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Compulsory Voting: Residual Problems and Potential Solutions

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The state-enforced compulsion to vote can be defended as a reasonable imposition on individual autonomy. This article moves on from this position to examine a number of residual problems with Australia's compulsory voting arrangements. While maintaining a commitment to the compulsory voting system, I suggest that, in order to protect the reputation of the practice and preserve the norm of universal participation, some reforms may be necessary. While the argument that it is reasonable to compel people to vote accepts that the state can legitimately penalise avoidance, I have doubts about the propriety of some current and past practices, specifically those relating to the legal consequences of avoidance and the public promotion of avoidance. One recommendation allows genuine 'conscientious objectors' to apply for exemption provided they meet a number of conditions. I also make suggestions that address the complaint that compulsion limits democratic choice.

I have argued elsewhere (Hill 2000, 2001, 2002) that the state-enforced compulsion to vote is a reasonable imposition on personal liberty. This article examines a number of residual problems with our current voting arrangements. Although my argument that it is reasonable to compel people to vote would be incoherent if I did not allow government to penalise avoidance, I express doubts here as to the effectiveness and/or appropriateness of some current practices. I argue further that the law should be amended in order to permit to abstain those with strong objections to voting. I call this category of would-be abstainers 'conscientious objectors'. The article also questions the justifiability of prosecuting those who publicly promote avoidance or the marking of ballots otherwise than in accordance with the Electoral Act. Finally, I make some suggestions for improving present arrangements with a view to addressing the charge that compulsion limits democratic choice.

In brief, I have defended compulsory voting on the grounds that voting is a public good and therefore a problem of collective action, which can be resolved

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only by mandatory means. The reason why voting is a collective-action problem is that it yields a number of clear and important benefits to both society and individuals, among them the following:

- It appears to provide protection against social and economic marginality and may prevent the poor and disadvantaged from becoming worse off.
- It removes the 'irrationalities' of voting which plague voluntary systems by limiting informational uncertainty, not only about the real value of the individual vote but also about the intentions of other voters. This uncertainty is a disincentive to co-operation (ie voting) and results in a self-defeating individualism. Compulsory voting as it is administered in Australia also limits private transaction and opportunity costs because the state makes voting so easy.
- By making suffrage work as a system rather than as a partial and often ineffectual tool of preference gathering, compulsion serves to protect democratic *desiderata* such as representativeness, legitimacy, accountability, political equality and minimisation of elite power. In this way, compulsion could be said to engender good or at least better government.
- Compulsion preserves political community and acts as a buffer against social isolation. By ensuring almost complete inclusion, it provides a rare occasion for solidary participation and gives rise, temporarily at least, to a powerful, non-particularistic moral and political community.
- Finally, compulsion permits the realisation of an important liberal value: equality of political opportunity. Compulsion brings with it a complex raft of measures designed to ensure that all the obstacles normally experienced by abstainers in voluntary systems are removed so that every Australian, regardless of circumstances, restrictions and contingent status, is enabled to vote. Because of the secret ballot, electoral officials cannot compel people to mark their ballot paper. Therefore voting itself does not *appear* to be compulsory; instead, it is registration and attendance at a polling place that is really compulsory.[1] In this way it is the *opportunity* to participate rather than the participation itself that is being actively sought. This may provide some compensation to anyone who regards compulsory voting as a violation of individual autonomy, provided he or she does not place a higher premium on choice over equality of political opportunity.

But I am conscious that these arguments may not be enough for those for whom individual rights are always trumps, or others who rail at being 'forced to be free',[2] and I have always conceded in my defences of compulsion that the claim that it violates the liberal democratic value of choice is a valid one. Accordingly, this article, while maintaining a commitment to compulsion, attempts to address and accommodate the complaints of some critics.

Australians several years ago witnessed a regrettable case of absenteeism, which may have brought the otherwise respectable institution of compulsory voting into disrepute. In 1999, a Victorian woman, Melissa Manson, was sentenced to one day in prison for failing to cast votes in the 1993 and 1996 federal elections and then

[1] There is some confusion as to whether in fact it is technically an offence to fail either to mark the ballot or record a formal vote (to be discussed further).

[2] To paraphrase Rousseau (1971, 184). For example, Senator Nick Minchin (1996, 245, 248) argues that 'compulsory voting is a fundamental breach of … civil liberties' and that it is 'inconsistent with the essence of a free and democratic society to force people to vote'.

subsequently failing to pay the imposed fines. Her rationale for refusing to vote was that 'there were no candidates worth voting for' and she declared that she was unwilling to 'pay the fines on principle' (Cassidy 1999, 4). She also apparently cited Article 25 of the International Covenant on Civil and Political Rights that guarantees freedom of political expression (National Voluntary Voting Register 2001). Ms Manson was not gaoled for her failure to vote but rather for her refusal to pay the fines (constituting contempt of court). Yet from the protesting voter's point of view, this distinction may not be a particularly helpful one since the fine is the penalty and it is the penalty which makes the vote compulsory and therefore objectionable.[3]

Failure to vote is not dangerous or harmful in the same way that it is dangerous to fail to observe other paternalistic laws like compulsory safety belts in cars. By the same token, it is not dangerous to avoid paying tax yet it is also wrong (at least for those who can afford to pay) because it is a case of free riding. Abstaining is neither dangerous nor a case of free riding.[4] For the cases in which I am interested, it is better understood as an instance of conscientious objecting because the desire to abstain is almost completely principle driven, especially in Australia where the opportunity and transaction costs are so low.[5] Important as I think voting is, I do not think fines and especially gaol terms—however brief—are appropriate for the misdemeanour of failure to vote, particularly where the abstainer has political objections to doing so. This latter qualification is important and I elaborate on it below, but for the moment I want to signal that I am not concerned here with cases of failure to vote that have their source in apathy or forgetfulness but only those where *political reasons* are given.[6]

The other category of electoral recalcitrance of concern here involves political communication relating to compulsion. It is the easier of the two categories, so I will deal with it first. Two emblematic cases are discussed below.

Joan Rydon (1997) has reported that the Australian Electoral Commission considered prosecuting her in 1984 when letters she had submitted to a number of newspapers pointed out that the Electoral Commissioner had incorrectly informed the public 'that voters must mark all their ballot papers'. In her published letters, Professor Rydon had suggested instead that '[t]hey could return them blank, or they could vote for only one House, or one or neither of the referendum questions' (Rydon 1997, 176).[7]

In February 1996, Albert Langer was sentenced to 10 weeks' imprisonment for

[3] It should be noted that electoral commissions do not have the power to determine or impose penalties for fine defaulters; rather, this is a matter for the courts.

[4] It is not a proper case of free riding because we know that voters tend to benefit while abstainers (usually the young, the homeless, the poor and poorly educated) tend to suffer; therefore, abstainers do not gain at the expense of participators; quite the reverse. For a fuller discussion, see Lijphart (1997) and the substantial literature cited in footnote 15 below. For a response to rational-choice arguments about voting, free riding and instrumental rationality, see Hill (2000, 2002).

[5] When we consider the enormous efforts of the Australian Electoral Commission to ensure inclusion, it becomes clear that the state does almost all of the work involved. Registration is relatively simple, elections are held on a Saturday in numerous and convenient locations and no one, including the infirm, imprisoned, ill or isolated, is expected to meet the potentially considerable opportunity and transaction costs of voting.

[6] In addition, the article does not deal with those who object to compulsory *enrolment* on politically principled grounds. The reason for this is mainly practical; those who have failed to enrol in the first place are much more difficult to detect and attract little or no publicity.

[7] Professor Rydon received no formal notification of the Commission's concerns but learned of it through private correspondence with Commissioner Hughes (Rydon 2002).

urging voters to fill in a ballot paper 'otherwise than in accordance' with Section 240 of the Commonwealth Electoral Act 1918 (AEC 1998a).[8] Mr Langer formed an organisation called 'Neither' and urged voters to show no preference among candidates from the major parties. He also indicated the manner in which ballots could be 'incorrectly' marked.[9]

Langer's prosecution and the reported admonition to Rydon beg the question of whether or not their communicative actions can be considered to be harmful public ones, rather than legitimate and harmless private ones. Of course their actions were public to the extent that there was a law which prohibited them, but what is really in doubt is whether the law itself was proper in deeming such actions public and harmful in the first place.

In order to address these questions, I suggest that we use, as a rough guide, the standard deontological legal framework which defines a public speech act as that which has the capacity to affect the welfare or liberties of other persons. John Stuart Mill is the important figure here. For a liberal like Mill, the only grounds for limiting speech are to prove that it causes 'harm' to the interests of others. Civil libertarians are generally loathe to acknowledge the harm of speech but most will concede that advising someone to do something illegal is wrong. Mill, for example, says that '[t]he case of a person who solicits another to do an act, is not strictly a case of self-regarding conduct. To give advice or offer inducements to any one, is a social act, and may, therefore … be supposed amenable to social control.' But he also makes the important point that: 'Whatever is permitted to do, it must be permitted to advise to do' (Mill 1991, 109). Since both Langer and Rydon were only advising people to do what was permitted under law, the justifiability of prosecuting either of them appears to involve an incoherence (at least as far as Australian/liberal jurisprudence is concerned) if not an injustice.

Embarrassingly, Langer's case drew the critical attention of Amnesty International, which published a global media release entitled: 'Australia: Political Activist becomes First Prisoner of Conscience for Over 20 Years.' Amnesty defined Langer as a prisoner of conscience because he had been imprisoned for a political belief but had 'not used or advocated violence' (Amnesty International 1996). Since Langer's actions constituted what appears to be a legitimate form of political communication, it was the state rather than Langer which seemed to be compromising democracy in this instance. Of course, Langer's actions were highly provocative to agencies committed to and vigorous in maximising the number of formal votes; nevertheless, this provision of the Electoral Act reflected an unjustified privileging of one form of political expression over another (ie voting over political speech). In addition, Manson-like recalcitrance could have been obviated if Langer- and Rydon-type recalcitrance had been tolerated (since Langer and Rydon could have advised Ms Manson that she was under no compulsion to vote for either party in the first place).[10]

[8] It should be noted, however, that the proscription on advocating aberrant voting was confined to the election period and more specifically 'from the issue of the writ to the end of polling day' (AEC 1998a).

[9] Rydon (1997, 176) observed:

> The method of voting 1, 2, 2 or 1, 2, 3, 3 had been considered formal since the Electoral Act was amended in 1984, but the advocacy of voting in this way had been made subject to a penalty of up to six months in gaol by a later amendment of the Act, the now notorious section 329A.

[10] Instead, she might have opted to attend a polling place, have her name ticked off and dropped a blank, spoiled or protest ballot in the ballot box.

Significantly, the section of the law which made it an offence to 'advocate the marking of a ballot paper other than in accordance with section 240' was repealed in 1998.[11] But there was a considerable downside to this change. Although it is no longer an offence to advocate Langer-style voting, such votes are no longer counted as formal. Thus advocating a Langer-style form of optional preferential voting would now be a waste of time. But this solution to the Albert Langer 'problem' has deprived electors of the valuable option of withholding preferences from candidates whom they dislike. The remedy seems to have inflicted more harm than the disease.[12]

The political communication cases are fairly easily dealt with; but the reasonableness of prosecuting people for actually failing to 'vote' is less clear-cut. Happily, the practice of imprisoning people for failing to pay voting-abstention fines appears to be being phased out in favour of seizing goods to the value of the fine or else issuing a community service order (AEC 2001b). And yet meting out even mild penalties for conscientious objectors also bothers me because such penalties retain the odour of retribution. Is any penalty at all appropriate for absenteeism?

I take it here as given that a high turnout at elections is a good thing and that genuine compulsion is the best way of achieving this result (Hirczy de Mino 1994).[13] Countries that claim to have compulsory voting but do not systematically penalise avoidance tend to have a low turnout.[14] Thus the maintenance of some kind of penalty seems unavoidable if we want to maintain not only the system-utility effects, but also the cultural norm itself. But what kind of penalty is suitable? Would it be appropriate to cancel a person's driver's licence, for example? It is appropriate to apply this penalty in the case of failure to pay speeding fines because losing a driving licence prevents the recalcitrant driver from enjoying the public good which has been abused and which the fines would have otherwise (directly or indirectly) funded. In addition, those people who fail to pay speeding fines usually do so not because they cannot be bothered or because they have ideological or political reasons, but because they either do not have, or are unwilling to part with, the money.

Would it be better to find a way of formally excluding the absent voter from the political community to which s/he has apparently declined to affiliate? I think the proper answer to this question is a definitive 'no'. For a start, it makes the assumption that voting is the only or perhaps the highest form of civic duty, but abstainers may be participating in other, equally significant, ways. And it would be difficult (and probably undesirable) to deny any citizen the rights of protection from

[11] Under the Electoral and Referendum Amendment Act 1998 (AEC 1998b).

[12] This cure does not appear to have been the preference of the AEC but was one of the options recommended to the parliament's Joint Standing Committee on Electoral Matters (JSCEM) and subsequently supported by the government. The AEC had also suggested that the JSCEM could seek to 'explicitly provide for optional preferential voting' or else 'seek a separate inquiry reference on whether optional preferential voting should be introduced'. The JSCEM rejected both options in favour of repealing the sections of the electoral Act which permitted Langer-style voting (AEC 1998).

[13] There are exceptions to this rule. For example, neither Malta nor the Seychelles has compulsory voting yet both systems enjoy very high turnout rates, a fact probably attributable to the small size of the electorate and the relative intimacy of the political culture.

[14] For example, in Egypt where there is no penalty, the turnout is 27.7%. Likewise the sanction of a fine is not enforced in Liechtenstein, where turnout is 54.7% (IDEA 1997).

the state of which they are a legal member in the same way that it would be inhumane to deny pacifists the protection of the state in times of war. People who have real and sustained objections to compulsory voting do not normally express a desire to exit; the fact that they sometimes protest noisily and endure quite a lot to defend their point of view suggests the opposite. They are more like conscientious objectors than tax avoiders; they are not really free riding in the same way that tax avoiders are because the opportunity and transaction costs of participating are met predominantly by the state. Furthermore, because voting has benefits,[15] there is no real payoff to abstaining in Australia except for the few minutes in time saved. Conscientious abstainers (a category from which I exclude those who either forgot to vote or simply cannot be bothered) are like conscientious objectors who object to compulsory military service, not because they fear combat or cannot be bothered serving, but because they have a deep conviction that war and militarism are wrong (although, strictly speaking, avoiding combat, especially where there is clear and present threat to the community, is also a form of free riding). Similarly, many abstainers have principled objections to being forced to vote, arguing that it violates the principle of democratic choice and the liberal right to freedom of action. They want to know why their autonomy is being interfered with when their failure to vote does not, in their view, directly harm the interests of others.

Even partial exclusion of abstainers from the political community seems to me to be undesirable. In Singapore, for example, abstainers are expunged from the register and reinstated only if an appropriate reason is given or the fine paid (IDEA 1997)[16] but I would not favour this type of penalty since a key benefit of

[15] Contrary to the public-choice claim that voters are unlikely to 'get anything' from the direction of their votes (eg Lomasky 1992, 2), a large body of comparative, voluntary system data suggests otherwise. There are strong negative correlations between voting and the following characteristics: geographical isolation, social isolation and relative lack of community; low levels of education; low levels of internal and external efficacy; residential instability; youth, being a new immigrant; economic marginality and unemployment (Lijphart 1997; Harrop and Miller 1987, 45; Martikainen,1998; Heath et al 1991, 165; Rosenstone 1982, 43; Cohn 1978; Milbraith and Goel 1977, 58–85; Scott and Acock 1979; Swaddle and Heath 1989, 548; McAllister and Mughan 1986, 146; Denver 1989, 119; Eagles 1991, 25; Wattenberg 1998a, 3; McAllister 1986, 91). Failure to vote, especially by members of a marginal group, can adversely affect the whole group's interests. According to Arend Lijphart (1997, 1, 7), it is well established that 'inequality of representation and influence are … systematically biased in favour of … those with higher incomes, greater wealth, and better education–and against less advantaged citizens'. This effect is demonstrated most vividly in the United States, where it has been observed that governments tends to be more attentive to the demands of voting groups such as senior citizens and the middle classes at the great expense of those who abstain. Far from having no effect, political apathy on the part of citizens leads to inaction on the part of governments. Verba and Nie (1972, 338) had already concluded by the early 1970s that voting 'helps those who are already better off', while Burnham (1987, 99) suggests 'if you don't vote, you don't count'. According to Quaile and Leighley (1992, 363), class bias in US State electorates 'is systematically related to the degree of redistribution'; in other words, government policy consistently reflects the degree of low-income, low-efficacy group non-participation. It is further suggested that class bias in public policy will become even more skewed over time due to the more rapid decline in turnout among the poor (Pacek and Radcliff 1995). As Wattenberg (1998a, 6) puts it so neatly: 'Politicians are not fools; they know who their customers are.' In effect, therefore, non-participation appears to disenfranchise the poor (see, for example, Hicks and Swank 1992: Leighley 1995; Mebane 1994). On a more abstract level, low turnout also leads to a long-term democratic system disutility whereby core democratic values like legitimacy, representativeness, political equality, popular sovereignty, representativeness, inclusive participation and minimisation of elite power are either eroded or impugned (see Hill 2002).

[16] Similarly, in Belgium, if a person has not voted in at least four elections within a 15 year period, s/he will be disenfranchised (IDEA 1997).

compulsion is its capacity to aid in the prevention of a trend, detectable both here and globally, towards civic demobilisation; such a strategy would only serve to escalate a trend which most democrats are anxious to staunch. In Peru, for a number of months after the elections, voters have to carry a stamped card as proof of having voted; without the stamp it is not possible to obtain certain goods and services from public offices (IDEA 1997). I would worry that this penalty could cause undue hardship to the poor; further, its retributive character might bring the institution of compulsion into disrepute and erode compulsory voting's status as a lightly assumed duty and cultural norm.

I therefore want to make a number of alternative suggestions that are not only intended to accommodate conscientious objectors but also to expand democratic choice and opportunity for all voters. All are related to my fundamental premise that it is political *opportunity*—not voting per se—that is compulsory, and that its capacity to promote equality of political opportunity is one of the best things about compulsion.

Suggestion 1: Excuse Genuine Conscientious Objectors

Although it is preferable if everyone votes, there are some people (few in number) who find compulsion so objectionable that it is counterproductive to try and compel them to vote. Fining them does little good because they are apt to stand on principle, refuse to pay the fine and either end up in gaol or have assets seized. This is bad both for the people concerned and for Australian democracy. I recommend (albeit reluctantly) permitting this particular class of dissenters to abstain without penalty.

Who are the conscientious objectors? Conscientious objectors are those who wish to be excused from voting not because voting is inconvenient or boring but because of politically principled reasons. Genuine conscientious objectors are not apathetic. Reasons like 'voting is too much trouble' and 'I can't be bothered' would not be grounds to be excused, because voting in Australia is relatively easy (since the state does most of the legwork) and because the point of compulsory voting is precisely to address the problem of apathy. Because they have a political point to make, neither would conscientious objectors wish to appeal to those categories of excuses currently accepted by electoral commissions (eg illness or infirmity, being in late pregnancy or having an intellectual disability).[17] Instead, they tend to give

[17] Orr (1997, 289–90) comments:

> The AEC refuses to make public the range of acceptable excuses that appear on this list even though such a list would usefully guide voters as to their legal rights, by enabling them to decide at election time whether the impediment to their voting is acceptable, or whether they should make extra efforts to vote. The AEC has successfully fought a freedom of information application seeking to make that list public [arguing] that publication of the list would give all non-voters a ready made, easily assertable, 'valid and sufficient reason'.

In his judgement in the *Judd v McKeon* case, Justice Isaacs did, however, give some practical examples of what he would have regarded as 'valid and sufficient' reasons for not voting:

> Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognised by law in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or

reasons that are politically principled in nature. Apart from finding the compulsory attendance per se objectionable, the sorts of arguments typically made by conscientious objectors include the following.

Many would-be abstainers complain about the poor quality of candidates and therefore the lack of real choice at election time. Some claim that because they find that none of the candidates are worth voting for, the compulsion to choose is tantamount to a compulsion to lie.[18] Some people have indicated that they wish to abstain according to the rationale that elections are merely occasions to fraudulently fabricate consent.[19] Others refer to prior or conflicting political commitments that would be impugned by their voting for candidates of whom they disapprove.

An example of this last variety is presented in the case of *Judd v McKeon*.[20] Mr Judd, a socialist, said he did not want to vote because all the candidates on offer were implicated in the perpetuation of capitalism, 'unemployment', 'prostitution' and the 'exploitation of the working class'. For this reason he and other members of the Socialist Labour Party were 'prohibited from voting' for any of the candidates.[21] This explanation was rejected and Mr Judd was fined 10 shillings by the Central Police Court in Sydney. When he appealed to the High Court, he lost on the grounds that his reason for not voting were those of a political party, not his own. And even if his reasons had been individual, the Court held, it was not a basis from which to be excused because it amounted 'to no more than the expression of an objection to the social order of the community' in which he lived (AEC 1999).

A conscientious objector facing a possible gaol sentence is Bill Smithies. Mr Smithies, a Canberra resident who says he has not voted since 1985, believes that 'no benefits have come from compulsion, and many disadvantages. For instance, parties assuming complete turnout can identify safe seats and award them to compliant dolts' (Devine 2001). In the November 2001 federal election, Smithies used his ballot paper to make a paper aeroplane while posing for media cameras

Footnote continued

to assist at some great disaster, as a fire: in all of which cases, in my opinion, the law would recognise the competitive claims of public duty. (AEC 1999)

[18] In the 1971 *Faderson v Bridger* case, Mr Faderson was convicted in a Magistrates Court for failure to vote. Mr Faderson claimed that he had no preference and that expressing one would have entailed telling a lie. But when the matter was heard in the High Court on appeal, all three Justices affirmed the principles laid down in *Judd v McKeon* (AEC 1999).

[19] There is an element of truth to this view of elections, given what we know not only about politics but about the power wielded by outside representative politics and in private hands. Unfortunately, the alternatives to voting (ie not voting or being prevented from voting) are worse. Voting still counts and we have a better chance of making governments accountable and preventing vested interests from manipulating elections where high turnout is assured.

[20] *Judd v McKeon* 1926 38 CLR 380.

[21] Mr Judd's submission included the following:

> All the political parties and their candidates participating in the election support and do all in their power to perpetuate capitalism with its exploitation of the working class, unemployment, prostitution, etc. The Socialist Labour Party, of which I am a member, stands for the ending of capitalism and the inauguration of socialism–and, consequently, its members are prohibited from voting for the aforementioned supporters of capitalism. The Socialist Labour Party has paid and lost hundreds of pounds in Federal election deposits for its candidates. The unjust penalty of 25 pounds on each candidate penalises us if we participate in a Federal election, and your letter suggests that we will be penalised if we don't. Is this fair? (Cited in AEC 1999)

(Doherty 2001). Smithies said that he was prepared to go to gaol for what he considers to be 'a political offence' (AAP 2001).

Another type of conscientious objection is represented by the case of Michael Mansell, prosecuted in July 1992 for failing to enrol to vote and subsequently fined $25 in the Hobart Court of Petty Sessions. Mr Mansell was opposed to compulsory voting for Indigenous Australians because he believed it to be an obstacle to self-government. He argued that enforcing 'Aboriginal participation in Australia's political system' was a policy 'aimed at containing Aboriginal political development.' He also suggested that Aborigines have not indicated that they actually want to vote (Mansell 1993).[22]

Many of these are plausible claims that should not be swept aside by any reasonable democrat. I do not personally find any of them sufficient reason to abstain from voting because I do not think abstaining makes the situation any better. Nevertheless, there is something troubling about compelling people like Judd and Mansell to participate in a political process to which they have sincere and sustained objections, and a properly functioning democratic society should seek to find some way of accommodating dissenters of this type.

There are two reasons why a defence of compulsory voting is consistent with excusing this category of abstainers from voting.

First, one of my key arguments for compulsory voting rests on its capacity to keep political apathy at bay. The general trend in democratic systems worldwide over the last three decades has been one of demobilisation politically as well as socially and civically.[23] Voting participation has decreased steadily in non-compulsory systems. Compulsion provides a stable buffer against a degenerative pattern that affects some social groups more acutely than others. It is a reliable way of preventing politically marginal or 'politically shy' populations from losing contact with civic life.[24] But people with strong conscientious objections are not apathetic in this way, and do not appear to be in any real danger of dropping off the political map. Neither are conscientious objectors anti-political; in fact they demonstrate a deeper than usual commitment to politics by publicly offering political reasons for

[22] According to Mr Mansell (1993, 27–8), 'It was migrants to Australia, not its original inhabitants who adopted the 1901 constitution.' But Mansell does not speak for all Indigenous Australians, many of whom fought vigorously for the right to vote. (For a more complete account of Indigenous enfranchisement, see Chesterman and Galligan 1997.) Voluntary registration for Indigenous people (abandoned in 1983) had been an obstacle to participation in National Aboriginal Council (NAC) and National Aboriginal Consultative Committee (NACC) elections. Voluntary voting for Aboriginal and Torres Strait Islander Commission (ATSIC) elections has also led to low turnout at these elections, giving rise to calls for the mandatory vote. Some have suggested the development of a separate electoral roll for Indigenous people (Sanders 2001, 169–73). But disagreements among Indigenous people on this issue does not affect the legitimacy of Mr Mansell's right to apply for exemption.

[23] Political demobilisation is measured largely in terms of decline in voter turnout, party dealignment (and therefore declining party membership) and a decline in the number and membership of voluntary associations, such as trade unions and interest groups. See Galenson (1994), Piven (1993), Krieger (1986), Przeworski (1985), Lijphart (1997, 5–7), Wattenberg (1998b), Borg (1995, 441), Flickinger and Studlar (1992), Burnham (1987), Teixeira (1987), Vowles (1994), Martikainen (1998) and Putnam (1995).

[24] We know from the comparative literature relating to voluntary settings (see footnote 15) that those who avoid the polls on election day tend to be the young, low-income earners, the less well educated, the socially isolated (such as those who live alone and new immigrants) and those with already low levels of political efficacy. It appears that non-compulsion serves to marginalise and make more vulnerable already vulnerable social groups. I call these 'high risk' or 'politically shy' groups, comprising sections of the community which would be significantly damaged by the introduction of a voluntary system.

their abstention upon which they are more than willing to act. In a sense, then, their objections and their preparedness to defend them are a form of *hyper*-politics, and to dismiss their concerns is to miss the whole point of democracy.

But I should like to make clear here that I am not so much interested in the specific *content* of any of these arguments (even those with which I happen to agree) as in the *types* of arguments that the would-be abstainers are making; that is to say, in whether or not the argument is politically principled in character. For example, the argument that compulsion violates individual autonomy might be an acceptable reason for being excused not because it is true, but because it potentially qualifies as a political objection.[25]

The second reason for excusing conscientious objectors is a strategic one. To date, most Australians seem happy to vote in elections and do not seem to feel particularly coerced.[26] Despite the existence of penalties, the majority of Australians experience voting not so much as a coercion as a cultural norm. The potential penalty for abstention—which, in the first instance, is quite modest[27]—acts to reinforce and preserve this norm. Vigorous prosecution of our electoral laws is apt to be both counterproductive and injudicious. The only likely long-term effect of repeated Manson- and Smithies-type prosecutions would be to alienate many more Australians from a system to which they are at present perfectly reconciled. Most Australians approve of compulsory voting, tend to accept it as a normal aspect of their political culture and regard it as a fairly undemanding civic obligation.[28] Gaol sentences and other such harsh penalties can only harm the already harmonious relationship that Australians have with their electoral arrangements and, if abstaining were routinely prosecuted in this manner, the likely effect would be to provoke antipathy.

Thus it seems to me that highly publicised cases of prosecuted voting recalci-

[25] Under this regime, Manson, Mansell and Judd would likely gain exemptions. Smithies might not, depending on how he framed his argument. If his argument simply amounted to the claim that compulsory voting is stupid or else the undefended (and, to my mind, counterfactual) claim that compulsion yields no benefits and has 'many disadvantages', then exemption would be denied. If, on the other had, he developed the claim that compulsory voting had an enervating effect on the electoral process, he would stand a much better chance, assuming, of course that his chief desire in protesting were to be excused from voting as opposed to merely attracting publicity.

[26] This is partly because of the extreme care taken by the various Australian electoral commissions to ensure that voting is a relatively simple matter. In addition, as elaborated in the next footnote, our commissions are generally reluctant to pursue non-compliance beyond 'please explain' letters and mild fines.

[27] Initially, the electoral commissions send the absentee a 'please explain' letter with the option of paying a $20 fine to settle the matter. If a satisfactory reason for abstention is provided, then the matter is dropped. However, if there is a dispute about the reasonableness of the explanation, the non-voter may be taken to court and a slightly heavier fine ($50) imposed in addition to legal costs. (This procedure varies slightly between State electoral commissions.) Less than 1% of the electorate is faced with a fine or court attendance in any given election (Bean, Gow and McAllister 1999, 72).

[28] A Morgan Poll conducted in 1997 found that 67% of Australians support compulsory voting while a national survey by Newspoll Market Research for the Australian Electoral Commission on 3 March 1996 immediately following the 1996 federal election found that 74% of Australians supported compulsory voting at federal elections (AEC 1999). This attitude fits with a more generalised attitude towards state activity: The 1998 Australian Electoral Study found, for example, that the majority of respondents regard the state as 'the best instrument for promoting the general interests of society' whereas only 10.8% saw it as a threat to 'the rights of people' (Bean, Gow and McAllister 1999, 86).

trance are likely, over time, to bring the institution of compulsory voting into unjustified disrepute. I say unjustified because the institution and its administration are by and large benign. Compulsion relies for its continued existence on a popular consensus that this is indeed the case. One of the most convincing justifications for compulsion is that it reinforces the cultural norm of universal voting participation but, if the obligation were blatantly coerced, the norm could be compromised. In other words, in order to preserve the easy relationship Australians have with their voting arrangements and to protect the institution of compulsion itself, it is desirable to avoid the kind of bad press that compelling the truly reluctant citizen involves.[29] Paradoxically, excusing conscientious objectors may be a way of protecting the reputation, and therefore future survival, of the institution.

On a practical note, in order to avoid abuse of the system, conscientious objectors under this regime would need to seek permission to be excused prior to the election and applications would not be accepted following the election.[30] Since it is my view that voting (or attendance) should be the default position, people who want to deviate from the norm should be required to give a convincing indication that their objections to voting are sincere and sustained and not merely rooted in apathy, caprice or simple bloody-mindedness.

Ideally, the application form would include a statement outlining the rationale for compulsion and the benefits of voting. Conscientious objectors would be asked to read and sign the statement, indicating they have understood its contents. Naturally, some will not bother to do this. However, it is important that the state seek to alert would-be abstainers to the value of the opportunity that they are applying for permission to forego; it should also take care to signal its ongoing commitment to a belief in the reasonableness of the imposition despite its preparedness to make exceptions. It is vital that application to abstain is not made too easy; indeed, the process should be designed so as to deter all but the most zealous of would-be avoiders, not only to prevent exploitation of the system but also as a guard against escalating political demobilisation.

There will be those who will refuse to apply for exemption. In such cases, prosecutions and fines are acceptable, not only because the avoiders are refusing to obey a reasonable law (reasonable, not only for the reasons already given but also because it provides a legitimate avenue for non-compliance) but because the refusal to apply for exemption suggests apathy and a more generalised objection to state coercion than anything else and these are not good enough reasons, as I have already indicated. The objector who expects to be able to avoid applying for exemption is a bit like the pacifist who refuses to apply for exemption from armed combat even where there is a good chance that the exemption would be granted. The legitimacy of any objections to the compulsion does not make the law disappear or give automatic grounds to flout it; it only gives grounds to seek to be excused from a default position, which has wide support and a high rate of compliance within the political community. In addition, failure to give notice of

[29] It may be that highly publicised cases of failure to vote are being exploited by politicians who see a partisan advantage in voluntarism and a smaller electorate.

[30] Measures would also need to be introduced in order to prevent party-political exploitation of the system. For example, parties who detected advantage in excluding certain voters from the electoral roll might launch door-knocking campaigns aimed at persuading (and assisting) such voters in applying for exemption.

intention to abstain causes the state (representing, in effect, all other voters) to waste resources on providing the voting opportunity about to be squandered.

This system would not work well if securing an exemption were easy. Neither would it work well if a significant number of Australians sought to abstain. But I do not think this would happen provided proper care is taken. Genuine conscientious objectors are normally highly motivated in their attempts to avoid voting; their example is unlikely to be imitated by any significant proportion of the population, not only because the effort involved would be far greater than that of voting in the first place[31] but also because, by and large, the majority of Australians are not particularly bothered by the compulsion.

Suggestion 2: Clarify Electoral Law

There is some confusion as to whether it is only registration and attendance at a polling place that is actually compulsory or whether in fact it is technically an offence to fail to either mark the ballot in some way or record a formal vote.[32] Clarifying that only the former is the case is important for my argument that compulsion does not enforce voting but rather serves the principle of equality of political opportunity.

Most political scientists and some lawyers assume that the law *is* in fact clear and that marking the ballot is definitely not compulsory. McCarthy (2000, 114) argues, for example, that '[t]he courts … have never said that an elector must … actually "mark" the ballot paper'. There is a practical reason for assuming this: the secrecy of the ballot and the fact that papers are not numbered means that it is impossible under present arrangements to investigate and prosecute voters for either failing to mark the ballot paper or failing to vote formally. But some other commentators are less certain. Twomey (1998, 174–8) notes that, while Section 245 of the Commonwealth Electoral Act states that electors have a legal obligation to 'vote', what is meant by voting is not actually defined. Other sections of the Act refer to the 'marking of a vote' on a ballot paper. Blackburn CJ in *O'Brien v Warden* found that 'marking a ballot informally does not meet the requirements in the Act on how to vote, and is therefore an offence' (Twomey 1996, 208–16). Orr (1997, 292) suggests that, although it 'is not technically an offence to fail, whether deliberately or inadvertently, to record a formal vote', nevertheless 'electoral officials probably do have power to force electors to actually vote, whether by stopping them leaving the polling station without depositing the ballot paper in the ballot box, or otherwise directing them'.[33]

[31] It is unlikely that many would bother to go to this much trouble, since Australian voters generally prefer to keep their voting style as perfunctory and simple as possible. For example, when given a choice between voting above or below the line, the overwhelming majority of Australians (usually between 85% and 95%) choose to vote above the line.

[32] As Rydon (1989, 97) notes: 'Officials constantly reiterate that "voting is compulsory" but "voting" is not defined. They reluctantly concede that it is not illegal to vote informally or return blank ballot papers, but they do their best to discourage such practices.'

[33] This power is a consequence of three provisions. First, Section 233 provides that 'the voter upon receipt of the ballot-paper shall without delay … in private, mark his or her vote … fold the ballot-paper' and deposit it in the ballot box. Whilst there is no penalty provided for breaches of Section 233, its wording is mandatory, and it is designed to authorise electoral officials to issue directions to people once they are issued a ballot paper. Second, Section 348(1) makes it an offence to disobey any lawful direction

So far, attempts to clarify this aspect of voting law have failed except in one jurisdiction (South Australia) where s85(2) of the State Electoral Act of 1985 now provides that an elector who leaves the ballot paper unmarked 'but who otherwise observes the formalities of voting does not breach the compulsory voting requirement' (Twomey 1998, 147–8).[34] It is probably desirable that the rest of Australia's parliaments follow suit and clarify the law along these lines (ie in favour of the view that it is only registration and attendance that is compulsory). If the law were clarified (or re-written) to the effect that it is actually compulsory to formally mark the paper, then in order for this to be properly enforced the secret ballot would have to be overturned. If the law were clarified to the effect that marking the ballot *in any way* were compulsory, then electoral officials would need to observe the activities of voters in booths and then apprehend and compel to mark the paper anyone who failed to comply. The potential ugliness of such a scene does not bear thinking about. A clarification in my preferred direction would also usefully underscore the claim that compulsion does not enforce voting but rather serves the principle of equality of political *opportunity*, a far more benign form of coercion.[35] If the South Australian example were to be uniformly taken up, it would be more difficult to argue convincingly that mandatory 'voting' either limits democratic choice, forces voters to lie or operates as nothing more than a mechanism to manufacture consent.

Suggestion 3: Optional Preferential Voting[36]

At present, New South Wales, Queensland and the Australian Capital Territory all have partial (and in some houses full) optional preferential voting systems for elections to their respective State/Territory legislatures.[37] The introduction of

Footnote continued

of the presiding officer. Third, Section 339(1) provides that it is an offence *inter alia* to 'fraudulently take any ballot-paper out of any polling booth or counting centre'. Section 245 is headed 'Compulsory Voting' and refers to 'a duty … to vote at each election'. Section 240 states that

> In a House of Representatives election a person shall mark his or her vote on the ballot paper by: a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and b) writing the numbers 2, 3, 4 (and so on as the case may require) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

Finally, the Langer case stands as 'authority for the proposition that s 240 was intended not to impose a legal duty' on a voter, but to give a 'direction to a voter as to how the voter is to discharge the statutory duty to vote in a federal election' (Orr 1997, 292–3).

[34] Ballot papers for the South Australian lower house remind voters of this option.

[35] The distinction between actual participation and access to participation is important because the former has controvertible value (since the costs and benefits are disputed) whereas equality of opportunity is an absolute value in liberal/social democratic cultures like ours. This is one of the strongest arguments for the reasonableness of compulsion, because it does not rest on a controvertible consequentialism but on a fundamental and invulnerable liberal-democratic principle.

[36] Under an 'optional preferential' voting system, an elector shows by numbers his/her preference for individual candidates but does not need to show a preference for all candidates listed for the vote to be formal.

[37] NSW uses optional preferential for its lower house and optional preferential with proportional representation for its upper house. Queensland uses optional preferential for its only house, the Legislative Assembly. For the NSW upper house, 15 numbers are needed if you vote below the line. In the ACT,

optional preferential voting in all of the other Australian electoral systems would be another means by which to expand democratic choice[38] and offset criticism of compulsory attendance. Having to number each square in order to record a formal vote compels voters to express a preference that they may not have and may force voters to approve candidates they positively dislike. This could be interpreted as a derogation of the general principle of democratic choice embodied in Section 24 of the Constitution which states that the parliament[39] be *chosen* by the people. This wording begs the question of what it really means to *choose* at election time. In the 1974 case of *Krosch v Springell*, Mr Springell, a Queensland resident, indicated that he had genuine and politically principled objections to the idea of marking his ballot because he did not consider any of the candidates worthy of his vote.[40] Although the presiding magistrate agreed that Mr Springell's rationale for declining to mark his ballot was 'valid and sufficient', the Supreme Court of Queensland subsequently overturned the decision and affirmed the earlier *Judd v McKeon* decision (AEC 1999).[41] In *Judd v McKeon*, the majority of judges in the High Court endorsed the Chief Justice's judgement that the law required a voter to choose among the candidates but that such a choice did not necessarily imply that the voter actually liked her/his choice. In making this point, Chief Justice Knox found an analogue in a fictional scenario in which the hero is told that he will be allowed to choose the manner of his own death but that this did not mean that he preferred any of the methods (Twomey 1996, 212). The justices were not unanimous in this curious interpretation of what it meant to 'choose'. The minority judgement of Justice Higgins argued that Mr Judd did indeed have a valid reason for not voting since parliament could not have meant that voters must 'lie' when indicating choices they did not have (Orr 1997, 290). Albert Langer's challenge[42] to the 'validity of a legal obligation to record a preference against all candidates'[43]

Footnote continued

at least as many squares as there are candidates to be elected in a district must be numbered (Electoral Council of Australia 2000, 2001).

[38] According to the Proportional Representation Society of Australia (Queensland Branch):

> It is most consistent with democratic principle that voters should be left free to decide for themselves how many preferences to put down. Voters should not have to record (say) a 32nd or a 33rd preference, or vote for a candidate they do not wish to support, in order to have their more important first and second preferences accepted. (PRSAQ 1990, Appendix 1, 2)

[39] In this case, the lower house.

[40] *Krosch v Springell* ([1974] QdR 107). I say genuine and politically principled because Mr Springell gave political reasons as to why he should be excused and went to some trouble to defend his position. When he arrived at the Rockhampton polling booth, he handed to the presiding officer a note which read:

I do not consider that any of the candidates standing for the seat of Rockhampton are worthy of my vote. This also applies to the parties they represent. The main problems of the day … are non-issues. Instead we have been treated to mudslinging, noise pollution, tree desecration and polemical discussions of trivia. (AEC 1999)

[41] *Judd v McKeon* (1926) 38 CLR 380.

[42] *Langer* case: (1996) 186 CLR 302.

[43] As had been argued by Blackburn, CJ in *O'Brien v Warden* (1981, 37 ACTR 13)

brought the whole question of genuine democratic choice at election time into focus; if a voter is 'required by law to vote for people and give full preferences' to candidates s/he rejects, then this does not reflect the 'genuine choice' of the voter (Twomey 1998, 148).[44]

Australian voters could be forgiven for assuming that failure to mark each square is either unacceptable or illegal. After all, advertisements published by electoral commissions in the lead up to elections convey the impression not only that voting is compulsory ('Remember, Voting is Compulsory') but also that numbering each square is compulsory.[45] Electoral commissions refrain from advising voters about the full 'range of choices which are open to them in the privacy of the ballot box' (Orr 1997, 29), including making it clear that they cannot be prosecuted for withholding preferences. This is not because they are obstructionist but because they are committed to maximising the number of valid votes and enforcing electoral law. Although the law here is ambiguous, it appears to give a partial mandate for this policy: Sections 233, 240 and 245 of the Commonwealth Electoral Act 1918 direct people to mark their ballots in full preferential fashion but no penalty is applicable in cases of failure to comply (Orr 1997, 295). Perhaps because many voters were unaware of their options, preference withholding in federal elections was still quite rare prior to the change in Commonwealth electoral law, which now renders this style of voting invalid.[46] But whenever there has been some publicity around the issue of withholding preferences, there has been a significant increase in the number of exhausted votes.[47]

Suggestion 4: Reconceptualise the Fine as Recouping Lost Outlay

A fine is probably the most appropriate penalty for failure to vote but there should be no taint of retribution in its imposition. In order to preserve the norm of compulsion, it is proper that the state continue imposing the fine as per present arrangements but with one qualification: rather than issuing the fine as a form of retribution, it could be imposed with the explicit and published goal of recouping the costs incurred by the state and subsequently squandered by the abstainer. (This penalty would apply only to abstainers who do not apply for exemption prior to the election.)

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[44] According to Twomey (1996, 148–9), the High Court failed to consider this problem 'adequately'; she expressed concerns that 'the judgement itself could be used to support laws which completely undermine democracy in this country'.

[45] Ballot papers direct people to 'number each square' and do not inform voters that they have other options. In addition, all the legislative directions are couched in mandatory terms. And yet the AEC Website Fact Sheet on voting concedes that in fact 'the voter isn't actually compelled to vote for anyone because voting is by secret ballot' (AEC 2001a).

[46] Orr (1997, 294) reports:

> On AEC figures compiled after the 1984 and 1987 elections, 1.55% and 1.29% of House of Representatives ballots were returned completely blank or with scribble on them and only 0.45% of House of Representative ballots at the 1996 election were in the '1233' style.

[47] For example, the publicity surrounding Albert Langer's campaign is thought to have caused an increase in exhausted votes from 2086 in the 1987 federal election to 18,771 in the 1990 election and from 7325 in the 1993 federal election to 48,979 in the 1996 election (Twomey 1996, 202–4). Note that Twomey's quoted figures for 1987 and 1990 have been adjusted for greater accuracy.

This fining strategy would make clear that any breach of obligations is a breach occurring horizontally between voting taxpayers rather than vertically between state and citizen. It would also underline that abstention is best understood as an opportunity sacrificed than a breach of law to be dealt with retributively.

For those whose only objection is to the payment of the fine, not because it is against their principles but because they simply do not want to pay it, the best approach is probably the garnisheeing of wages or other forms of income[48] as a means of avoiding a situation where a persistent refusal to pay leads to a gaol sentence, the seizing of assets or a community service order. Such people are indeed like tax avoiders since they will have squandered the costs incurred by the state (ie in effect by other voters) to provide them with the opportunity to vote.

Conclusion

The critical tone of this paper belies my general attitude towards Australia's electoral system. Our compulsory voting arrangements are arguably the best in the world. Our electoral commissions administer them efficiently and competently, sometimes going to quite extraordinary lengths in order to ensure equality of voting opportunity for all Australians, whether they are incapacitated, ill or approaching maternity and wherever they reside, be it the outback, prison, a nursing home, Europe, an Antarctic supply ship or even nowhere in particular (eg the homeless and itinerant workers). The fact that compulsory 'voting' is so well tolerated by the vast majority of Australians suggests that its administration is a case of best practice which many nations, especially those experiencing rapidly declining turnout, would envy. But in order to protect the reputation of compulsory voting and preserve the norm of universal participation, I recommend that the *small number* of conscientious objectors who receive so much press at election time be excused from what most of us regard as a fairly undemanding civic obligation. In addition, there are a number of ways by which the compulsion could be offset and the democratic experience enriched for the vast majority who will continue to vote. Some of them have been foreshadowed here.

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[48] Preferably at a progressive rate. People living below the poverty line could be fined at a nominal rate–say ten cents per week. In this way, the fine would have symbolic value without exacerbating the evil that voting purports to ameliorate (ie economic and social marginality).

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