a result of the

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154 Supra, note 150, at para. 101.
155 For a critique of this view of morality as public consensus see Del Bigio, “Denying the Right to Vote: A Decision of Political Philosophy or Constitutional Principle?” (2002) 15 C. of R. Newsletter, No. 6, at 2.
157 R. v. Jones, [1986] 2 S.C.R. 284, at para. 74; R. v. Morgentaler, supra, note 156, at para. 231; B. (R.) v. Children’s Aid Society of Metropolitan Toronto, supra, note 143, at para. 74; Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code, supra, note 143, at para. 50. While the Court invariably only quotes part of Mill’s famous dictum, the full quotation reads: “The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.” Mills, On Liberty, Great Books of the World (Chicago: Encyclopaedia Britannica, Inc., 1994), at 273.
158 Supra, note 150, at para. 15.
Canada Election Act’s link between voter eligibility and qualification for office, prisoners may run as candidates in federal elections. Given the virtually absolute status accorded by the majority to the right to vote, it is difficult to see how any new legislative restriction on the prisoner franchise could survive scrutiny.

In another sense Sauvé signals the need to begin a new dialogue about Charter interpretation, a dialogue within the Court, between the Court and Parliament, and between the Court and the larger political community. Sauvé points to three areas needing a fresh approach to Charter interpretation. First, sections of the Charter guaranteeing rights and freedoms need to be interpreted in their entirety. By interpreting only part of a section at a time, a court risks losing sight of the interplay and interdependence of the various interests protected by the right or freedom. Second, the vigorous disagreement within the Court about the application of the Oakes test perhaps indicates that it is time to fundamentally rethink the proper approach to section 1. Oakes may have outlived its usefulness; its many layers and glosses have taken the courts far from the original language and principles of section 1. It is time to look anew at the language of section 1. Finally, the differences within the Court regarding the appropriateness of passing any moral judgment on those who have broken the criminal law reflects a deeper problem with the state of contemporary Charter analysis. Most Charter commentary paints a battle between individual rights and state restrictions; missing is any fulsome discussion of individual responsibilities or obligations that are the corollary of rights. While “citizen law-breakers” may fit nicely with a feelings-based concept of human dignity, encouraging “citizen law-keepers” must remain a primary goal of Canadian law.
**APPENDIX “A”**

<table>
<thead>
<tr>
<th>Case name</th>
<th>Administrative and security reasons</th>
<th>To affirm and maintain the sanctity of the franchise in our democracy</th>
<th>To preserve the integrity of the voting process</th>
<th>To sanction offenders</th>
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<tr>
<td>Re Jolivet and Barker and The Queen and Solicitor-General of Canada (1983), 1 D.L.R. (4th) 604 (B.C.S.C.)</td>
<td>√</td>
<td>X</td>
<td>√</td>
<td>?</td>
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? = Not clear from judgment if advanced as an objective.
X = Rejected as a justification/reasonable limit by the majority.
√ = Accepted as a justification/reasonable limit by the majority.
(√) = Accepted as a justification/reasonable limit in a dissent.
<table>
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<tr>
<th>Case Study</th>
<th>Issue Presented</th>
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APPENDIX “B”

The Use of Political and Legal Philosophers by the Supreme Court of Canada\(^{159}\)

<table>
<thead>
<tr>
<th>Name</th>
<th>Cases referring to philosopher</th>
<th>Cases actually quoting philosopher</th>
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<tr>
<td><strong>Political philosopher</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. John Stuart Mill</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>2. Aristotle</td>
<td>9</td>
<td>7</td>
</tr>
<tr>
<td>3. Plato</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>4. Alexis de Tocqueville</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>5. Jeremy Bentham</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>6. G.W.F. Hegel</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>7. Immanuel Kant</td>
<td>2</td>
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</tr>
<tr>
<td>8. John Milton</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>9. Robert George</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>10. Alexander Hamilton</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>11. Thomas Jefferson</td>
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<td>0</td>
</tr>
<tr>
<td>12. John Rawls</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>13. Joseph Raz</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>14. Voltaire</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Legal Theorist</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15. William Blackstone</td>
<td>16</td>
<td>16</td>
</tr>
<tr>
<td>16. Ronald Dworkin</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>17. Oliver Wendell Holmes</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>18. H.L.A. Hart</td>
<td>3</td>
<td>1</td>
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</tbody>
</table>

\(^{159}\) The search was conducted of the Quicklaw database “Supreme Court Judgments” on all decisions involving Charter issues since 1985. This table does not purport to represent an exact compilation of all references, but only serves as an approximation.
The actual citations are as follows:

**Aristotle**


**Bentham, Jeremy**


**Blackstone, Sir William**


De Tocqueville, Alexis


Devlin, Sir Patrick


Dworkin, Ronald


Emerson, Thomas

Robert George


Hamilton, Alexander


Hart, H.L.A.


Hegel, G.W.F.


Holmes, Oliver Wendell


Jefferson, Thomas


Kant, Immanuel


Kymlicka, Wil


Lorde, Audrey


MacKinnon, Catharine


Macklin, Audrey


Maritain, Jacques


Mill, John Stuart


Milton, John


Plato


Rawls, John


Raz, Joseph


Voltaire

## Sauvé (No. 2): Section 1 – Evidence Judicially Noted

### APPENDIX “C”

<table>
<thead>
<tr>
<th>EVIDENCE</th>
<th>TRIAL JUDGE</th>
<th>FEDERAL COURT OF APPEAL</th>
<th>SUPREME COURT OF CANADA</th>
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<tr>
<td></td>
<td>WETSTON, J.</td>
<td>MAJ (2)</td>
<td>MIN (1)</td>
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<tr>
<td><strong>A. PRESSING AND SUBSTANTIAL OBJECTIVE</strong></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Lortie Royal Commission on Electoral Reform and Party Financing, including research studies</td>
<td>✓</td>
<td>✓ (para. 38 + 41)</td>
<td>✓</td>
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<tr>
<td>Bill C-114 debates, including the Special Committee on Electoral Reform</td>
<td>✓</td>
<td>✓ (para. 41)</td>
<td>✓</td>
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<td>Past Cases</td>
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<tr>
<td><em>Belczowski</em></td>
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<td>✓ (para. 31)</td>
<td>✓</td>
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<td><em>Sauvé (No. 1)</em> (Arbour, J.A.)</td>
<td>✓</td>
<td>✓ (para. 31)</td>
<td>✓</td>
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<tr>
<td>Dr. Colin Meredith (crime statistics)</td>
<td>✓</td>
<td>✓ (para. 31)</td>
<td>✓</td>
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<tr>
<td>Foreign legislative regimes</td>
<td>✓</td>
<td>✓ (para. 124-133)</td>
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<tr>
<td>John Rawls, <em>Theory of Justice</em></td>
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<tr>
<td>EVIDENCE</td>
<td>TRIAL JUDGE</td>
<td>FEDERAL COURT OF APPEAL</td>
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<td>Prof. Jean Hampton</td>
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<td>(philosophy of punishment)</td>
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<tr>
<td>Prof. Thomas Pangle</td>
<td>✓</td>
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<tr>
<td>(political theorist)</td>
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<tr>
<td>Prof. Christopher Manfredi</td>
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<td>(constitutional and political theory)</td>
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<tr>
<td>Prof. Grant Amyot (comparative politics and political theory)</td>
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<td>Prof. Arthur Schafer (biomedical ethics, jurisprudence)</td>
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<td>Prof. Michael Jackson (criminal law)</td>
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<td>C. MINIMAL IMPAIRMENT</td>
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<td>D. PROPORTIONATE EFFECT</td>
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<td>Prof. Neil Boyd (criminology)</td>
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<td>Eric Andersen (Danish penal system)</td>
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