

## **In Defence of Democracy: the Criminalisation of Impersonation**

**Abstract:** This article offers a philosophical justification for the criminalisation of voting as another person (impersonation or, in English law, personation) in public elections by arguing that it involves wrongdoing in the form of anti-democratic behaviour and that the failure to criminalise it will harm the public good of electoral integrity. With regard to harm, the article argues that the failure to criminalise impersonation will eventually result in widespread impersonation, such widespread impersonation undermining electoral integrity, itself instrumental to a number of public goods reflecting the democratic character of any given polity. Finally, the article completes the case for criminalisation by arguing that, in any given jurisdiction, it may be neither effective nor desirable for the entire burden of preventing impersonation to fall onto the civil law, with the result that the criminalisation of impersonation can serve a useful complementary role to the civil law in maintaining electoral integrity.

**Keywords:** Electoral offences · Impersonation · Criminalisation · Political theory

## Introduction

The act of impersonation, where a person votes as some other person, living, dead or fictitious, is a crime in many democratic jurisdictions.<sup>1</sup> In the UK the offence, known as personation, is to be found in the Representation of the People Act, s. 60 (1983) (RPA 1983), with the core offence to be found in RPA, s. 60(2)(a) (1983), as follows:

(2) A person shall be deemed to be guilty of personation at a parliamentary or local government election if he—

(a) votes in person or by post as some other person, whether as an elector or as proxy, and whether that other person is living or dead or is a fictitious person; ...

This article will offer a theoretical and practical justification of the crime as defined by s 60, with a view to providing a useful model for other jurisdictions. As for terminology, whilst the practice is commonly known as impersonation, since the analysis that follows focuses on the UK, the term personation as employed in English law will be used throughout the article.

This article will argue that personation as defined by RPA, s. 60(2)(a) (1983) is worthy of criminalisation for two principal reasons: first because, as a form of anti-democratic behaviour, it is wrongful and, second, because the failure to criminalise it will harm the public good of electoral integrity. It will then complete the case for criminalisation by demonstrating how the criminalisation of personation plays a

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<sup>1</sup> For example, India, see the Indian Penal Code, s. 171-D (1860); Australia, see the Commonwealth Electoral Act, s. 339 (1918); Ireland, see the Electoral Act 1992 s 134 with its similarity to the UK offence; and South Africa, see s 88(b) of the Electoral Act 1997. The offences under s 88 are termed ‘impersonation’ because the Republic has a much wider range of offences than the UK reflecting, perhaps, that country’s experience. The situation in the USA is discussed throughout the article.

necessary, complementary role to the civil law of voting procedures so that the civil and criminal law work together in maintaining electoral integrity and, ultimately, a healthy democracy.

Few if any of those committed to democracy would question the criminalisation of personation. It might therefore be asked whether its criminalisation needs explicit justification. One reason is theoretical neglect: unlike other crimes in the criminal calendar which have received extensive examination, personation, indeed electoral crime generally, has not been put under the theoretical microscope. There is therefore interest in deepening understanding of a crime whose criminal status is taken for granted.<sup>2</sup> This is especially so since this examination involves fusing, in an unprecedented way, democratic theory with theories of criminalisation and, in so doing, revealing how the crime protects, in ways perhaps previously sensed but not fully understood, fundamental democratic values. A further reason explored in this article is topicality, in light of what appears to be a recent resurgence in the commission of the offence in the UK. At a time when attention in the UK may more frequently turn to the prosecution of personation, this article serves as a timely reminder of the important democratic values protected by the criminalisation of personation.

However this article is more than a theoretical exercise: it is concerned with electoral integrity as a general matter and how the criminalisation of personation

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<sup>2</sup> In this regard this article follows a model whereby the nature of the wrongdoing is carefully distinguished from a potential harm it causes or may cause. Such an approach reflects the approaches adopted to rape and bribery in, respectively, “The Wrongness of Rape”, Chapter 1 in J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) and J. Horder, “Bribery as a Form of Criminal Wrongdoing”, *Law Quarterly Review* 127 (2011): pp. 37-54. It is perhaps worth noting that Lindsay Farmer labels the identifying and understanding of wrongs independently of any harms they cause a “trope” of certain theorists’ view of the role of wrongdoing in criminalisation: see “Criminal Wrongs in Historical Perspective” in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo and V. Tadros (eds.), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2004) pp 214-237, p 223. It is submitted that it is a useful trope where personation is concerned.

integrates with the civil law to maintain it. In this vein, attention is drawn to the fact that matters of electoral law are sensitive, complex and may appear (wrongly, it is thought) to lack the impact upon the public of a number of more high profile crimes. That electoral law is often seen as esoteric is reflected in the fact that, in the UK, matters of election crime are dealt with by a special section of the Crown Prosecution Service (Special Crime), along with a range of other matters such as mercy killing, euthanasia, deaths in custody, corporate manslaughter and crimes allegedly committed by high profile public figures.<sup>3</sup> In times of public austerity there may well be pressure to reduce the section's workload by rendering electoral corruption a purely civil matter. In this vein, it is to be noted that the Law Commission is currently reviewing electoral law and it may be thought expedient to remove personation from the calendar of crimes.<sup>4</sup> This may come as a recommendation from the Law Commission or it may appear in the forthcoming parliamentary Bill. This article provides a counterargument to any such move.<sup>5</sup>

This article is therefore designed to draw attention to what is a serious, and, in the UK, an increasingly prevalent form of wrongdoing and, in so doing, expand understanding of electoral integrity, its relationship to democracy, and the mechanisms

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<sup>3</sup> See the Crown Prosecution Service website – Special Crime and Counter-Terrorism Division; Introduction to Special Crimes at [http://www.cps.gov.uk/your\\_cps/our\\_organisation/sc\\_and\\_ctd.html#a04](http://www.cps.gov.uk/your_cps/our_organisation/sc_and_ctd.html#a04) (site visited 25 March 2015).

<sup>4</sup> See <http://lawcommission.justice.gov.uk/areas/electoral-law.htm> (site visited 11 February 2014). The matter is not raised in the latest Consultation; *Electoral Law: A Joint Consultation Paper* LCCP 218 (London, TSO) but this is no guide to the future.

<sup>5</sup> It may be asked whether this would, in fact, happen. Unfortunately there are some tentative signs in the Law Commission's latest consultation paper, *ibid*, that it might. As will become clear below personation (most) frequently occurs in the context of absent or postal voting. Whilst the Law Commission's paper contains an entire chapter (Chapter 6) on the subject, most of the discussion focuses upon increasing the administrative burden on already overworked electoral officials and upon controlling the activities of party election workers in handling postal vote applications and even postal voting papers. Little if any, of the discussion concerns itself with the primary actors, the voters themselves, yet it is voters who commit personation. Here we therefore focus on potential primary wrongdoers.

that can, and should, be used to maintain both.<sup>6</sup> It will begin by addressing an important preliminary point concerning the existence of a distinct crime in the form of personation; it will then summarise the various elements of the argument supporting criminalisation so as to give readers an overview, before proceeding to a deeper exploration of each of these elements.

### **Why a Crime in the Form of Personation?**

Personation proscribes a form of behaviour, voting as another person that, as this article will demonstrate, embraces three different wrongs. These wrongs are multiple voting by a single individual eligible to vote once ('multiple voting'), voting by those ineligible to vote and, finally, what this article shall term 'pure personation', whereby a person simply votes as another person without voting as himself or, alternatively, votes as another with the other's permission, but the procedure for appointing a proxy or voting by post is not followed. The aim of this article is to explain why these wrongs are worthy of criminalisation.

The criminalisation of pure personation raises a particular set of issues flowing from its status as a *mala prohibita* crime; for this reason, the justification of its criminalisation will be addressed in a discrete section at the end of the article. The article will therefore begin by addressing the criminalisation of multiple and ineligible voting, to which, for the sake of clarity, it will confine the expression 'personation'. However, it should be noted

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<sup>6</sup> The authors are aware of the political controversy surrounding this matter in the USA and that the balance of academic opinion is that personation is a very rare event in the USA: see Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment Ahlquist John S., Mayer Kenneth R., and Jackman Simon. *Election Law Journal: Rules, Politics, and Policy*. -Not available-, ahead of print. doi:10.1089/elj.2013.0231. See also *Comprehensive Database of US Voter Fraud Uncovers No Evidence That Photo ID Is Needed* by Natasha Khan and Corbin Carson | News21Published Aug. 12, 2012 <http://votingrights.news21.com/article/election-fraud/>. See also L. C. Minnite, *The Myth of Voter Fraud* (Cornell University Press, 2010).

that both wrongs are also criminalised in the UK by s 61 RPA 83.<sup>7</sup> This raises an important preliminary question that must be answered immediately: given the overlap with s 61, and similar provisions in other jurisdictions, why should these wrongs be conceived, targeted and perhaps prosecuted as forms of personation? The following reasons may be proffered.

First, personation as a crime has the virtue of simplicity;<sup>8</sup> rather than having to specify the necessary conditions, where multiple voting is concerned, of election and jurisdiction, and, where voting whilst ineligible is concerned, of eligibility, it targets in simple language behaviour that can be used to commit these wrongs; furthermore, it does so without risk of over and under-inclusiveness. Secondly, its execution, for example the registering of fictitious names on the electoral register, requires premeditation and organisation;<sup>9</sup> when this is combined with the fact that personation involves disguising the fact of multiple voting or voting whilst ineligible, it reveals personation as entailing a particular kind of deception of the electoral system, making personation a distinct form of wrongdoing.<sup>10</sup> Thirdly, it has the advantage of descriptive accuracy: as already noted, personation involves disguising multiple voting and voting by the ineligible and this fact, in combination with the mechanisms used to execute it, means that, as will be argued below, it is the only way to execute both wrongs strategically and on mass scale, arguably

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<sup>7</sup> Section 61(1) criminalises those who, in general terms, vote when subject to a legal incapacity in public elections. Section 61(2) and (3) criminalise those who, in general terms, vote more than once at public elections.

<sup>8</sup> Simplicity in this area may be a distinct advantage: the multitude of voting and voting-related offences created by, inter alia, ss 13D, 61 and 62A of the Representation of the People Act 1983 are extremely challenging to navigate.

<sup>9</sup> See Minnite, n. 6 above, who points out that voting as another (p. 7) and voting twice (p. 19) can happen by accident. The example of voting as another ('...; John Smith Sr. on line number twelve in the poll book signs for John Smith Jr. on line thirteen and voila--another voter is ensnared in a fraud.') and the example of voting more than once ('...a confused voter who mails in a ballot and then shows up at the polls to vote again because he or she is not sure the mailed ballot got counted...') can be addressed by the relevant crimes incorporating, expressly or impliedly as a matter of statutory interpretation, *mens rea* requirements that exempt non-culpable instances of voting as another or more than once. In other words, offences targeting such behaviour should *not* be conceived or interpreted as crimes of strict liability.

<sup>10</sup> See Minnite, *ibid*, p 26.

the most harmful manifestation of electoral fraud. In light of this, its existence as a separate crime allows the criminal law to label what has occurred in the most accurate way. Fourthly and finally, its existence leads to a rational division of labour with s 61 type offences, whereby s 61 and its ilk can be used to capture those who vote in their own name in violation of certain technical rules concerning jurisdiction, election or eligibility. Thus, for example, where voting more than once is concerned, s 61 can be used to catch people who attempt to vote in respect of more than one address in an electoral division or to vote by post as well as in person. This leaves s 60 to target those who seek to corrupt the system in a particular way, which is through voting by posing as another person.<sup>11</sup>

Before proceeding it is also necessary to explain what personation *is not*. The plain words of s 60 criminalise voting as ‘some other person’ and, since the meaning of that phrase is not immediately apparent, this may lead to confusion. Thus s 60 may appear to say that a Mr Brown who decided to vote under an alternative name of his own creation, say, for example as a Mr Smith, would be caught by the provision. This is not the meaning of s 60, as was made clear in *Reg v Patrick Fox*.<sup>12</sup> Here one Patrick Fox seems to have become known for electoral purposes only as James Cummings. When he voted as James Cummings and was subsequently prosecuted, Hawkins J clarified the law by

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<sup>11</sup> Distinguishing between the two crimes introduces greater precision in our understanding of the concepts of voter and election fraud: see generally Minnite, *ibid*, Chapter 2 ‘What is Voter Fraud?’ where she argues that such precision is a necessary part of removing confusion in the empirical study of election fraud. It is worth noting that Minnite draws a distinction between voter fraud, which is exclusively concerned with the ‘intentional, deceitful corruption of the electoral process by voters’ and election fraud, which includes voter fraud but extends to the ‘corruption committed by elected or election officials, candidates, party organizations, advocacy groups, or campaign workers...’ (p 36). The election petitions discussed in this article reveal that personation can extend beyond voter fraud into election fraud, whereas s 61 and its kind are examples of voter fraud.

<sup>12</sup> (1887) 16 Cox CC 166. This case was decided under s 24 of the Parliamentary and Municipal Elections Act 1872, which criminalises the act of applying for a ballot paper “in the name of some other person, whether that name be that of a person living, or dead, or of a fictitious person”. This offence was re-enacted by Part 3 of Schedule 3 of the Corrupt and Illegal Practices Prevention Act 1883. This provision was repealed and re-enacted by the Representation of the People Act 1949 in Schedule 9 and s 47(2) respectively. The substance of these offences – i.e. voting or performing acts immediately preparatory to voting as some other person, living fictitious or dead, – has remained constant since 1872 despite the minor changes in language thus s 60 remains governed by the earlier case law. See P. Gribble (ed) *Schofield’s Election Law* (London: Sweet & Maxwell. Updated tri-annually) para. 6.024 in further support of this view.

pointing out that the offence was voting *as some other person*, not voting *under some other name*. In this regard, Hawkins J stated: “A man, if he likes has a right to pass by two names. ... You cannot say a man personates another if, in point of fact, he is the very individual who has been placed on the register by the [Electoral Registration officer].”<sup>13</sup> Thus if an eligible voter called Peter Smith creates an alias for any purpose, even the exclusive purpose of voting in another name, and then votes under that assumed name, this will not be personation: the intention must be to vote *as another person*. Thus it is submitted that the reference to ‘a fictitious person’ under s 60 is a reference to those instances when the person uses the fictitious name to create the impression of an additional legitimate voter, a genuine ‘other person’, thereby concealing the fact that he is voting twice.

Having hopefully justified the existence of the crime of personation in addition to s 61, it is now possible to summarise the case for its criminalisation when it is used as a means to vote more than once or when ineligible. When this is completed the article will turn its attention to the criminalisation of pure personation.

### **The Case for Criminalisation: a Summary**

The distinction between wrongdoing and the harm caused or risked by such wrongdoing is familiar to criminal law theorists. It is derived from a theory of criminalisation that conceives of both wrongdoing and a causal relationship between that wrongdoing and harm as necessary, and perhaps sufficient, conditions of criminalisation.<sup>14</sup> The distinction provides an enlightening two-stage mode of analysis for existing and

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<sup>13</sup> *Ibid* 168.

<sup>14</sup> For an excellent discussion of the role of wrongdoing and harm in criminalisation, see generally A. P. Simester and A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford and Portland, Oregon: Hart, 2011).



potential offences. First, the requirement that wrongdoing be demonstrated permits a deeper understanding of the conduct the criminal law seeks, or might seek, to prohibit;<sup>15</sup> secondly, demonstrating a link between the wrongdoing and harm serves not only partially to justify criminalisation, but also satisfies liberal constraints on over-criminalisation.<sup>16</sup> This article will subject personation to this two-stage mode of analysis.

In order to understand the wrongfulness of personation it is necessary, as indicated above, to distinguish two sets of circumstances. In the first set, the personator is legitimately entitled to cast a vote in a given election but casts more than a single vote; in the second set, the personator is *not* entitled to vote in a given election but nevertheless casts a vote. Both sets involve wrongdoing because both involve behaviour that is fundamentally incompatible with democracy properly conceived. With the first set, this incompatibility resides in the personator's violation of political equality amongst voters, a principle at the heart of democracy; here the wrongdoing consists of the personator illegitimately claiming, in a practical way, superior political status to her fellow voters. With the second set, the incompatibility emanates from the fact that democracies may legitimately impose certain restrictions on the right to vote, in the form of citizenship, competence and other eligibility criteria; here the wrongdoing consists of the personator exercising a legal right that she is legitimately denied by the electoral system.

With regard to harm, the argument will take a particular form: it will be argued that personation is not worthy of criminalisation by dint of the direct harms instances of

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<sup>15</sup> *ibid*, in particular ch. 2.

<sup>16</sup> A classic account of the role harm can play in criminalisation is to be found in J. Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (New York: Oxford University Press, 1984). For a perfectionist liberal account of the harm principle, see J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

personation might cause, though the risk of such harms lends some weight to its criminalisation, but mainly because the failure to criminalise personation will eventually damage electoral integrity. Electoral integrity is worthy of protection because it is a “public good”. By “public”, it is meant a good shared by most, if not all, members of society. By “good”, it is meant that democracy requires electoral integrity, and democracy itself has a number of inherent and instrumental virtues that benefit society.<sup>17</sup>

Finally, the case for criminalisation will be completed by arguing that civil measures and remedies are often insufficient to curtail the problem of personation, a situation made worse, in the UK, by the free availability of the postal vote. However it is also necessary to note that measures such as postal and electronic voting are designed to increase electoral participation and widen its social base, legitimate democratic goals.<sup>18</sup> Furthermore, in many jurisdictions, perhaps most saliently the USA, there may be very good political and/or practical reasons for both widening voting mechanisms and for not making the barriers to registration and voting too onerous or complex.<sup>19</sup> As a result, it will be argued that personation is a case where the civil law and the criminal law can work together harmoniously in the name of good societal governance. This is because measures such as postal voting, and generally the relaxing of administrative

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<sup>17</sup> See n. 86 below and corresponding text, where Joseph Raz’s definition of a public good is quoted. There is no conflict between Raz’s definition and the definition offered in the text.

<sup>18</sup> Remote electronic (or online voting) is not discussed in this article, in part because it is not currently used in the UK, a situation welcomed by the authors for the reasons set out in S. Birch and B. Watt, “Remote Electronic Voting: Free Fair and Secret?”, *Political Quarterly* 75(1) (2004): pp. 60-72. Readers might wish to note that Watt (in particular) argued that online voting and postal voting are in breach of Article 3 of the First Protocol ECHR. It is also worth noting that at least one very experienced judicial commentator takes the view that no innovation in voting methods will increase electoral participation, observing that “It’s not how you vote that brings out the voters. It’s the choices you are given.” See Commissioner Mawrey in the *Woking* petition n. 9 below at [350].

<sup>19</sup> See generally Minnite, n. 6 above, in particular pp 22-25.

barriers to registration and voting, increase the opportunities for personation.<sup>20</sup> This exposes the difficult balancing act between increasing electoral participation and maintaining electoral integrity. The criminalisation of personation plays a key role in balancing these competing concerns by deterring those who, faced with the opportunities to personate presented by new voting methods, might otherwise be tempted to personate.

An exploration of personation is not a merely theoretical exercise but, in view of widespread evidence of the commission of the crime in the UK, addresses a practical problem. This evidence includes four relatively recent election petitions concerning elections in *Aston*, *Bordesley Green*, *Slough* and *Woking*.<sup>21</sup> The most recent of these petitions, in *Woking*, involved significant personation by a variety of means and arguably provides an example of the level of fraud currently afflicting many elections in the UK. Other recent evidence of personation is to be found in the Electoral Commission's *Analysis of Cases of Alleged Electoral Fraud in 2012*, which reported 80 cases of alleged personation concentrated in Tower Hamlets and Peterborough.<sup>22</sup> It is also noteworthy that the famous violinist Nigel Kennedy admitted, somewhat blithely, that he had participated, although not as a principal, in personation in the 2010 General

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<sup>20</sup> *Woking* n. 9 below at [3]: “The introduction of postal voting on demand in 2001, however, laid the electoral system wide open to massive and well-organised fraud.”

<sup>21</sup> *In the Matter of a Local Government Election for the Bordesley Green Ward of the Birmingham City Council held on 10 June 2004 and In the Matter of a Local Government Election for the Aston Ward of the Birmingham City Council held on 10 June 2004* [2005] All ER (D) 15 affirmed [2005] EWHC 2365. The Slough petition is reported as *Simmons v Khan* [2008] EWHC B4 (QB) and the Woking petition as *In the Matter of the Representation of the People Act 1983 and in the Matter of a Local Government Election for the Maybury and Sheerwater Ward of the Woking Borough Council held on 3 May 2012 between Mohammed Ali and Mohammed Bashir and Ray Morgan*. EWHC M/336/12 (QB). The lack of a coherent modern series of election reports to replace O'Malley & Hardcastle (O'M & H) is to be regretted.

<sup>22</sup> *Analysis of Cases of Alleged Electoral Fraud in 2012: Summary of Data Recorded by Police Forces*. (London: Electoral Commission, 2013)

[http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0005/155336/Analysis-of-cases-of-alleged-electoral-fraud-in-2012.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/155336/Analysis-of-cases-of-alleged-electoral-fraud-in-2012.pdf) (Site visited 17 February 2015)

Election.<sup>23</sup> Further demonstration of the practical import of an exploration of personation is that the Law Commissions (of England and Wales, Scotland, and Northern Ireland) are co-operating in a major revision of the UK's arguably outdated electoral laws, including electoral offences.<sup>24</sup> Personation is thus within its purview, and an analysis and defence of this electoral offence will facilitate this review.

### **Personation: The Violation of Political Equality**

As noted above, the first kind of wrongdoing involves the personator voting more than once in an election where he is eligible to vote on a single occasion. This is wrongful because it is a violation of the principle of "one person, one vote" ("OPOV"). OPOV requires that no individual can vote more than once in any given election,<sup>25</sup> that any given vote is counted no more than once and, finally, that each individual vote is granted (more or less) the same weight as other votes.<sup>26</sup> OPOV is the practical manifestation of what this article shall term, following Dahl, the "strong principle of equality", a principle that is, as will be argued below, a key foundation of, and

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<sup>23</sup> Kennedy admitted that he had asked a friend to vote in the place of his absent wife, behaviour that is caught by RPA, s. 60(1) (1983), which criminalises those who aid, abet, counsel or procure personation as defined by s. 60(2). Kennedy made this admission outside the period of limitation for prosecution for the offence, which is set at 12 months by RPA, s. 176 (1983); as a result, the police did not take further action: see <http://www.hampsteadandkilburn.org/news/police-cannot-prosecute-kennedy-ballot-fraud> (Site visited 11 February 2014).

<sup>24</sup> See n.3 above. There are a number of election laws which variously cover the UK. The definition of these laws is set out in a number of places, the best being R. A. Watt, *Reflections on a New Structure for the United Kingdom's Electoral Law* (London: Electoral Commission, 2013) par. 1.2.1-1.2.3. The Report is available at [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0007/162178/Reflections-on-a-New-Structure-for-the-UKs-Electoral-Law.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/162178/Reflections-on-a-New-Structure-for-the-UKs-Electoral-Law.pdf) (Site visited 11 February 2014)

<sup>25</sup> The legal foundation of this rule is to be found in RPA, s. 1(2) and s. 61(2)(a) (1983). The minor exceptions to this rule are discussed in *Fox v Stirk* 2 QB 463 (1970) and *Hipperson v ERO Newbury* 1 QB 1060 (1985).

<sup>26</sup> It is sometimes thought that J. S. Mill was a proponent of plural voting, but close attention to his text reveals that he was prepared to tolerate it only as a short-term measure to overcome particular difficulties in the development of the franchise; see Mill, *Considerations on Representative Government* (New York: Holt, 1890), pp. 170-175. For a well thought out justification of plural voting in the form of a novel, see N. S. Norway ("Nevil Shute"), *In the Wet* (London: Vintage, 2000).

justification for, democracy.<sup>27</sup> Thus to understand the wrongfulness of personation under these circumstances, it is necessary to explain the central role the strong principle of equality plays in democratic theory, and how OPOV emanates from it.

Democracy as a political system is concerned with decision making in the context of national and local governance. It acknowledges that certain decisions of national and local governance will, in crude terms, favour the interests and preferences of some members of the community and ignore the interests and preferences of others. That this is so is a product of both limited resources, inevitably requiring the prioritisation of certain interests over others,<sup>28</sup> and the fact of inevitable and pervasive disagreement amongst citizens on a wide range of policy issues.<sup>29</sup> Democracy as a principle holds that, in light of this inevitable favouritism and disagreement, decisions relating to certain, though by no means all,<sup>30</sup> issues of national and local governance are taken in the most just way, and hence justly imposed, when, in some form or another, members of the national or local community have been involved in the policy selection process.<sup>31</sup>

The next questions are: why is the involvement of such members the most just way to make certain collective decisions, and in what form exactly? Dahl argues

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<sup>27</sup> See also R. A. Dahl, *Democracy and Its Critics* (New Haven and London: Yale University Press, 1989), especially ch. 7, “Personal Autonomy”.

<sup>28</sup> On the question of limited resources (“scarcity”) meaning the interests of all cannot be satisfied equally, see T. Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder, Colorado: Westview Press, 1996), pp. 69-70.

<sup>29</sup> On the inevitability of disagreement on policy, see J. Finnis, “Natural Law: The Classical Tradition”, in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 1-60, p. 23; T. Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford: Oxford University Press, 2008), pp. 75-78 and *The Rule of the Many* *ibid* pp. 47-51 and C. R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton, New Jersey: Princeton University Press, 1989), pp. 76-77. The necessity for governance in light of such disagreement is articulated by Finnis, 23 and Dahl, *Democracy and Its Critics*, see n. 27 above, p. 83.

<sup>30</sup> For a discussion of the systemic (rights-based) constraints on policy selection see J. Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), especially p. 161 and pp. 240-241 and Rawls, *A Theory of Justice* (Cambridge MA: Belknap Press, revised ed. 1999), especially p. 201. Whether these substantive constraints on majoritarian rule are inherent to democracy properly conceived, or rather external to it, is beyond the scope of this article. For an argument that bases these substantive limitations on the notion of political equality itself, see generally Christiano, *The Constitution of Equality* *ibid*.

<sup>31</sup> Christiano, *The Constitution of Equality* *ibid*, pp. 95-96.

persuasively that the answer to these questions lies in what he terms the strong principle of equality: all appropriately qualified adults are sufficiently and equally well qualified to participate equally in making binding collective decisions that significantly affect their goods and interests, a principle that takes practical form as an equally weighted vote for all appropriately qualified adults.<sup>32</sup> This principle is an amalgam of two further principles: the principle of equal consideration of interests and the principle of personal autonomy. How these two principles account for the strong principle will now be explained.

The principle of equal consideration of interests is rooted in the moral notion that no adult's interests are intrinsically more valuable than those of his or her fellow adults.<sup>33</sup> At first blush, this fundamental notion of equality would appear to require that policy advance the interests of all equally – an equality of well-being. However, such a substantive definition, concerned as it is with outcomes as opposed to processes,<sup>34</sup> would seem to have nothing to say about the strong principle, itself concerned exclusively with processes. However, it will be argued below that the principle of equal consideration of interests should not be interpreted in this substantive way, as equality of well-being poses insurmountable problems of articulation and application. In turn, this rejection of a substantive definition exposes a procedural conception of equal consideration of interests, a conception that does play a role in justifying the democratic mode of decision making.

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<sup>32</sup> Dahl, *Democracy and Its Critics*, n. 27 above, ch. 7, “Personal Autonomy”. The authors have mildly altered Dahl's definition by adding the word “equally” after “to participate”. It should be noted that the term “political equality” in the fullest sense of the term embraces more than the procedural equality entailed by the strong principle of equality: see text of n. 47 below for further discussion.

<sup>33</sup> Another formulation is offered by Christiano, *The Rule of the Many*, n. 28 above, p. 54: 2 “...advancing the interests of one person is as important as advancing the interests of any other person.”

<sup>34</sup> As stated by Christiano *ibid* 58: “Equal well-being can only be a general principle for evaluating the outcomes of political processes.”

In terms of its articulation, equality of well-being should be rejected because, as pointed out by Christiano, it is unintelligible as a political ideal.<sup>35</sup> To summarise Christiano's complex and subtle argument, there are three reasons to reject equal well-being as a political principle: the first two concern the fact that persons' conceptions of their own interests are, first, incomplete and, second, constantly evolving, so we lack the basic material with which to make comparisons of well-being; the third reason is that, even if we possessed such material, whether persons' interests are actually met, and then met equally, would be "a matter of deep contestation".<sup>36</sup> To this may be added overarching and reasonable disagreement about what constitutes well-being in the first place, not least whether it is confined to the pure satisfaction of preferences, or includes certain objective values that might override preferences on occasion.<sup>37</sup> Thus, as Christiano states, "[i]t would be absurd to evaluate political institutions on the basis of so unfathomable a standard."<sup>38</sup>

The above rejection of equal well-being exposes two difficulties with the principle: its essential contestability, and the fact that an individual's conception of her own well-being is liable to be mutable and evolving. Both of these difficulties would suggest that, within the political process, individuals *themselves* should retain governance over the articulation of their own interests. This latter claim receives further support when attention turns to certain practical difficulties should the pursuit of an individual's well-being be left to others, say bureaucrats. The danger here is that those bureaucrats may (eventually) lack the skill and/or virtue required to pursue the well-being of all those

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<sup>35</sup> Christiano's argument is set out in *The Rule of the Many* *ibid*, ch. 2, "Equality" and also *The Constitution of Equality*, ch. 2, "Social Justice and Public Equality" and ch. 3, "Democracy as the Public Realisation of Equality", n. 29 above.

<sup>36</sup> Christiano, *The Rule of the Many* *ibid* 66. See also Dahl, n. 14 above, pp. 87-88, especially p. 87 where he compares "person-regarding equality" with "lot-regarding equality".

<sup>37</sup> See Dahl, *Democracy and Its Critics*, n. 14 above, ch. 5, "A Critique of Guardianship", especially, pp. 65-72. See also Christiano, *The Rule of the Many*, n. 15 above, pp. 57-58.

<sup>38</sup> *The Rule of the Many* *ibid* p. 67.

they govern equally.<sup>39</sup> Even if such skill and virtue could always be found in recruits, and maintained in those appointed to power, such bureaucrats would still need to ascertain, at regular intervals, the preferences and interests of those they governed as an empirical matter, a process that would be immensely complex, time consuming and expensive, and also liable to error.<sup>40</sup>

These difficulties of articulation and implementation are addressed by the second principle embedded in the strong principle of political equality, which is the principle of personal autonomy. This principle states that each *individual* is the best judge of his or her own interests where individual and collective decisions are concerned.<sup>41</sup> Thus no person is better qualified than the individual herself to judge what her preferences and interests are, and then to decide upon the policies that best reflect those preferences and interests.<sup>42</sup> In turn, this exposes a procedural, as opposed to substantive, conception of equal consideration of interests, whereby the articulation by each individual of his or her interests is given the same weight as those of each and every other individual involved in a given policy selection process.<sup>43</sup>

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<sup>39</sup> Dahl, *Democracy and Its Critics*, n. 27 above, p. 76 and p. 103. See also Dahl, *On Democracy* (New Haven and London: Yale University Press, 2000), pp. 73-74, where the corrupting effect of power on a governing elite (guardians) is described.

<sup>40</sup> As A. Weale states: "Even good-natured persons have only a limited incentive to acquire information about the circumstances of others in conditions of bounded rationality." Weale, *Democracy* (New York: Palgrave MacMillan, 2nd ed., 2007), p. 64. See too, Christiano, *The Constitution of Equality*, n. 29 above, p. 89. This idea is also reflected by Dahl: "The more that knowledge of A's interests requires direct access to A's awareness, the more advantageous is the position of A herself." Dahl, *Democracy and Its Critics*, n. 27 above, p. 102.

<sup>41</sup> As Dahl points out, this principle is a rule of prudence, by which he means a prudential mix of moral and empirical judgments: see Dahl, *Democracy and Its Critics*, *ibid* p. 100.

<sup>42</sup> Dahl, *Democracy and Its Critics*, *ibid* 98. See also Weale, *Democracy*, n. 40 above, p. 64. In a system of representative democracy, the question of articulation of interests is performed indirectly, through the existence of political parties who formulate policy and voters then voting for the candidates of those political parties whose policies more or less reflect their interests as they see them. Such a system can be unjust in many ways, including failing to offer a sufficient range of choices: whether these potential injustices can and do undermine the strong principle of equality is a matter for another article.

<sup>43</sup> This approach may be contrasted with the proposals for "fancy franchises" considered in the British Parliament between 1867 and 1884, which gave extra votes to the wealthy and/or the educated; for a full account see C. Seymour, *Electoral Reform in England and Wales* (New Haven: Yale University Press, 1915).



Thus, when the principle of personal autonomy combines with the notion of equal consideration of interests, the strong principle of equality emerges, that all members of the relevant community are sufficiently and equally well qualified to participate equally in making collective decisions that affect his or her good or interest.<sup>44</sup> This procedural vision of equality takes practical form as OPOV:<sup>45</sup> each person should have an equal say in the selection of the policies and laws by which he or she is governed, in the form of an equal weighted vote as part of a democratic process.<sup>46</sup>

The strong principle of equality provides a powerful and intrinsic justification for democracy because OPOV involves the state treating all members of the political community as deserving equal political influence, and therefore equal political status, in the system.<sup>47</sup> Readers will now understand the wrongfulness of personation when the eligible voter votes more than once. Personation is wrong under such circumstances

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<sup>44</sup> Dahl, n. 27 above, p. 105. Though it is not necessary to resolve the issue for the purposes of this article, the authors believe this principle is political in the Rawlsian sense of the word, as opposed to metaphysical. It is also worth noting that in a system of representative democracy, the mode of participation is indirect, through the election of representatives and the fact of regular elections. However it should be noted that both the (non-binding) Art. 21(1) of the Universal Declaration of Human Rights and the binding Article 25(a) of the International Covenant on Civil and Political Rights treat direct and indirect democracies as equivalent and equally valid, provided they are conducted on the basis of “universal and equal suffrage” (present authors’ emphasis). The authors assert that Dahl’s arguments apply equally to the election of representative governments by universal and equal suffrage and direct democracies.

<sup>45</sup> As Dahl states, “voting equality at the decisive stage is necessary in order to provide adequate protection for the intrinsic equality of citizens and the Presumption of Personal Autonomy [author’s capitalisation].” n. 27 above, p. 109.

<sup>46</sup> It should be noted that OPOV also requires that, where elections combining votes from more than a single electoral district are concerned, those districts are roughly equally populated, so as to ensure the equal weight of each vote where the overall outcome is concerned. Such equality in the voting populations of electoral districts satisfies the *quantitative* dimension of the fairness of electoral procedures. Electoral fairness may also have a *qualitative* as well as a quantitative dimension, as the debate over gerrymandering reveals. For a discussion of the issues surrounding qualitative fairness, see Beitz, n. 29 above, ch. 7, “Fair Representation and Legislative Districting”.

<sup>47</sup> Political equality in the fullest sense of the concept can be defined as “equal resources to influence decisions regarding the collective properties of society”: see Christiano, *The Rule of Many*, n. 28 above, p. 87. This fully realised conception of political equality is concerned with equal concrete power over decisions and therefore incorporates not only the equal procedural opportunity to influence decisions offered by OPOV but also the economic, social and educational resources whereby all can take advantage of that procedural opportunity. For discussion of these enabling resources, see, for example, A. Przeworski, *Democracy and the Limits of Self-Government* (New York: Cambridge University Press, 2010), p. 73; Beitz, *Political Equality*, n. 29 above, pp. 14-16; and Christiano, *The Rule of the Many*, n. 28 above, pp. 89-90. Nevertheless OPOV and the principles it makes concrete are a fundamental part of the notion of political equality.

because it involves the personator illegitimately claiming superior political status over her fellow voters, in violation of the strong principle of equality and, ultimately, the concept of the equal political status of all citizens. This is because, in giving her voice greater voting weight by voting more than once, the personator is either claiming that her interests are deserving of greater consideration than those of her fellow citizens, in violation of equal consideration, or that she is a better judge of someone else's interests and should therefore express this judgment on her behalf, in violation of personal autonomy.

### **Personation: The Violation of Exclusion**

In the second set of circumstances articulated above, it was posited that personation is potentially wrongful when a person who is excluded from the franchise of any given election committed the act of personation. It was suggested that the wrongfulness of personation in these circumstances consisted of the personator's violation of legitimate rules of exclusion from the franchise.

In order to understand the wrongfulness of the violation of exclusion, it is necessary to explore the distinction between *mala in se* and *mala prohibita*.<sup>48</sup> *Mala in se* refers to those wrongs that can be largely identified and defined independently of the law: the law can then choose to reflect their existence through the creation of criminal and civil wrongs. Murder and rape are quintessential examples of such wrongs. Such wrongs should be contrasted with those wrongs, *mala prohibita*, whose existence is largely dependent on their articulation by the law, though they will ultimately be derived from a legitimate moral and/or administrative purpose. An example of such a wrong is the

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<sup>48</sup> For an excellent discussion of the nature of *mala in se* crimes, to which the authors are indebted, see Simester and von Hirsch, n. 14 above, pp. 24-29.

violation of the rule that establishes which side of the road people must drive on: though there is no reason in morality to favour one side of the road over the other, once, in the name of road safety and societal co-ordination, a side has been chosen, it becomes wrongful to do the opposite. On occasion, the *ex ante* reasons for the creation of such wrongs allow for a range of reasonable choices, with the result that the precise formulation of the wrong chosen by the law will be somewhat arbitrary, a result justified by the organisational imperative to draw the line somewhere. In such cases, the law makes determinate an abstract concern with safety or fairness or health or any other number of legitimate concerns of the state.

Where the violation of political equality is concerned, its wrongfulness is pre-legal in the sense of *mala in se*, because that wrongfulness is articulated by a moral argument concerning political equality and the relationship between political equality and democracy. The wrongfulness of the violation of exclusion however is post-legal in the sense of *mala prohibita*: this is because, though the question of who should belong to the franchise is informed by morality, such that it can be morally wrong to *exclude* people from the franchise for certain kinds of reasons, different systems can nevertheless draw the line in different places without injustice, for example electoral systems that carve out different eligibility criteria where age and competence are concerned. Such differences may be informed by a wide range of moral, practical and cultural concerns, for example, a nation may decide selectively to lower the age of eligibility for those who have served in the armed forces.<sup>49</sup> However, once an electoral system has drawn the line in a reasonable way, violating that rule is wrongful.<sup>50</sup>

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<sup>49</sup> An historical example is when the voting age was set at 21 for males by the Representation of the People Act, s. 1(1) (1918), reflecting a common law view of the age of majority, save for those who had undertaken military service, in which case s. 5 set a younger age of 19. This reflected the view, certainly defensible in its historical context that, if one is old enough to die for one's country, one is old enough to

*Mala prohibita* crimes might raise concerns with any theorist who believes that a necessary condition of criminalisation is that the conduct concerned is morally wrongful prior to criminalisation.<sup>51</sup> Antony Duff has suggested that *mala prohibita* crimes do in fact satisfy this condition, so long as the conduct is wrong *prior to criminalisation*, though not wrong prior to legal regulation by the civil law.<sup>52</sup> In the case of eligibility requirements for voting, this is almost universally the case.<sup>53</sup> However it is not clear that the legitimate criminalisation of *mala prohibita* crimes should require pre-criminalisation, civil law wrongfulness: if the conduct *becomes* wrongful once the law has declared it to be so, it should not matter that, on occasion, it is exclusively the criminal law that makes that declaration. What is of the essence is whether, exclusively or in conjunction with the civil law, the articulation of that conduct as wrongful by the criminal law is justified.<sup>54</sup>

Where eligibility requirements for the franchise are concerned, it is submitted that that is the case when those eligibility requirements reflect, in a reasonable and proportionate way, important values concerning capacity and commitment to the polity.<sup>55</sup> It is for this reason that personating in order to overcome unjust exclusions from the franchise, for example those based on race, would be morally justified, and its

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vote for the government. This reflects the notion that inclusion in the franchise is partly dependent on the demonstration of commitment to the polity/nation, a notion discussed in the text above.

<sup>50</sup> Simester and von Hirsch, n. 14 above, pp. 24-29; see also Minnite, n. 9 above, pp. 32-35.

<sup>51</sup> This is a particular branch of what is commonly known as legal moralism.

<sup>52</sup> *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing 2007), pp 91-92. See also "Perversions and Subversions of Criminal Law" in RA Duff, L Farmer, SE Marshall, M Renzo and V Tadros (eds.), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2004) 88, 94-95.

<sup>53</sup> The rules governing eligibility to vote and inclusion in the Electoral Registers (the Parliamentary and Local Government Registers differing slightly in ways which do not affect or argument) are to be found in the Representation of the People Act 1983, substantially in ss 1-7C.

<sup>54</sup> For a similar argument, see Simester and von Hirsch, n. 14 above, pp. 24-29.

<sup>55</sup> Of course the complete case for criminalisation also turns on questions of harm, questions which this article will address below. The overall conclusion is that criminalisation of personation is justified because there is a powerful social need for regulation in the name of the common good, and the deterrent effect of the criminal law is required.

prohibition by the law in such cases could not make it wrongful in any sense.<sup>56</sup> Thus when an electoral system excludes people from the franchise illegitimately, such unjust exclusions are fatal to the criminalisation of personation by those unjustly excluded. Therefore, to summarise, whether personation is wrongful when committed by the excluded depends, in large part, on the equity and reasonableness of any given jurisdiction's rules of exclusion. This article will examine the situation in the UK in order to illustrate this mode of analysis.

Such an analysis must begin with a principle of inclusion against which the rules of exclusion can be evaluated. In light of the commitment to the principle of political equality and democracy, as opposed to any alternative political arrangement, Schumpeter's proposal that it is just for the members of any given polity to decide, without restriction, who is admitted to the franchise is rejected.<sup>57</sup> This is a clear violation of the principle of political equality and is in contravention of almost two hundred years of struggle in the United Kingdom to extend the franchise to almost all adult members of the population.<sup>58</sup> At the other extreme is Dahl's proposal that all adults subject to the laws of a polity should be enfranchised, a generous test of inclusion that this article will use as a starting point.<sup>59</sup> It will be argued that Dahl's requirement of being an adult subject to the laws of the polity should be narrowed by a further

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<sup>56</sup> Simester and von Hirsch, n. 14 above, p. 25 "...doing does not become (morally) wrong just because the state declares it to be so."

<sup>57</sup> J. Schumpeter, *Capitalism, Socialism and Democracy* (London: Allen and Unwin, 1943), p. 245.

<sup>58</sup> See G. D. H. Cole, *British Working Class Politics 1832-1914* (London: Routledge, 1941); E. S. Pankhurst, *The Suffragette Movement* (London: Virago, 1977); Seymour above n. 31 and, for a short summary of the major developments from 1430 to 2000, B. Watt, *UK Election Law: a Critical Examination* (London: Glasshouse, 2006), pp. 34-48.

<sup>59</sup> Dahl, *Democracy and Its Critics*, see n. 27 above.

necessary condition of *commitment* to the polity, following Walzer.<sup>60</sup> However, the analysis will begin with the requirement for adulthood.<sup>61</sup>

The requirement for adulthood is a rule concerned with competence based on maturity. Given that political choice is a matter of some sophistication, it is reasonable for a polity to restrict the vote to those deemed to have developed basic intellectual and emotional capacities, and age is a good generalised and impartial indicator of the required maturity.<sup>62</sup> Since 1968 an elector in the UK must have attained the age of 18 years before s/he is able to cast a ballot.<sup>63</sup> Though the exact age to indicate the required maturity is perhaps contestable, and some mature minors might feel unjustly excluded from the ballot, there is clearly an organisational imperative to draw the line somewhere, and 18 is a perfectly reasonable choice shared by many democracies.<sup>64</sup> That personation by those who are under 18 is wrongful is therefore judged uncontroversial.

It is arguable that sufficient age is not a guarantee of the required competence to make an informed political choice and for this reason electoral jurisdictions might concern themselves with questions of mental capacity *tout court*. However readers may be surprised to learn that UK electoral law contains, with a limited exception,<sup>65</sup> no barriers on this basis. Previously at common law a person suffering from severe mental

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<sup>60</sup> M. Walzer, *Spheres of Justice: a Defence of Pluralism and Equality* (Oxford; Blackwell, 1982), ch. 2.

<sup>61</sup> It should be noted that the election law of the United Kingdom does not contain a simple statutory statement of the breadth of the franchises. This is because, problematically, UK electoral law, or more properly laws, is/are to be found in a complex set of common law rules and statutory provisions dating back to the nineteenth century, if not before. The reader is advised to consult P. Gribble (ed.), *Schofield's Election Law* (London: Sweet and Maxwell, 3<sup>rd</sup> edition and updates) for a full account.

<sup>62</sup> Christiano, above n. 29, p. 128 where the notion of basic standard of minimal moral competence is defended, but no barriers beyond that.

<sup>63</sup> See Family Law Reform Act, s. 1 (1968) and RPA, ss. 1(1)(d) and 2(1)(d) (1983).

<sup>64</sup> The Chartsbin representation compiled from CIA and Inter-Parliamentary Union data reveals that the most common age for gaining the franchise is 18 years: see <http://chartsbin.com/view/re6> (last visited 17 February 2014).

<sup>65</sup> RPA 1983, s. 3A governs this exception, which is generally concerned with a person who, on conviction, is forcibly detained in a mental hospital. She is deprived of her vote under provisions analogous to those which deprive convicted prisoners of their vote.

illness could not vote.<sup>66</sup> However, this common law rule was removed by the Electoral Administration Act s. 73 (2006) and the Mental Capacity Act s. 29 (2005); these two provisions are to the effect that the only person who may make the decision on whether a person has the capacity to vote is the voter herself. The UK's failure to refuse the vote to adults due to lack of mental capacity means that there are no controversial exclusions on this basis.<sup>67</sup>

It has been suggested that being subject to the rules of the polity as the measure for inclusion in the franchise should be narrowed by a further principle requiring commitment to the polity. Given the overwhelming empirical challenge of ascertaining such a psychological attitude in all cases, commitment needs to be assumed from general factors that bear a rough empirical link to such commitment. In the UK that commitment is assumed from a combination of two factors: citizenship and residence.

Where citizenship is concerned, the UK rules are very generous. British citizenship through birth is, subject to the residence requirements addressed below,<sup>68</sup> sufficient for inclusion in the franchise.<sup>69</sup> However, it is not necessary, since citizens of the Irish Republic and of the Commonwealth may also vote in elections to the Westminster Parliament, the Scottish Parliament, the Welsh and Northern Irish Assemblies and also

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<sup>66</sup> *Schofield's Election Law* cites the *Bedford County and Burgess* cases 2 Lud EC 381 (1785) and the *Oakhampton and Robin's* cases 1 Fras 69 (1791) as authorities for this proposition.

<sup>67</sup> M. Redley, J. C. Hughes and A. Holland, "Voting and Mental Capacity", *British Medical Journal* 341 (2010): p. c4085 argue in favour of the view that people with questionable mental capacity should not be prevented from voting that "voting is a political right, not a matter of competence to make decisions". Compare this with the (Australian) Commonwealth Elections Act, s. 93(8)(a) (1918) which disenfranchises a person not of "sound mind who is incapable of understanding the nature and significance of ... voting". A full discussion of this point is beyond the scope of the present article.

<sup>68</sup> There are some voters who escape both the principle about being subject to the rules of the polity and the rule about being resident because, in these cases, citizenship is enough by itself. Members of the Crown Services (military and civil) in service overseas are entitled to vote because there are service registration provisions to this effect: see RPA, ss. 14-17 (1983). Expatriates may vote in national elections and referendums provided they have been registered in respect of a UK address within the last 15 years: the Representation of the People Act, ss. 1 to 4 (1985) as amended provide the fundamental provisions.

<sup>69</sup> Birth or, more accurately, *citizenship by virtue of birth*, may be seen as another form of inherited property and thus indistinguishable from wealth in terms of the arbitrariness of its bestowal; see A. Shachar and R. Hirschl, "Citizenship as Inherited Property", *Political Theory* 35 (2007): pp 253-287.

in local government elections. These last two groups, which may number over a million voters satisfying the residency requirements, may vote because of their former status as citizens of the British Empire. This rule was introduced without a great deal of debate by the Representation of the People Act 1918 because no distinction could or should have been made between subjects of the British Empire, who all had the right to travel freely in the Empire. This inclusive position has been maintained in subsequent legislation governing eligibility.<sup>70</sup>

As for residence, where local government elections are concerned, such commitment can be assumed from residence because the locally resident, directly affected by local decisions, have, as a result, a direct interest in local governance. It is arguably that interest that explains why the citizenship requirements outlined above are expanded to include locally resident EU citizens.<sup>71</sup> Where general elections are concerned, given the principle of OPOV and a system of electoral districts, it seems reasonable that residence should govern for which constituency your vote is counted, and can therefore be justified as a simple administrative device for deciding how to count votes in national elections. Personation to overcome these residency rules is therefore wrongful.

In light of these rules, certain persons are excluded by dint of citizenship alone. Is it just that a citizen of France who has lived and worked in London for twenty-five years should not be entitled to vote for a member of the Westminster Parliament? She would be subject to the laws of England and Wales and would be paying taxes, directly and indirectly, to HMRC. It is nevertheless suggested that there is a way to distinguish between our citizen of the UK and, at least in 1918, our citizen of the Empire, on the

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<sup>70</sup> See now RPA, s. 1 (1983) (Parliamentary) and S2 (Local Government) for the eligibility rules.

<sup>71</sup> RPA, s. 2(1)(c) (1983).



one hand, and our Frenchwoman, on the other. Whilst Dahl points out the dangers of a group being able arbitrarily to exclude others distinguished by mere accident of birth, our hypothetical Frenchwoman is distinguished by more than that. If she has lived lawfully in Britain for more than five years she is able to become a citizen with full rights to vote.<sup>72</sup> The reason she has not assumed the franchise is not because she has been (permanently) excluded, but because she has, ultimately, chosen to exclude herself. As Walzer points out, being, or becoming a citizen entails a commitment to live in a common way of life and, if a person freely chooses not to adopt a methodology to demonstrate that commonality, she cannot expect to benefit from one of the rights contingent upon membership. This explains why our hypothetical French citizen should be criminalised if she personates. She is usurping the rights of those whose commitment to some measure of a common way of life can be reasonably assumed or demonstrated through an active decision.

The most important form of exclusion based on lack of commitment is the most contentious.<sup>73</sup> A convicted prisoner during the time s/he is in prison may not register to vote and is not free to vote.<sup>74</sup> As the Standard Note records this has been repeatedly affirmed as the law.<sup>75</sup> Despite the fact that it has been the subject of adverse comment in the UN Human Rights Committee the UK Parliament is unwilling to consider any amendment to the law. The criticism in the ECtHR and the UNHRC has not been

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<sup>72</sup> See <https://www.gov.uk/becoming-a-british-citizen> for a helpful guide to the procedure.

<sup>73</sup> The most accessible account is to be found in the House of Commons Library Standard Note SN/PC/01764 “Prisoners’ Voting Rights” of 15 January 2014 available as a PDF from <http://www.parliament.uk/business/publications/research/briefing-papers/SN01764/prisoners-voting-rights> (Site visited on 11 February 2014).

<sup>74</sup> RPA 1983, s. 3. Persons convicted of certain electoral offences are also denied the vote even if they are not imprisoned. Under RPA, s. 160 (1983), a person reported guilty of a “corrupt offence/practice” (such as personation or electoral bribery under RPA, s. 113 (1983)) is denied the vote for five years whilst a person guilty of a (lesser) “illegal offence/practice” (such as failing to provide a return of election expenses under RPA, s. 84 (1983)) is denied the vote for three years. This, it is suggested, uncontroversial measure derives its justification from the direct connection between the wrongdoing and the punishment - a person who cheats during elections might well be denied the right to vote.

<sup>75</sup> Most recently in *R (on the application of Chester) v Sec. State for Justice* [2013] UKSC 63.

directed towards the principle that prisoners should be denied the vote, but towards the breadth of that principle as it is applied in the UK. Many democracies deny prisoners the vote to some extent,<sup>76</sup> but it has been suggested that the UK has gone outside the margin of appreciation of Article 3 of the First Protocol to the ECHR<sup>77</sup> by operating a blanket ban.

The UK Parliament's explanation of this position is that those who have shown themselves unwilling to be bound by the laws have lost the privilege to vote for lawmakers. The problem with that position is that both Art 25 of the ICCPR and Article 3 of the First Protocol to the ECHR view voting as a right which may only be denied on the strongest possible grounds, and not all offences for which imprisonment is the penalty are sufficient grounds. However one can see within this unresolved situation indications of a desert-based morality. The argument seems to be Walzer's view that commitment to a society is more than a simple subjection to the laws and tax policies of a country; it is furthermore a psychological commitment to a common way of life. If criminals have breached their commitment by committing an imprisonable offence, it is reasonable, though contestable, that they lose their vote for the duration of their imprisonment. As such, though this exclusion is contestable, it is sufficiently reasonable such as to make personation by such a prisoner wrongful in the sense of *mala in se* as explained above.

## **Personation and Harm**

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<sup>76</sup> See the (Australian) Commonwealth Elections Act 1918 s. 93(8)(b) and s. 93(8AA). For the avoidance of doubt the text of the Commonwealth Elections Act 1918 does not date from that year, but was completely revised in 1984. See Watt n. 12 above at [2.10.2].

<sup>77</sup> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Establishing the wrongdoing involved in personation is a necessary first step in justifying its criminalisation. The next step in the justificatory process requires an exploration of personation's relationship to harm.<sup>78</sup> This exploration serves two purposes: first, establishing a link between personation and harm furnishes a good reason to criminalise it;<sup>79</sup> second, such a link arguably ensures that its criminalisation does not violate the constraints on coercion emerging from political liberalism.<sup>80</sup>

In order to understand the link between personation and harm it is necessary to understand that personation, as defined by RPA s. 60 (1983), is a *harm-independent* wrong that is to say its definition incorporates no harm. This is the case because personation is not wrong, in whole or in part, *because* it is harmful, but because, as explained above, it is incompatible with certain fundamental democratic principles.<sup>81</sup> Nevertheless individual or collective acts of personation can give rise to a number of direct harms, and this potential certainly lends some weight to the criminalisation of personation. By direct harms it is meant that a single instance of personation, or the collective effect of several instances, actively and directly sets back the interests of fellow voters and/or candidates.<sup>82</sup> Perhaps the most salient example of such a setback is when a legitimate voter is personated and, as a result, turned away at the ballot box.<sup>83</sup> However, sufficiently widespread and organised personation can alter the result of an

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<sup>78</sup> Harm has been defined by Feinberg as a "thwarting, setting back, or defeating of an interest." Feinberg, n. 16, p. 33.

<sup>79</sup> Feinberg, *ibid* p. 26; Simester and von Hirsch, n. 14 above, pp. 35-36 and p. 48.

<sup>80</sup> The liberal requirement for harm, sometimes known as the harm principle, seeks to prevent the criminalisation of behaviour purely upon the grounds of its moral wrongfulness by also requiring that the prohibited behaviour should either be harmful or that, should the behaviour *not* be criminalised, that would be harmful.

<sup>81</sup> Simester and von Hirsch, n. 14 above, pp. 50-51, in particular p. 51: "...some actions are wrongs prior to, and not in virtue of, any harm...that they may cause."

<sup>82</sup> See Feinberg n. 78 above.

<sup>83</sup> This occurred in the Aston and Bordesley Green elections and should not occur again because relevant laws have been amended. The particular circumstances in which this occurred are a little peculiar and limitations of space prevent an explanation in this article. Readers are directed to RPA (1983), Schedule 1 Rule 40 as amended (itself over 1100 words) for an outline of the present procedure; see also n. 82 below for further detail.

election, thereby setting back the interest of both the candidate who would have won legitimately, and all voters who supported that candidate in the ballot box. However, these direct harms are not always caused by personation; indeed some instances of personation will cause no harm at all. An example would be where an eligible voter who has never voted in his life, and has no interest in taking part in the democratic process, has his vote personated by a zealot, himself ineligible to vote, who adds a vote to a 10,000 vote majority. It might be argued that every act of personation, even that of the zealot in the example just given, dilutes the voting power of legitimate voters, but in the case of the zealot the harm is, at worst, *de minimis*.<sup>84</sup>

Given that direct harms caused by personation may be relatively infrequent or *de minimis*, it might be thought that that the harm principle is not satisfied. However, the criminalisation of personation conclusively satisfies the harm principle not because of (the risk of) such direct harms, but because the failure to criminalise it would (eventually) result in serious social harm, in the form of damage to the public good of electoral integrity. This harm is indirect.<sup>85</sup> It should be noted that the argument that follows relies on an empirical assumption: that the failure to criminalise personation would, eventually, significantly increase instances of personation.

A public good has been defined by Raz as follows:

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<sup>84</sup> Arguably no dilution in fact takes place as the person personated, who had no intention to vote, nevertheless had a right to vote. However, there will be dilution, albeit *de minimis*, if the zealot personates in the name of a fictitious person.

<sup>85</sup> Simester and von Hirsch call indirect harms that are caused by the failure to criminalise “secondary, reactive harms” n. 14 above, pp. 47-50. Such harms are articulated by the following question: “What matters, in other words, is not the question, ‘is this act harmful?’ but, rather, ‘what if this act were always permitted?’” Simester and von Hirsch, n. 14 above, p. 48. For an analysis of rape in terms of secondary reactive harms, see J. Gardner, “The Wrongness of Rape”, n. 2 above. For an analysis of bribery in terms of secondary reactive harms, see J. Horder, “Bribery as a Form of Criminal Wrongdoing”, n. 2 above.

“[A good] that refers not to the sum of the good of individuals but to those goods which, in a certain community, serve the interest of people generally in a conflict-free, non-exclusive, and non-excludable way”<sup>86</sup>

Electoral integrity is such a good because it is a necessary component of a healthy democracy, and all members of society benefit from a healthy democracy in “a conflict-free, non-exclusive, and non-excludable way”. In turn its public quality means that harm to electoral integrity takes the form of a general deterioration in the democratic culture of a given society, thus harming all voters equally given their collective interest in that democratic culture.

Electoral integrity has many different features.<sup>87</sup> One of these is that the extent of support for individual candidates and political parties is accurately represented by the results of elections.<sup>88</sup> When personation is widespread in an electoral system, by means of either mass multiple voting or mass voting by the ineligible, the extent of that support is always misrepresented. When sufficiently widespread, electoral outcomes are altered as well, allowing those who orchestrate the personation to achieve, or to place into, power those who do not have the necessary support of the electorate. Indeed, organised personation may well allow those with little support to achieve power. This latter state of affairs is fatal to the democratic character of a given society.

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<sup>86</sup> J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) p. 52. Raz also uses the terms “common” and “general” good. It is worth noting that in his “Rights and Politics”, *Indiana Law Journal* 71 (1995): pp. 27-44, Raz refers to “the common good of living under a democratic government”, p. 34.

<sup>87</sup> See generally S. Birch, *Electoral Malpractice* (Oxford: Oxford University Press, 2011), ch. 2: “Defining Electoral Integrity and Electoral Malpractice”. See also Pippa Norris, “The New Research Agenda Studying Electoral Integrity”, *Electoral Studies* 32 (2013): pp. 563-575.

<sup>88</sup> The article thereby adopts a conception of electoral integrity that, in this context at least, sees electoral integrity as reflecting the values of liberal democracy; to use the language of Norris, the values of “transparency, inclusiveness and participation”, *ibid*, p 569.

The above argument is general in nature. The following is a list of more precise harms widespread personation would cause. This list reveals that the public good of electoral integrity is instrumental to a number of specific public goods reflecting the democratic character of a given polity:<sup>89</sup>

1. Widespread personation will create a generalised loss of confidence in the electoral system, in turn triggering a significant reduction in participation in elections. As a result, a large section of the adult population will disengage with a key feature of the political process.<sup>90</sup> For many, this disengagement will blunt their political awareness, perhaps to the point of extinction. A vital resource for political argument and change will be lost.
2. Faith in elections, and consequent public participation in elections, is instrumental to a culture of public debate of political issues, not least because politicians must persuade the public of the merits of their political platforms in order to influence voting. Such public debate is a good because it improves the quality of the exploration of political issues and the equity of decisions taken by those in power.<sup>91</sup> However, widespread personation means that, as influence is replaced by raw power, such debate becomes increasingly pointless, and is perceived as such. The

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<sup>89</sup> As such, personation may be considered a crime against the State: see Minnite, above n. 6, p 26.

<sup>90</sup> For empirical support for this claim see S. Birch, "Perceptions of Electoral Fairness and Voter Turnout", *Comparative Political Studies* 43 (2010): pp. 1601-1622. On loss of confidence in electoral fairness generally and participation, see S. Birch, "Electoral Institutions and Popular Confidence in Electoral Processes: A Cross-national Analysis", *Electoral Studies* 27(2) (2008): 305-320. Voter abstention also increases the risk of one of the direct harms outlined earlier in the text, that of actually altering the result of an election, as noted by F. E. Lehoucq: "If rates of voter participation fall, then fabricating a handful of votes may be sufficient to retain power, a fact that opposition or regional parties may exploit as elections become more competitive." Lehoucq, "Electoral Fraud: Causes, Types, and Consequences", *Annual Review of Political Science* 6 (2003): pp. 233-253.

<sup>91</sup> See Beitz, n 29 above, p. 113.

harmful result is that the diversity and quality of public debate, and the equity of decisions taken, will degenerate.<sup>92</sup>

3. “[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens.”<sup>93</sup> Dahl has argued that there are two reasons why this is so: regular elections and political competition among parties.<sup>94</sup> Personation, by allowing politicians and/or groups and/or individual voters to pervert the competitive process by not persuading voters but simply *usurping* votes, means that the capacity of elections to maintain such responsiveness is severely blunted, perhaps to the point of extinction. As noted by Lehoucq, “to the extent that public officials can corrupt the electoral process, they are less accountable to the electorate.”<sup>95</sup> Widespread personation therefore damages a key beneficial feature of the democratic process.
  
4. The final harm is concerned with Dahl’s second reason why politicians remain responsive to the preferences of citizens: political competition. Widespread personation will result in a reduction in the range of political choices available to the electorate, through the erosion of certain political parties. Widespread and systematic personation will mean that certain parties, not involved in the personation, will fade, lose resources and maybe disappear because, despite their appeal to certain sections of the population, they cannot influence the outcome of elections, or at least have the degree of their support expressed accurately in

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<sup>92</sup> See Beitz *ibid* p. 114. .

<sup>93</sup> *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971), p. 1.

<sup>94</sup> *A Preface to Democratic Theory* (New Haven: Yale University Press, 1956), pp. 131-132.

<sup>95</sup> “Can Parties Police Themselves? Electoral Governance and Democratization”, *International Political Science Review* 23 (2002): pp. 29-46, p. 35.

election results. Once such parties fade, or disappear, the electorate loses a mechanism whereby certain minority opinions can be expressed in the public arena, and thereby taken into account.<sup>96</sup> In turn those groups that subscribe to those minority opinions may vanish, or at least have their interests consistently ignored, as the system no longer has politicians and parties who reflect, and therefore, voice their interests.<sup>97</sup>

To summarise, the criminalisation of personation maintains and, equally importantly, publicly expresses a culture of electoral integrity and the need for and value of honest just and fair electoral processes. This may seem abstract and remote from reality but it is of fundamental socio-cultural concern. In turn, and linked to the idea of confidence in the electoral system, it is vital in maintaining a democratic culture of public involvement in political process. It is a significant democratic failure when voters decline to vote due to lack of confidence that the voting system will deliver a result in accordance with the wishes of the electorate, and the criminalisation of personation plays a key role in maintaining that confidence.

### **Personation and the Civil Law**

Establishing that personation is a form of wrongdoing and that, if it became widespread, this would lead to harm, are important steps in justifying its criminalisation. Nevertheless there remain potential factors militating, perhaps decisively, against

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<sup>96</sup> Dahl has argued that democracy does not in fact lead to the tyranny of the majority but rather that the system of competition for votes, which Dahl calls “polyarchy”, encourages a proliferation of minorities whose interests must be taken into account by politicians: n. 94 above, p. 132. For a discussion of Dahl’s argument, see D. Held, *Models of Democracy* (Cambridge: Polity Press, 3<sup>rd</sup> ed., 2006), pp. 160-165.

<sup>97</sup> As Przeworski states: “Whoever ends up governing must consider the full distribution of preferences, including the fact that some people have extreme views. Hence, even if voting for minor candidates does not influence who governs, it may affect how they govern.” Przeworski, n. 47 above, p. 102



criminalisation. Some might argue that if personation can be contained by civil measures and administrative safeguards, there is no need for so powerful and personally destructive a tool as the criminal law. In other words, is the criminalisation of personation an example of the unnecessary use of the criminal law?<sup>98</sup>

This article will argue not, on the basis that civil and administrative measures alone may not be able to prevent personation, and, where certain jurisdictions are concerned, it may be, in any event, undesirable to make the administrative procedures for voting too onerous or complex, for two reasons: first, because such measures may have a negative impact on participation;<sup>99</sup> secondly, because they may have undesirable logistical and cost implications.<sup>100</sup> Given these limitations where the civil law and its relevant procedures are concerned, this section of the article will argue that the criminal law can play a vital role in complementing and supplementing the civil law, by acting as a generalised deterrent against personation.<sup>101</sup> It will, once again, use the situation in the UK to illustrate this argument. The argument will begin with an exploration of how personation can and does take place, addressing both voting at the polling station and by post.

Before proceeding, however, it is important to note that there are two paradigmatic mechanisms for personation. The first mechanism may be described as “inflating the

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<sup>98</sup> For an in depth analysis of such concerns, see D. Husak, *Overcriminalization: the Limits of the Criminal Law* (Oxford: Oxford University Press, 2007).

<sup>99</sup> For conflicting views on this question, see Hans A. von Spakovsky, “Protecting the Integrity of the Election Process”, *Election Law Journal* 11 (1) (2012): pp 90-96 and Justin Levitt, “Election Deform: The Pursuit of Unwarranted Electoral Reform”, *Election Law Journal* 11 (1) (2012): pp. 97-117. See also T. S. James, “Fewer Costs, More Votes? United Kingdom Innovations in Election Administration 2000-2007”, *Election Law Journal* 10 (1) (2011) pp. 37-51, especially at pp. 50-51.

<sup>100</sup> See Levitt, *ibid*, especially pp. 115-117. See also T. S. James, “The Spill-Over and Displacement Effects of Implementing Election Administration Reforms: Introducing Individual Electoral Registration in Britain”, *Parliamentary Affairs* (2014) 67 (2) 281-305.

<sup>101</sup> *Ibid*, p 115.

electoral roll” or, to use an expression in common usage, “roll-stuffing”.<sup>102</sup> It involves registering people to vote who are either fictitious or dead, or, alternatively, ineligible for registration, for example for minors or transients who are made to look eligible by the alteration of a key characteristic. The registration of the bogus voter is the first step in this process and, where the registration process is relatively lax,<sup>103</sup> it may be easily accomplished.<sup>104</sup> Once such registration is in place, the personator can then either vote in person (i.e. at the polling station) or by post in the name of the bogus voter. The second mechanism is aptly described as “vote appropriation”, and consists of voting in the name of another real person who is eligible to vote. This can be done either consensually, for example through the voluntary handing over of the eligible voter’s voting card to another who then votes in person,<sup>105</sup> or by stealth, for example a person stealing a postal ballot paper of an eligible voter so as to vote by post in her name.<sup>106</sup> It should be noted that both mechanisms can be used by multiple voters and ineligible voters. Voting at the polling station and by post will now be examined in light of both paradigms.

Vote appropriation at the polling station requires that a person present herself at the Presiding Officer’s desk and give the name and address of an eligible voter who is on the electoral roll and who has not yet voted. A ballot paper will then be issued and the name on the electoral roll crossed off the Register as having voted.<sup>107</sup> There is some risk

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<sup>102</sup> Roll-stuffing, which Commissioner Mawrey identified as an Australian term for “a traditional Irish fraud”, there known as “voting the graveyard”, i.e. putting the names of dead electors on the electoral roll: see *Slough* above n 9. at [123-126].

<sup>103</sup> See the *Slough* petition *ibid* in general. The provision of false information connected with the registration of electors is criminalised by s 13D of the Representation of the People Act 1983.

<sup>104</sup> See *Minnite*, above n. 6, p. 32.

<sup>105</sup> As happened in the Nigel Kennedy incident: see n. 23 above.

<sup>106</sup> There is, of course, some overlap between these two types; the registration of a transient Commonwealth citizen by claiming that she is resident and then using her vote following her return home is an obvious example of the intermediate form

<sup>107</sup> Should the person personated appear later in the day she will be issued with a tendered (coloured pink) paper under Rule 40 of the Parliamentary Election Rules (or the law applicable to the election, which

with this process, since the impersonated person may have already voted or may be known to the polling staff. However it should be noted that, without the crime of personation, this risk means nothing more than the thwarting of the would-be personator.<sup>108</sup> The criminal law makes the risk involve negative consequences beyond mere prevention: thus the criminal law and the administrative framework work in conjunction with each other, the criminal law serving to motivate all potential personators to comply with the democratic values underlying the voting process.

Given the public and physical “one-by-one” nature of voting in person, and, where vote appropriation is concerned, the risks just outlined, it might be thought that the potential for widespread and strategic personation at the polling station, rather than limited and fragmented instances, is limited. Thus the harms flowing from widespread personation articulated above would perhaps not materialise. Stewart articulates this view in quoting the Electoral Commission as stating that “personation at polling stations is “necessarily a small-time business. It is also a risky business”.”<sup>109</sup> However, this view seems unjustifiably optimistic where both vote appropriation and roll-stuffing are concerned.

In the case of vote appropriation and local government elections, political parties are well aware that turnouts are low, often at the level of 15-20% of the eligible voters, and they often have good records of who does and does not vote. Since those political parties are also furnished with copies of the electoral registers, which give the full

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varies according to the type of election: local government, European Parliament, Police and Crime Commissioner etc.) and her vote placed in the ballot box. The Returning Officer is obliged to report the number of tendered ballots counted and, it is to be presumed, if one of the candidates judges, because there is a large number of tendered papers, that the election was tainted by fraud, (s)he may decide to issue an election petition.

<sup>108</sup> If the would-be personator were thwarted prior to voting, then the appropriate charge would be attempted personation, in accordance with the Criminal Attempts Act 1981, s. 1(1).

<sup>109</sup> See J. Stewart, “A Banana Republic? The Investigation into Electoral Fraud by the Birmingham Election Court”, *Parliamentary Affairs* 59 (2006): pp. 654-667, especially pp. 663-664, where Stewart quotes the Electoral Commission in their report *The Shape of Elections to Come*.

names, addresses and poll numbers of voters, they could, quite plausibly, use supporters from inside or outside the relevant area to take the place of voters who chose not to vote.<sup>110</sup>

Furthermore, roll-stuffing offers an alternative mechanism that enables mass personation even at the polling station. To illustrate, in Woking, following a strategic exercise in roll-stuffing whereby a number of fictitious voters were entered onto the electoral roll in respect of addresses controlled by the impugned candidate, some 22 “votes-in-person” were identified as being the product of personation.<sup>111</sup> One can easily imagine a situation where a number of households sympathetic to a candidate each registered one or more fictitious voters and then, on polling day, a coach party of personating voters could be brought in from some adjoining area, producing a large number of fraudulent votes.

Where the postal vote is concerned, the introduction of the postal vote *on demand* means opportunities for mass and successful execution of both paradigms are great.<sup>112</sup> The postal vote on demand means any person who wishes to vote by post in a specific election or in elections can apply for, and receive, a postal vote. Where roll-stuffing is concerned, the postal ballot merely requires a would-be personator to apply for a postal

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<sup>110</sup> The electoral frauds committed in Birmingham, Slough, Woking and, it is alleged in the latest election petition, Tower Hamlets (which has been heard, but not yet decided), were largely carried out amongst communities of South Asian (especially Pakistani and Bangladeshi) origin. In such communities, cultural, familial and kinship ties are especially strong and many people are employed by businesses run by members of their own community. Sobolewska and her co-researchers have shown how, for a variety of reasons amongst which the tendency of immigrant groups to cohere, a lack of interest from mainstream political parties and social exclusion possibly inspired by racist motives, South Asian community politics are strong and may not readily conform to the democratic practices of the majority community. Religion (and the perception of threats against religion) may also play a significant role in the mobilisation of the South Asian (Muslim) politic; see M. Sobolewska, S. Wilks-Heeg, E. Hill and M. Borkowska *Understanding electoral fraud vulnerabilities in Pakistani and Bangladeshi origin communities in England: A view of local political activists* (Electoral Commission, London) 2015).

<sup>111</sup> See [9], [83-85], [100-107]

<sup>112</sup> Rendered lawful by the Representation of the People Act 2000 which implemented the provisions of the Howarth Report and which was brought into effect by the Representation of the People (England & Wales) Regulations 2001. For a brief history of postal voting on demand, which goes on to consider the amount of electoral fraud occasioned by it between 2001 and 2009 see I. White, “Postal Voting and Electoral Fraud 2001-2009” *Parliamentary Standard Note* SN/PC/3667 14 March 2012.

vote in the names of, say, fictional or deceased persons, and none of the minor existing formalities prevent this.<sup>113</sup> Then, when the ballot papers arrive, the personator can vote multiple times. Where vote appropriation is concerned, one particular method which became infamous in Aston and Bordesley Green is for a community elder (or a member of the family) to collect the postal voting form from a consenting eligible voter and then complete it on his or her behalf.<sup>114</sup> There are few, if any, ways of systematically detecting fraud of this sort prior to an election.<sup>115</sup> In view of these difficulties of detection during the voting process, the deterrent power of the criminal law reduces the risk of compromised elections occurring, and is therefore a vital compliment to the civil law of election procedures.

The best modern example of widespread personation using postal votes is the Woking election petition. It is particularly helpful because it arose following an attempt to “fix the holes” in RPA (1983) which were exemplified in the Birmingham and Slough petitions.<sup>116</sup> In the Birmingham Petitions Richard Mawrey Q.C. identified some fourteen methods by which personation could be accomplished for example, a mixture of roll stuffing and vote appropriation.<sup>117</sup> However he was at pains to point out that these identified methods “by no means exhausted the possible methods of postal vote

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<sup>113</sup> Though it is criminalised by s. 62A of the Representation of the People Act 1983 (inserted by s. 40 of the Electoral Administration Act 2006).

<sup>114</sup> See the *Aston and Bordesley Green* judgment at [91].

<sup>115</sup> In *Aston* a “voting factory” of this kind was only discovered because, in a hotly contested election involving a number of parties trying to attract Muslim voters away from the Labour Party over the Iraq war, rumours reached the authorities. All parties were on notice that “dirty tricks” might be used to secure the vote and accordingly everyone was on their guard. See par. 82 of the judgment in which Mr Hemming (Deputy Leader of the Council) was judicially noted to have said that “The system invites fraud” and, in succeeding paragraphs Commissioner Mawrey’s investigation of the method with Philip Coppel Q.C. [149] sets out the factual basis for the particular concerns in Birmingham. The political atmosphere in Birmingham at the time of the elections is set out in par. [217-227]. See, for some further explanation, the article by Sobolewska *et al* above n.110.

<sup>116</sup> In the *Slough* Petition Commissioner Mawrey had pointed out that the addition of section 62A to the Representation of the People Act 1983 only remedied one of the defects in the Act: see [110].

<sup>117</sup> See par. [386-413] for a complete catalogue of the fourteen methods used. In this regard it is worth noting that most of the methods of corruption used in *Aston and Bordesley Green* amounted to vote appropriation.

rigging”.<sup>118</sup> Furthermore it seems from a reading of *Woking* that he was by no means certain as to how the widespread personation there had been accomplished, not least because of the elaborate means which the candidate and his “agents” (whether formal Agent or election helpers) used in trying to cover up the fraud.<sup>119</sup> The larger point being made by Commissioner Mawrey was that, whatever politically acceptable administrative means were introduced to control personation, the fraudsters will always find a way to circumvent those safeguards.

In the *Slough* petition Commissioner Mawrey acknowledged one way in which personation could be significantly minimised.<sup>120</sup> He noted the example of the French Presidential election of 2007, where there was both a requirement for personal registration of electors, achieved by attendance at the local *Marie* together with one’s identity card, and only “voting in person”.<sup>121</sup> One might also think of Sweden, where personation is prevented by an elaborate system of voting in person; however, this is only possible because of the small size of the electorate, the relatively large number of polling stations and the fact that many of the voters are known to the polling station staff.<sup>122</sup> No doubt these political choices, in the form of the abandonment of postal voting, the rigorous individual registration of voters, and the careful checking of voters at the polling booth, would have significant impact on the problem. However the price paid in any given jurisdiction of such measures might be very high, both in terms of cost and organisation, on the one hand, and/or voter participation, on the other; for these and

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<sup>118</sup> See *Slough* at [92].

<sup>119</sup> See *Woking* at [97-99] where Mr Bashir’s assertion that he ran a “one-man campaign” was dismissed as “fanciful” and reference was made to the involvement of his extended family and his network of business associates.

<sup>120</sup> [349].

<sup>121</sup> There was, nevertheless, an 85% turnout of voters.

<sup>122</sup> See the OSCE/ODIHR Needs Assessment Mission Report of 9-10 June 2010 in preparation for the Sept. 19th 2010 General Election available at <http://www.osce.org/odihr/elections/70947> (Visited 11th February 2014).

similar reasons, such measures might be deemed unacceptable.<sup>123</sup> Furthermore, where vote appropriation is concerned they may still not be effective because, if a person is willing to hand over their vote, they are equally likely to hand over any checking or comparison documents. Even voting in person is susceptible to the substitution of close family members for the authentic voter. Thus the general deterrent effect of the criminal law will still be needed.

The individual voter registration that has now been introduced by the Electoral Registration and Administration Act 2013 has the potential to reduce many of the opportunities for roll stuffing because it will make the registration process more rigorous, though the Act has loopholes which may be exploited.<sup>124</sup> However, as discussed throughout this article, there is a danger with more rigorous registration requirements, as argued by James. He has pointed out that the likely effect of the Electoral Registration and Administration Act 2013 is to reduce the number of bona fide voters registering to vote.<sup>125</sup> If everyone has to fill in their own electoral registration form in the canvass rather than relying upon some person in the household charged by the form with a sense of civic and legal responsibility, it is likely that those who are not

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<sup>123</sup> One of the present authors (Watt) takes the view that postal voting should be abandoned, but recognises that this is politically unlikely in the UK. He has also proposed to the Law Commission in his response to its latest Consultation (above n. 4) that extra polling stations be provided and that the special provisions in Northern Ireland (as an example of an area in which voting fraud was formerly widespread) that allow for the establishment of Special Polling Stations under Schedule 1 of the Representation of the People Act 1985 be extended to all areas of the UK, so that they may be used where there is an appreciable risk of widespread or organised fraud.

<sup>124</sup> The Act has introduced a new form of electoral registration known as Individual Electoral Registration (or IER) which replaces household registration and is supposed to make fraud more difficult. Under Part 1 of the Act (and in particular ss 1 and 2) individuals wishing to register to vote must provide their name, address, date of birth and National Insurance (NI) number (a number provided by the state which facilitates the collection of tax through the payroll) in order to register. The NI number is then cross-checked against a government database. However the safeguards provided by this system may be illusory. In a private demonstration to the Electoral Commission, one of the authors was able to register his family members without their knowledge or permission. Furthermore, and of much greater concern, is the fact that NI numbers and dates of birth are supplied to employers. Employers could subvert that information in order to register electors in their workforce or to 'import' electors from their own family or kinship groups in an adjacent area.

<sup>125</sup> See T. S. James, n. 100 above.

strongly committed to voting will simply fail to complete the form. Commissioner Mawrey in his judgment in the Birmingham cases noted that many people treat voting forms as “just another meaningless piece of paper from the council and bin it”.<sup>126</sup> It is much more likely that this will occur when everyone in the house is sent an individual form because it may simply seem to be wasteful duplication to those who are turned off from the political process. The drop in actual registrations forecast by James will also arguably amplify the effect of personation because, if the number of real voters falls, the proportionate effect of fraudulent votes will be so much greater.

The above illustrates the importance of criminalising personation on a practical level. The dangers of personation have been demonstrated in this article and the election petitions from the UK demonstrate that there is a desire amongst some candidates and some sections of the electorate to secure election for their chosen candidate at any cost. Furthermore it is clear that those willing to cheat are prepared to use a variety of methods to inflate the electoral register or to obtain ballot papers. These are, no doubt, serious enough matters to warrant criminalisation because, as Commissioner Mawrey has discovered, the methods employed are always at least one step ahead of the electoral officials. Furthermore, on those occasions when, for a variety of reasons, the use of the civil law to prevent personation is undesirable, the criminalisation of personation can play a vital role in deterring those who otherwise might personate.

Finally, a sceptic opposed to further extension of the criminal law might look at the two Birmingham election petitions, the Slough petition and the Woking petition and suggest that the petition procedure itself is sufficient to curtail personation. However, it is not because, whilst it offers a mechanism to remove from power those guilty of

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<sup>126</sup> See par. [42].



organising systematic personation, it does not, of itself, prevent them from trying again or provide deterrence. Furthermore it is cumbersome, premised upon the need for a private party (such as a disappointed political rival) to initiate action at some expense, and subject to very onerous nineteenth century procedural rules.<sup>127</sup> The criminal law and criminalisation, on the other hand, focuses upon the corrupters of an election and socialises the burden of deterring personation, placing the operational work upon the police, the CPS, the courts and, ultimately, the prison service to ensure electoral integrity.<sup>128</sup> These are public bodies and, as such, they act as antibodies of the state protecting the body politic.

### **Pure Personation**

Having hopefully justified the criminalisation of personation, attention must now turn to pure personation. As indicated at the outset of this article, pure personation takes place when a person votes as another person, as opposed to under another name, *without* voting as himself or, alternatively, votes as another with the other's permission, but the procedure for obtaining a proxy or voting by post is not followed. Examples of the first instance, Type 1, include an eligible voter who does not vote as herself but rather votes as either another eligible voter who she knows is too lazy to vote, or, alternatively, votes as her dead father, who might remain for some months upon the electoral roll. The second instance, Type 2, is exemplified by the high profile case involving Nigel Kennedy, where a friend of Kennedy's, at Kennedy's request, voted as Kennedy's absent wife for the candidate she wished to vote for, in the absence of a proxy or

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<sup>127</sup> Representation of the People Act Part III (1983).

<sup>128</sup> Personation is an imprisonable offence, with a maximum term of up to two years: RPA, s. 168(1) (a)(i) (1983).

Kennedy's wife applying for a postal vote.<sup>129</sup> Arguably Type 1 is a rather eccentric and pointless piece of behaviour and, for this reason, highly unlikely to take place; Type 2 is certainly understandable, as the example of the Kennedy case reveals.

The label pure personator has been chosen for both instances because there is a sense in which no illegitimate vote has been cast. With Type 1, this is because the personator would be perfectly entitled to vote as himself; with Type 2, this is because the person granting permission would be entitled to vote and could have done so by post or, had a proxy been appointed, the personator would have been entitled to cast the vote. Thus arguably no wrongdoing has occurred nor harm done: we are concerned here with *mala prohibita* of the purest kind, since what is being enforced might seem, at first blush, to be a petty bureaucratic insistence either on voting as yourself or going through a somewhat laborious and arguably unnecessary process of completing a proxy or applying for a postal vote.<sup>130</sup>

It is submitted that criminalisation is nevertheless justified for both Types, as instances where safeguarding the integrity of the electoral process can justify insisting on certain administrative procedures designed to guarantee that integrity.<sup>131</sup> This is because the detection of personation in all its forms often requires that the votes cast are subjected to a 'scrutiny'.<sup>132</sup> This process involves opening the sealed bundles of votes

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<sup>129</sup> See n 23 above for details of the Kennedy case.

<sup>130</sup> Some may believe Type 1 involves wrongdoing and harm if the eligible voter who is personated is subsequently turned away at the ballot box. However, this cannot happen because Rule 40 of Schedule 1 to the Representation of the People Act 1983 provides that a person who claims to be a voter disenfranchised in this way should be issued with a Tendered Ballot Paper. This paper is packaged separately from the other papers and, if it is subsequently shown that s/he has been personated, the false vote is substituted.

<sup>131</sup> That criminal wrongs can legitimately be carved out of such an objective is articulated by Duff: see his 173.

<sup>132</sup> Scrutiny is a common law process undefined by statute as it dates from the period between *Ashby v White* (as reported in (1703) 2 Ld Raym 938 as supplemented by (1703) 1 Brown 62) and the Parliamentary Elections Act 1868, during which Petitions relating to Parliamentary elections were debated on the floor of the House of Commons. The full story of the controversial case of *Ashby* is recounted by Watt *UK Election Law: A Critical Examination* (London; Glasshouse 2006) 155, 196.

and comparing them with the marked register of electors (i.e. those who have voted) and ensuring that each voter is properly qualified.<sup>133</sup> Scrutiny is a lengthy, difficult and expensive process, and the distraction and disruption caused by either type of personation should not be underestimated, as will now be explained.

The process of scrutiny involves the positive identification on paper of each and every voter. When a person goes into a polling station and applies for a vote s/he is checked off on the electoral register as an eligible voter (whether or not s/he is voting in the correct name). The person giving that name is then issued with a securely numbered ballot paper which is recorded as having been issued in their name. The ballot paper is marked and placed in the box. After counting, which is done in such a way as to render the number on the ballot paper invisible, the ballot papers and the registers marked with the name and number of the ballot paper are sealed separately and may only be recombined by order of an Election Court in a scrutiny process. In the scrutiny the names and numbers are combined so it is possible to see how each person voted. The scrutiny is attended by representatives of the parties to the Petition and, whilst it may seem unlikely, they may be able to challenge a particular vote. This was certainly threatened in the case of *Sanders v Chichester* where it was alleged that some voters had voted for a candidate other than their favoured candidate by mistake.<sup>134</sup> They had allegedly been confused when a candidate styling himself the 'Literal Democrat' had entered the contest with the intention of depriving the *bona fide* 'Liberal Democrat' candidate of votes. If the Petition had not been settled on alternative legal grounds (that misdescription was not an offence in any event) the petitioners intended to call witnesses to say that they had been duped. The scrutiny may thus reveal that 'innocent'

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<sup>133</sup> See the Woking Petition para. 6, revealing a number of improper votes detected on scrutiny.

<sup>134</sup> QBD Election Court, *The Times* 2 December 1994.

personation had taken place, which would take up time and money to resolve and might distract attention away from those who had personated in order to corrupt the election.

There is also a ‘slippery slope’ argument here. If the state allowed the personation of the dead father, why not of the sick father, or the absent father’, or the lazy father? All three have the option of taking part in the poll by means of a postal vote or by means of a proxy.<sup>135</sup> So it is not that the person is disenfranchised by illness, absence or sloth, but simply that they are required to take part in a regulated process so as to facilitate the apprehension of offenders. The pure personator, such as Mrs Kennedy’s friend described above, risks providing a (perhaps unwitting) smokescreen for those who seek to act in an illegal way.

It is accepted that where it is unequivocally shown that the personation is pure in nature, punishment by means of a summary fine might be appropriate.<sup>136</sup> However there is a countervailing argument. The problem is, of course, that in the absence of criminalisation of ‘pure personation’ or where it is punished by means of a small fine, personation gangs such as those acting in Aston and Bordesley Green might find it convenient to arrange for their supporters to form personation rings so as to distract attention from real wrongdoing. Accordingly, whilst it will never be possible to stop the isolated pure personator there are circumstances in which, rather than simply being amusing, convenient, or harmless, the pure personator can amount to a menace.

## **Conclusion**

The principal aims of this article were two-fold: to reveal the nature of the wrongdoing involved in personation and to demonstrate how the failure to criminalise personation is

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<sup>135</sup> See Schedule 4 to the Representation of the People Act 2000.

<sup>136</sup> RPA, s. 168(1)(a)(i) allows for punishment by fine alone. In such cases, the offence would be minor: see Duff above n 131, 173.

harmful, potentially fatally, to the democratic character of a given polity. If successfully orchestrated, personation allows elections to act as vehicles for family, business, or other sectarian interests, as opposed to those elections reflecting the will of the electorate as a whole. This shrinking of the political landscape through the perversion of the democratic process harms the public good of electoral integrity in the ways outlined in this article, thereby harming society as a whole.

The recent Elections Petitions examined in this article demonstrate that personation continues to be a viable and potentially effective form of electoral fraud. For as long as there remain effective ways to overcome procedural safeguards against personation, the criminalisation of personation will continue to serve a vital role in the defence of democracy.