CRIMINALS AND (SECOND-CLASS) CITIZENSHIP

Twenty-First Century Attainder?

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This article considers whether criminal offenders in Australia are second-class citizens. Using TH Marshall's seminal conception of citizenship, the article discusses various ways in which offenders' civil, political and social rights are delimited in Australia. While acknowledging that the liberty of prisoners is curtailed – which is the defining and necessarily punitive feature of imprisonment – the article argues that the legal system goes further, imposing a range of collateral consequences on offenders that seriously infringe other fundamental rights. Using penological and liberal theories, consideration is given to the question of whether the impairment of offenders' fundamental citizenship rights can be justified. It is argued that the impairment of rights discussed is not theoretically justifiable, and is arguably best explained as an anachronistic remnant of attainder.

Conviction of felony renders a man for ever infamous in England, – infamous in law, – and attaches to him for life certain disabilities, which incapacitate him for exercising some of the rights and duties of citizenship. It is not enough that the felon pay the immediate penalty which the law awards to his crime. Other consequences, both legal and moral, flow from the fact of the conviction. So accordant is all this with the spirit and feeling of the British people, as well as with the genius of British institutions, that there is not, perhaps, in all England, a public body of any description, – not even a single benefit society, – or even a convivial club, – in which the conviction of a member for felony is not instantly followed by the expulsion of the member so convicted from the society to which he belongs ... thereby declaring the universal feeling of the entire British people, that a convicted felon is unworthy both of future trust and of mingling with and participating in the provident arrangements or the social enjoyments of his former associates and fellow subjects.¹

Introduction

The duty to obey the law is undoubtedly a key duty of citizenship. It is the only tangible duty referred to in the Australian Citizenship Pledge,² and has express recognition in the Preamble to the *Australian Citizenship Act 2007*. For those who don't obey the law, society imposes a heavy burden. Of

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¹ Mudie (1837), pp 19–20.

² Department of Immigration and Citizenship (nd).

course, the criminal justice system passes sentence; in addition, however, various collateral consequences can follow conviction, not only while the offender is under sentence, but beyond – even after the offender has ‘paid his or her debt’ to society. Collateral consequences are the *indirect* results of conviction, arising not from the sentence but from the fact of conviction.³ They are less visible than a sentence passed in open court; they emerge silently from diverse, scattered statutes and government and private sector policies, and descend on the criminal under the cover of darkness.⁴ The impact on offenders can be significant – sometimes more deleterious to particular offenders than the sentence itself.⁵ Yet most offenders – even those who plead guilty – will have scant suspicion of the network of consequences that can or will follow their convictions.⁶

This article examines the collateral consequences of conviction in Australia. It argues that the collective result of collateral consequences is that many of the trappings of citizenship are stripped from offenders, turning them into second-class citizens during their sentences and beyond.⁷ The first section of the article discusses the contested notion of citizenship in the Australian context.⁸ Following Demleitner’s lead, I use TH Marshall’s seminal conception of citizenship⁹ to frame the discussion.¹⁰ In the second section, I discuss some of the ways in which the citizenship of criminals¹¹ is delimited in Australia by reference to their civil, political and social rights. Finally, I assess whether the practice of imposing second-class citizenship on criminal offenders can be justified using penological or liberal theories. It will be argued that collateral consequences are impossible to justify under either of those theories. Although collateral consequences in Australia are both fewer in number and less severe than in some jurisdictions (notably, the United States), they are not justifiable as sound penal policy, and may in fact

³ Von Hirsch and Wasik (1997), p 600.

⁴ Demleitner (1999), p 154; Damaska (1968), p 348.

⁵ Pinard (2006), p 634. Consider one high-profile example: Marcus Einfeld was a QC and former Federal Court judge convicted of charges of perjury and perverting the course of justice over lies told to avoid a speeding fine. He was sentenced for both offences to a one-year, non-parole period; however, despite an impressive and unimpeachable legal career, he will be unable to practise law ever again: *R v Einfeld* [2009] NSWSC 119 at [208].

⁶ Pinard (2006), pp 630, 639.

⁷ Demleitner (1999); Ewald (2002); Schall (2006).

⁸ Brown (2002), pp 319–25.

⁹ Marshall and Bottomore (1992). Marshall’s essay, *Citizenship and Social Class*, was first published in 1950.

¹⁰ Demleitner (1999).

¹¹ ‘*Criminals*’ – the word is value laden and potentially confronting. The word implies that we can fairly or usefully label people according to one or more, possibly isolated, instances of proscribed conduct. I don’t shy away from the use of that word in this article. Part of its purpose is to invite the reader to consider the significance of that label.

be counter-productive to the goal of building better citizens.¹² The conclusion reached is that most collateral consequences are an anachronistic remnant of attainer.¹³

Attainder

Attainder was a medieval punishment imposed as an adjunct to a death sentence or following a commuted capital sentence.¹⁴ The punishment was derived from the ancient Greek and Roman notion of infamy and the European feudal notion of outlawry.¹⁵ Essentially, attainder involved the infliction of civil death on the offender. The offender's property was forfeited to the Crown; he was prevented from entering contracts or receiving property by way of gift or inheritance; his marriage was dissolved, his wife was made a widow, his children were orphaned. He lost all forms of civil capacity, including the capacity to give evidence or to sue.¹⁶ As time went on and civil and political rights developed, the attainted was denied these rights as well.¹⁷ Thus the attainted could not sit on a jury or vote, or \ even hold occupational licences.¹⁸ The offender lost these capacities because, as Blackstone explained, he was already dead in the eyes of law.¹⁹ Attainder applied only when it was 'clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society'.²⁰ But in Blackstone's time, almost all felonies carried the death penalty, including offences that would be considered trivial today.²¹ Clearly, views about who is 'fit to live upon the earth' change over time.

Damaska argues that attainder was squarely aimed at the degradation of offenders.²² But by the time of the Enlightenment, degradation was losing its

¹² Demleitner (1999), p 154.

¹³ Anon. (1989), p 1301; Anon. (1989); Brown (2002), p 310; Ewald (2002), p 1060.

¹⁴ Damaska (1968), p 351.

¹⁵ Damaska (1968), p 351; Schall (2006), p 55.

¹⁶ Damaska (1968); Schall (2006), pp 54–55; Ewald (2002), p 1060.

¹⁷ *Australian Constitutions Act 1842* (Imp), s 6. Section 6 provided for the establishment of a legislature in the colony of New South Wales, and that 'no person shall be entitled to vote at any such Election who shall have been attainted or convicted of any Treason, Felony, or infamous Offence within any Part of Her Majesty's Dominions, unless he shall have received a free Pardon, or one conditional on not leaving the Colony, for such Offence, or shall have undergone the sentence or Punishment to which he shall have been adjudged for such Offence'.

¹⁸ Schall (2006), p 73; Brown (2002), p 310.

¹⁹ Blackstone (1979), pp 373–74, cited in Schall (2006), p 55.

²⁰ Blackstone (1979), pp 373–74, cited in Schall (2006), p 55.

²¹ Hughes (1986), p 29. Hughes notes that among hundreds of capital felonies were diverse offences, such as posing as a gypsy, poaching a rabbit and cutting down an ornamental shrub. See also *Dugun v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 602.

²² Damaska (1968), p 354.

penological cogency. Instead, the emergent notion of expiation was garnering support. This idea involved finite sentencing, following which the offender's rights were reinstated, not because of sentimental ideas of rehabilitation or reintegration, but because the offender had 'paid his debt to society'. On this view, consequences outlasting a fixed sentence were unjust.²³ Attainder was eventually abolished by statute in England in 1870, although some features lived on in statutory form.²⁴

In Australia, attainder was received as part of English law applying to the colony of New South Wales, suitable (although not necessarily convenient) for the conditions of the settlement.²⁵ The vast majority of convicts originally had been convicted of capital offences and were transported pursuant to the remission of their death sentences. A study by Hughes shows that in England in the decades between 1750 and 1800, the percentage of capital sentences actually carried out decreased from 69 per cent to 15 per cent. Capital statutes were undoubtedly intended to terrify and deter and signify, in the Foucauldian sense, the awesome power of the sovereign's law over life and death. Conversely, the commuting of those sentences signified the magnanimity of the sovereign, demonstrated through the prerogative of Royal Mercy, exercised often by the monarch personally as well as judicially in the sovereign's name.²⁶ Convicts transported to Australia were thus attainted, and the attainder endured in Australia until the grant of a Governor's pardon on the expiry of the commuted sentence, and even longer in England until (an unlikely event) a pardon was given under the Great Seal expressly reversing the attainder.²⁷ As noted above, England took legislative action to override or modify many of the harshest features of attainder in 1870.

²³ Damaska (1968), p 352.

²⁴ *Forfeiture Act 1870* (UK); *Dugun v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 593.

²⁵ *Dugun v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 586–87. In the early days of settlement, attainder frequently was ignored. The plaintiff in Australia's first civil case, *Cable v Sinclair* [1788] NSWKR 7, was an attainted convict, although no mention of it is made in the report. Hughes claims that the courts simply ignored the doctrine of attainder for expediency. The early settlement was peopled mostly by convicts. The convict assignment system required masters to treat their assignees fairly, and this requirement conferred legally enforceable rights on convicts against their masters. Moreover, the economy depended on ticket-of-leave and emancipated convicts for the exchange of their free labour and their enterprises. The system thus required convicts to have access to the courts: Hughes (1986), p 302. The courts evaded the rule by insisting that proper proof of the capital sentence be obtained from England before attainder would be enforced: *Dugun v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 589. See also Windeyer (1962), pp 661–62.

²⁶ Hughes (1986), pp 35–36, 30; Foucault (1977).

²⁷ *Dugun v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 603; *Bullock v Dodds* (1819) 106 ER 361 at 369.

In Australia – probably owing to legislative oversight – many of the features of attainder persisted until the demise of capital punishment.²⁸ While the death penalty largely was eradicated in Australia before the late twentieth century,²⁹ some offenders whose capital sentences had been commuted lived on beyond its abolition. Darcy Dugan was one such offender. Dugan had been sentenced to death in New South Wales in 1950 for wounding with intent to murder. His sentence was commuted to life imprisonment. Eventually he earned conditional release, but committed an armed robbery while at large. While serving the remainder of his life sentence and another sentence for the armed robbery, he commenced court proceedings against a newspaper for defamation.³⁰ In *Dugan v Mirror Newspapers Ltd*,³¹ the High Court held that attainder remained part of Australian law.³² The majority reasoned that attainder was indisputably part of the common law; that it had been received into the colony on settlement as suitable and applicable; and that it had not been overturned by statute in New South Wales.³³ In separate judgments, Barwick CJ and Gibbs J stated that the court was not free to overturn the law simply on the basis that it was inappropriate to modern conditions.³⁴ In his dissent, Murphy J drew on international human rights jurisprudence and declared that civil death was dehumanising, unjust and inhumane.³⁵ He held that the High Court was free to overturn attainder: ‘Judges have created the doctrine of civil death and judges can abolish it.’³⁶ Murphy J was the sole dissident. Dugan, as the recipient of a death sentence, was attainted, and thus barred from commencing court action.

The argument advanced in this article is that, while modern collateral consequences are not a remnant of attainder in a legal sense, they exist as a cultural hangover from times when attainder seemed penologically appropriate. Later, I will elaborate on the argument that these anachronistic

²⁸ See the detailed discussion of the legislative history of the *Criminal Law Amendment Act 1883* (NSW) by Stephen J in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 592–99.

²⁹ Walton (2005), p 2. The death penalty was abolished by statute in Australia in the following years: Commonwealth, ACT and NT, 1973; Victoria, 1975; Queensland, 1922; South Australia, 1976; Western Australia, 1984. In New South Wales, the death penalty was abolished in 1955 for all offences except treason and piracy, and abolished for the latter offences in 1985. The last execution in Australia occurred in Victoria in 1967.

³⁰ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 583–84.

³¹ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

³² *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

³³ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583. The majority consisted of Barwick CJ, Gibbs, Stephen, Mason, Jacobs and Aickin JJ. See Barwick CJ at 586; Gibbs J at 591; Stephen J at 592; and Jacobs J at 604, 605. Mason J agreed with Jacob J.

³⁴ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 per Barwick CJ at 586, Gibbs J at 590–91.

³⁵ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 607–12.

³⁶ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 611.

consequences are not supportable under modern approaches to penology or citizenship.

Citizenship in Australia

In the middle of the last century, TH Marshall formulated what has been described as the 'ultimate liberal statement' on citizenship.³⁷ Marshall considered that an enriched rights-based conception of citizenship resolved many of the inequities of class-stratified societies.³⁸ Marshall argued that modern citizenship comprises three essential elements, which emerged in three distinct phases in the evolution of *citizenship* as a paradigm for relations between individuals and the state.³⁹ The first phase was the emergence of civil rights, mostly in the eighteenth century. Civil rights are the cluster of rights necessary to constitute individual freedom. They consist of the right to personal liberty, freedom of thought, religion and speech; the right to own property and conclude contracts; and the right to access to justice to assert or defend those rights in equality with others. The second phase was the emergence of political rights. This phase occurred later, around the nineteenth century, but did not reach any degree of universality for adults until the twentieth century.⁴⁰ In a representative democracy, these rights include not only the right to vote, but also the right to participate in government as a representative. The third cluster of rights Marshall describes as 'social rights'.⁴¹ These rights started emerging in the twentieth century, and arguably their realisation is both a work-in-progress and a moving feast.⁴² These rights are resistant to strict definition, but they include, as a minimum, rights to education, basic health care and an economic safety net sufficient to allow recipients to live reasonably by reference to prevailing social standards. Additionally, social rights include the opportunity to share in full in the enjoyment and development of a collective social and cultural heritage.⁴³

In Marshall's conception, citizenship is essentially a *status* that emerged to replace feudal class-based forms of status. It evolved by degrees. Necessarily, civil rights came first; there was some overlap, but it is a fair generalisation to assert that political rights followed and social rights came later, the latter being necessary for the meaningful enjoyment of the two former rights.⁴⁴ It was an evolution that trended towards equality. Citizens, in

³⁷ Murray (2007), p 223; Schuilenburg (2008), p 361.

³⁸ Marshall (1998), p 93, cf p 109.

³⁹ Marshall (1998), pp 94, 96; Murray (2007), p 226.

⁴⁰ Marshall (1998), pp 98–99.

⁴¹ Marshall (1998), p 94.

⁴² Marshall (1998), p 109.

⁴³ Marshall (1998), pp 94, 108. For discussion of Marshall's work, see Murray (2007), pp 226–27; Rubenstein (1995), pp 518, 523; Schuilenburg (2008), p 361; Kymlicka and Norman (1994), p 354.

⁴⁴ Marshall (1998), p 105.

Marshall's view, were therefore those who, as full members of society, were bearers-of-rights; and they shared their status in equality with other full members of the society.⁴⁵

Marshall wrote from a British perspective. In Australia, citizenship as legal status came much later. When the colony of New South Wales was founded in 1788, its occupants – including its Indigenous inhabitants – were British *subjects*.⁴⁶ Not even the federation of formerly disparate colonies into a united Commonwealth had the legal effect of producing citizens; Australians remained merely British subjects until 1949 when the *Nationality and Citizenship Act 1948* (Cth) was proclaimed.⁴⁷ In a legal sense, citizenship in Australia is therefore not a constitutional concept but a statutory one, and a rather belated one at that.⁴⁸ By contrast, citizenship in a normative sense is much broader.⁴⁹ Few would doubt that Australians have enjoyed a non-legal bond of citizenship – one brought about by a shared geographical, cultural and political identity – since well before Federation. A number of commentators have noted the disjunction in Australia between legal and normative citizenship.⁵⁰ In Rubenstein's view, the former notion is becoming increasingly exclusionary. Since the original *Nationality and Citizenship Act 1948* was passed, subsequent amendments have progressively tightened citizenship eligibility criteria. By contrast, normative conceptions of citizenship have become more inclusionary, aiming to encompass all who share in the social and civic life of the community, whether legal citizens or not. On this view, citizenship is about belonging and shared aspects of identity.⁵¹ This disjunction between the legal and the normative is not socially inert. As Rubenstein notes, disjunctions can 'reach deep into the heart of the national political community, and profoundly affect the nature of relations among those residing within'.⁵² Arguably, this phenomenon applies to ex-offenders as the exemplar *par excellence*. In light of Damaska's discussion of the evolution of attainer, it seems likely that this was one of the specific points of attainer.⁵³

Marshall's theory has come under attack from various quarters for failing to pay due regard to the duties of citizenship.⁵⁴ Liberal theories do

⁴⁵ Marshall (1998), pp 102–4.

⁴⁶ Hughes (1986), p 275; Thornton (1996), p 72.

⁴⁷ The concept of Australian citizenship was introduced by section 7 of the *Nationality and Citizenship Act 1948* (Cth), but section 7 also provided that an Australian citizen continued to be a British subject. The status of British subjectivity was removed by amendment when the *Australian Citizenship Amendment Act 1984* (Cth) was passed.

⁴⁸ Rubenstein (1995), p 506.

⁴⁹ Rubenstein (2000).

⁵⁰ Rubenstein (2000); Thornton (1996), p 74; Berns (1998), p 4; Australian Citizenship Council (2000), p 7.

⁵¹ Brown (2002), p 316; Berns (1998), pp 2–3.

⁵² Rubenstein (2000).

⁵³ Damaska (1968), p 351.

⁵⁴ Kymlicka and Norman (1994), p 355.

recognise that citizenship confers duties as well as rights.⁵⁵ Neoliberals claim that the duties must precede the rights. On this view, citizenship rights are preconditioned on the fulfilment of certain social obligations, such as the duty to be economically self-supporting.⁵⁶ The main target of this attack is the idea of unconditional entitlement to social rights. In Australia, this neoliberal conception underpinned policies such as the mutual obligation/work-for-the-dole scheme introduced under the Howard government in 1997.⁵⁷ The challenge to this view of citizenship recognises that it privileges formal equality over substantive equality. It does this by failing to concede the necessity for social rights to redress disadvantage and facilitate opportunities for the poor to participate in the economy.⁵⁸ Arguably, the neoliberal view blames the poor and unemployed for their own plight, seeking to marginalise them from the polity, as they have been from the economy. The idea of the 'undeserving poor', however, is arguably discredited, especially in light of the recent Global Financial Crisis.⁵⁹ In Australia, as in the United States, the idea of the 'undeserving poor' may be retreating. Many now believe that people are welfare-dependent not because they refuse to contribute, but because of a lack of meaningful opportunities for work or training brought about by economic failures beyond their control.⁶⁰

Citizenship and the Duty to Obey the Law

By analogy with their position on social rights, neoliberals presumably would insist that the duty to obey the law precedes the rights that flow from citizenship. The duty to obey the law is undoubtedly a key duty of citizenship. A national survey undertaken on behalf of the Keating government found that obedience to the law was nominated by a substantial majority of respondents as the defining feature of a good citizen.⁶¹ This is not a recent conception. Locke believed that the foremost duty of citizenship was the duty to obey the law. Locke's concept of the social contract involved men uniting into a commonwealth for the specific purpose of mutual protection through law.⁶² In Locke's view, violent criminals 'may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security [sic]'.⁶³

⁵⁵ Brown (2002), p 319.

⁵⁶ Kymlicka and Norman (1994), p 356; Kapur (2007), p 565.

⁵⁷ Parliament of Australia Parliamentary Library (2000).

⁵⁸ Kymlicka and Norman (1994), p 355.

⁵⁹ Gans (1994), pp 270–71, 280–81; MacGregor (1999), p 104.

⁶⁰ Kymlicka and Norman (1994), p 358.

⁶¹ Civics Expert Group (1994), cited in Brown (2002), pp 319–20.

⁶² Locke (1690), paras 119, 131.

⁶³ Locke (1690), para 11.

Modern liberals continue to accept the premise that citizens have a duty of obedience to law.⁶⁴ But even assuming that obedience is the prime duty of citizenship, criminals arguably cannot forfeit their rights unless the duty precedes the rights. Furthermore, it would be hard to accept that one could forfeit one's citizenship rights for a trivial offence. In contractarian terms, the crime committed must, as a breach of the social contract, be sufficiently serious to constitute an implicit rejection of the rule of law – a rescission of the contract.⁶⁵ This issue will be discussed further below. In the meantime, Kymlicka and Norman's challenge to the neoliberal critique of social rights arguably applies here too – that is, the rights must logically precede the duties because fulfilment of the rights is necessary for full participation as a citizen.⁶⁶ This argument seems especially pertinent to the duty to obey the law, given the well-documented relationships between crime and unemployment, low educational achievement, mental disorder, drug and alcohol addiction, and other forms of social disadvantage.⁶⁷

From a legal perspective, in Australia the duty to obey the law is seemingly the primary duty of citizenship. This is implicitly revealed by our treatment of non-citizens. A prerequisite for eligibility for grant of citizenship is demonstrated obedience to law. Good character is the nominal criterion,⁶⁸ and while a criminal record doesn't automatically exclude applicants, a criminal record is the main measure of character. Legislation currently disqualifies citizenship applicants with criminal records unless they can show at least two years of blameless behaviour after release from a 'serious prison sentence'⁶⁹ or ten years if the applicant was a 'serious repeat offender'.⁷⁰

A similar ethos governs policy on deportation of non-citizens. A man born in Paris to Serbian parents, brought up in Melbourne since infancy, was deported in 2004 after serving two years in prison for a number of burglaries. Prior to his deportation he had never been to Serbia, did not speak the language and had no social or familial networks to support him in that country.⁷¹ A similar fate was visited on a 43-year-old Turkish man, resident of Australia for 31 years. He had a history of schizophrenia and drug use, and was deported following his release from prison.⁷² These cases

⁶⁴ Dworkin (1977), p 186.

⁶⁵ Cheney (2008), pp 136, 138.

⁶⁶ Kymlicka and Norman (1994), p 355.

⁶⁷ Blaauw et al (2002), pp 9–10.

⁶⁸ *Australian Citizenship Act 2007* (Cth), s 21(2)(h).

⁶⁹ A 'serious prison sentence' is imprisonment for twelve months or longer: *Australian Citizenship Act 2007* (Cth), s 3.

⁷⁰ *Australian Citizenship Act 2007* (Cth), s 24(6). A 'serious repeat offender' is someone who has been sentenced to a serious prison sentence for an offence committed after his or her release from prison, pursuant to an earlier serious prison sentence: s 3.

⁷¹ 'Out-of-Touch Deportation Rules' (2005); 'Deportee to Serbia' (2008).

⁷² 'Valid Visa Means Deported Addict Can Return' (2006).

feature among some 290 others,⁷³ involving deportations pursuant to 1998 amendments to the *Migration Act 1958*, which allow deportation of non-citizens, even when they are long-term residents.⁷⁴ Arguably, these examples are tangible demonstrations of Rubenstein's disjunction between the legal and the normative,⁷⁵ deplored even by normally conservative media outlets on the basis that 'most people would regard [these non-citizens] as Australians'.⁷⁶ However, as Berns has noted, it is all very well deporting foreign criminals, but we are certainly stuck with our own.⁷⁷

Criminals' Truncated Rights

Civil Rights

Liberty is, arguably, the most fundamental of civil rights. It has been claimed that liberty is so vital that it trumps other rights because other rights generally require liberty as a precondition for their enjoyment.⁷⁸ That is why, subject to well-established exceptions,⁷⁹ before someone can be deprived of liberty, he or she must be convicted of a specified offence by a trial process replete with the recognised hallmarks of fairness.⁸⁰ Deprivation of liberty pursuant to sentence has therefore traditionally been required to be proportionate to the offender's criminality, constituting the offender's just deserts punishment for the crime, but not more.⁸¹

Increasingly, this principle has come under attack. In a number of states, sexual and violent offenders are now able to be detained beyond the expiry of their proportionate sentences, subject to a finding that they are dangerous. Two distinct schemes are in use: the first involves a judicial finding of dangerousness at the time of sentence to support an order for

⁷³ 'Out-of-Touch Deportation Rules' (2005).

⁷⁴ *Migration Act 1958* (Cth), s 501, inserted by section 23 of the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*. Section 501 expanded powers found in sections 200 and 201, which previously only allowed deportation of non-citizen permanent residents for conviction of offences when the non-citizen had lived in Australia for less than ten years. The constitutionality of deportation of long-term resident non-citizens on character grounds was upheld in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

⁷⁵ Rubenstein (2000).

⁷⁶ 'Out-of-Touch Deportation Rules' (2005).

⁷⁷ Berns (1998), p 7.

⁷⁸ Von Hirsch and Wasik (1997), p 621.

⁷⁹ The well-established exceptions include, *inter alia*, remand, quarantine, mentally ill people who exhibit violent behaviour and some categories of asylum-seekers: Edgely (2007), p 361.

⁸⁰ *International Covenant on Civil and Political Rights*, Art 14.

⁸¹ *Veen v R (No 2)* (1988) 164 CLR 465; Edgely (2009), p 244.

indefinite detention.⁸² The second involves a judicial finding of dangerousness close to the end of the sentence to forestall the prisoner's release.⁸³ The difficulty with these schemes is that, as eminent psychiatrists have freely admitted, the science of psychology is simply not able to accurately predict dangerousness in particular prisoners.⁸⁴ One could be forgiven for suspecting that these schemes are less about crime prevention and more about law-and-order politics and politically convenient moral panics.⁸⁵

The declaration of dangerousness constitutes both a label and a warning, acting – as a branding on the forehead might – to symbolise otherness, and to humiliate and terrify. 'Dangerousness' is a label that sits conformably with Locke's 'lion or tyger' and Blackstone's 'monster', unfit to 'live upon the earth'.⁸⁶ It marks someone as unfit to live among us, unfit to enjoy our rights and unfit for citizenship.

Freedom of speech is another important civil right that is severely constrained for prisoners. Laws in all Australian states and territories prevent prisoners from talking to journalists, and in some cases academic researchers, unless departmental permission is granted.⁸⁷ In Queensland, the Department of Corrections' media access policy states that permission will not be granted if it could embarrass the department or for purposes of investigating a prisoner's claims of innocence.⁸⁸ Recently, the policy operated to silence Graham Stafford, released on parole in 2005 after 14 years in prison for a murder that he didn't commit. Although Stafford had always maintained his innocence, parole conditions prevented him from talking about his case to media.⁸⁹ In 2009, the Queensland Court of Appeal accepted new evidence, resulting in the quashing of his conviction for murder.⁹⁰ In another case, the release on parole of Indigenous activist Lex

⁸² *Penalties and Sentences Act 1992* (Qld), Part 10; *Sentencing Act 1991* (Vic), Part 3, Div 2, Subdiv 1A; *Criminal Law (Sentencing) Act 1988* (SA), Part 2, Div 3; *Sentencing Act 1995* (WA), Part 14; *Sentencing Act 1991* (Tas), s 19.

⁸³ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Criminal Law (Sentencing) Act 1988* (SA), Part 3, Division 3. See Edgely (2007).

⁸⁴ Edgely (2007), p 370.

⁸⁵ Weatherburn (2004), pp 46–48; Garland (2000), pp 348–49; Garland (1996), pp 461–63. Regarding preventative detention schemes of violent sex offenders, see: Edgely (2007), pp 351–53.

⁸⁶ Locke (1690), para 11; Blackstone (1979), pp 373–74, cited in Schall (2006), p 55.

⁸⁷ *Crimes (Administration of Sentence) Act 1999* (NSW), s 267; *Corrections Act 1986* (Vic), ss 33, 37; *Corrective Services Act 2006* (Qld), s 155; *Correctional Services Act 1982* (SA), s 85A; *Prisons Act 1981* (WA), ss 65, 66; *Corrections Act 1997* (Tas), ss 12, 19; *Prisons (Correctional Services) Act* (NT), s 40. Walsh (2007), p 74.

⁸⁸ Walsh (2007), p 74.

⁸⁹ 'The Night Before Christmas' (2010).

⁹⁰ *R v Stafford* [2009] QCA 407.

Wotton is subject not only to a four-year media gag, but also to a ban on his attendance at public meetings or rallies without departmental consent. Queensland's Premier Anna Bligh confirmed that these types of parole conditions are commonplace.⁹¹

The department's media policy is backed with coercive powers that extend beyond the prisoners themselves. In recent times, two Queensland journalists have been convicted of offences for failing to obtain appropriate permission before talking to prisoners.⁹² The more recent was Anne Delaney. Delaney's purpose in visiting the prisoner was to conduct preliminary discussions with a view to making a documentary questioning the soundness of the prisoner's conviction for killing her baby.⁹³ The court rejected claims made on Delaney's behalf that the provisions breached the constitutionally implied freedom of political expression.⁹⁴

In a Victorian case, a media challenge to the department's refusal to permit an interview with a prisoner was rejected.⁹⁵ The prisoner had sought the interview because, he claimed, he had information relevant to the newspaper's ongoing investigation into corrupt activities by a former police officer.⁹⁶ The court challenge failed because the court accepted the Commissioner's claims to have balanced competing interests in the making of her decision, including good order in the prison and the safety of the prisoner. In accepting those assertions, the court rejected the plaintiff's claim that the decision breached the prisoner's common law right to freedom of speech.⁹⁷ While the court accepted the existence of a common law right of free speech, and that the right is not extinguished by imprisonment, the court noted that the right is not absolute.⁹⁸ Freedom of speech for the prisoner's particular purpose was not sufficiently fundamental to trump the competing interests.⁹⁹ As Eames J noted, courts in Australia have historically tended to interpret legislation to give a wide degree of latitude to correctional

⁹¹ 'Palm Island Rioter's Lawyers' (2010). Wotton was sentenced for inciting a riot following the 2004 death in custody of Indigenous man Cameron Doomadgee.

⁹² *Police v Delaney* (2005) Western Districts Magistrates Court (unrep, 22 Dec 2005). Delaney's defence, that the provision breached the constitutionally implied freedom of political communication, failed: Walsh (2007), p 72. Journalist Louise Robson pleaded guilty in the Caboolture Magistrates Court in September 1999 to two offences against *Corrective Services Act 1998* (Qld), s 104(10)(f): *Renwick v Bell* [2001] QDC 006, [6].

⁹³ Walsh (2007), p 72.

⁹⁴ Copies of defence submissions in the *Delaney* case were available at: www.boewilliams.com.au/current%20focus.html, 23 June 2010. Walsh criticises the magistrate's decision and argues that a proper application of the test from *Lange v ABC* (1997) 189 CLR 520 should have resulted in acquittal: Walsh (2007), p 83.

⁹⁵ *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329.

⁹⁶ *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329 at [2].

⁹⁷ *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329 at [66].

⁹⁸ *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329 at [61].

⁹⁹ *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329 at [79].

authorities in carrying out their statutory powers.¹⁰⁰ This contrasts with the modern position in many overseas jurisdictions. In the United Kingdom, the House of Lords has recognised the existence of a common law right to freedom of speech, which prevents a blanket ban on prisoner communications with journalists. This right is qualified, but serves (at least) to protect contacts with media for purposes of investigating the correctness of convictions.¹⁰¹ In the United States, although interviews with prisoners can be banned by prison authorities, such bans will only be constitutional if there are other genuinely effective avenues for communications between prisoners and the media, such as by uncensored mail and telephone.¹⁰²

Lumby draws on Foucault to argue that the invisibility of prisoners to the media – indeed, the community at large – is the flipside of the intensive surveillance they face inside prisons.¹⁰³ She argues that the moral panics and shrill media commentary that often accompany the trials, sentencing and release of notorious prisoners are a reflection of the deafening silence that accompanies their time inside.¹⁰⁴ Prison life is thus hidden from us; it is ‘outside the media’s unblinking eye’.¹⁰⁵ Because the media are the foundation of modern social memory, the result is that prisoners’ lives are beyond community. Not only are they isolated from us, but we are also isolated from them. We don’t have to bear witness to the regime of brutality and dehumanisation imposed in our name.¹⁰⁶

Political Rights

The most fundamental expression of citizenship in Western democracies is the right to vote.¹⁰⁷ In Australia, universal suffrage is a legislative scheme, not a constitutional one.¹⁰⁸ Like prisoners in many other countries,¹⁰⁹ certain

¹⁰⁰ *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329 at [95].

¹⁰¹ *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115. Foster (2000).

¹⁰² *Pell* 417 US 817 (1974); *Saxbe* 417 US 843 (1974). Both cases are discussed in Walsh (2007), pp 75–77.

¹⁰³ Lumby (2002), p 104.

¹⁰⁴ Lumby (2002), p 105.

¹⁰⁵ Lumby (2002), p 104.

¹⁰⁶ Lumby (2002), pp 104, 108.

¹⁰⁷ Rubenstein (2000); Cheney (2008), p 141; Demleitner (1999), p 157.

¹⁰⁸ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173. The Constitution provides only that the Members of Parliament be ‘directly chosen by the people’: ss 7, 24. The combined effect of ss 8, 30 and 51(xxxvi) is that Parliament can make laws stipulating the qualifications for voting: at [6], Gleeson CJ.

¹⁰⁹ Canada: *Canada Elections Act 2000*, c 9, s 4(c). The provision denied the right to vote to prisoners serving a sentence of imprisonment of two years or more. It was challenged in *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68 and declared to be fundamentally inconsistent with guarantees under the Canadian Charter of Rights and Freedoms. United Kingdom: *Representation of the People Act 1983*, c 2, s 3. The provision denied the right to vote to all convicted offenders serving a sentence of imprisonment, regardless of

Australian prisoners have always been denied the right to vote. The criterion for exclusion has traditionally been the length of sentence, which meant that only prisoners convicted of serious offences were excluded.¹¹⁰ The most recent amendment in 2008¹¹¹ provided that all convicted offenders serving a prison sentence, regardless of duration, were disqualified from voting.¹¹² That legislation was challenged in the *Roach* case.¹¹³ The High Court held that the legislation was beyond what was proportionate to maintenance of Australia's system of representative democracy.¹¹⁴ The result was that the provision's repealed predecessor¹¹⁵ was restored.¹¹⁶ That provision disenfranchised prisoners serving a sentence of three years or longer.¹¹⁷ The majority denied that the case concerned the existence of an individual right. Instead, the joint reasons explain that the case concerned the extent of the limitation on legislative power articulated in *Lange*,¹¹⁸ derived from the text and structure of the Constitution.¹¹⁹ The law must therefore be appropriate and adapted, or proportionate, to the maintenance of Australia's system of representative democracy. The law would not be proportionate if the purpose were the further punishment or stigmatisation of offenders.¹²⁰ However, the majority were prepared to accept the traditional justification for excluding felons from voting without analysis: because of their lack of probity, serious offenders lack the fitness of character needed to vote responsibly.¹²¹ The problem with simply accepting that traditional justification was that the High Court didn't grapple with the question of whether it was soundly grounded in principle.

duration. That provision was challenged in the Grand Chamber of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* [GC] no 74025/01, ECHR 2005–IX (6/10/2005) and declared to be a contravention of the European Convention on Human Rights. The United States has the most draconian disenfranchisement provisions of any Western democracy. Ewald's study shows that thirteen states disenfranchise some offenders indefinitely, during sentence and beyond. Fifteen states disenfranchise all prisoners during sentence, including probation and parole, four more during incarceration and parole only and sixteen states and the District of Columbia during incarceration only. Only two states do not disenfranchise convicted offenders: Ewald (2002), p 1054.

¹¹⁰ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 175, 179.

¹¹¹ *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*.

¹¹² *Commonwealth Electoral Act 1918*, ss 93(8AA), 4(1A).

¹¹³ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162.

¹¹⁴ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202.

¹¹⁵ *Commonwealth Electoral Act 1918*, s 93(8)(b).

¹¹⁶ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202–3.

¹¹⁷ *Commonwealth Electoral Act 1918*, s 93(8)(b).

¹¹⁸ *Lange v ABC* (1997) 189 CLR 520.

¹¹⁹ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199–20, per Gummow, Kirby, Crennan JJ.

¹²⁰ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200.

¹²¹ *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 176–77, 183, 189, 192, 200–1, 203.

Why is fitness of character a prerequisite for voting in a democracy featuring universal suffrage? Is there a subcutaneous concern that the electoral process will be sullied in a symbolic way?¹²² Or is the concern a more pragmatic one: that the electoral *result* might be compromised by irresponsible or tainted voting?¹²³ Alternatively, perhaps the concern is not with the electoral process at all, but with the offenders – that those convicted of serious crimes deserve not just to be isolated physically from the community, but to be excluded from exercising the most fundamental expression of their citizenship.¹²⁴ If it is the latter, then the ban on voting smacks of double punishment – something long prohibited in Australia in legislation¹²⁵ as well as at common law.¹²⁶

Some of the explanations put forward in the literature for restricting the voting rights of prisoners are patently fanciful.¹²⁷ Suggestions have been made, for example, that prisoners would use their votes to oppose the rule of law, for pro-crime policies and against law-and-order measures.¹²⁸ Apparently, this notion is taken seriously in some quarters, especially in the United States, and has even been aired in Congressional hearings as a concern about criminals uniting in a voting bloc to thwart ‘the ability of law abiding citizens to reduce deadly and debilitating crime in their communities’.¹²⁹ This implausible scenario renders patent the histrionic ‘othering’ that sometimes features in the disenfranchisement-of-offenders debate. The implausibility of this scenario derives firstly from the unlikelihood that a political representative could be found to advance the anti-law cause in a way that conflicted with the wishes of the majority of voters. Prisoners are a miniscule, electorally irrelevant percentage of the voting population, whose residential address for voting purposes is the

¹²² Many commentators discuss the need to ‘preserve the purity of the ballot box’. The comment was used in *Washington v State*, 75 Ala 582, 585 (1884) and in a range of further US cases and papers on disenfranchisement. Cf comments by Anon (1989), p 1302; Von Hirsch and Wasik (1997), p 606; Ewald (2002), p 1083.

¹²³ See, for example, comments by Gummow, Kirby and Crennan JJ in *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 183. See also Damaska (1968), p 358; Cheney (2008), p 137; Schall (2006), pp 82–83, 89.

¹²⁴ See, for example, comments by Gleeson CJ in *Vicki Roach v Electoral Commissioner* (2007) 233 CLR 162 at 175, 179. See also Demleitner (1999), p 160.

¹²⁵ For example, *Crimes Act 1914* (Cth), s 4C; *Criminal Code* (Qld), s 16; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 20; *Criminal Code* (Tas), s 11.

¹²⁶ *Pearce v R* (1988) 194 CLR 610.

¹²⁷ I contend that these strong words, immoderate as they are, are justified in this instance.

¹²⁸ Ewald (2002), pp 1053, 1079, 1088, 1099; Demleitner (1999), p 157; Anon (1989), p 1302; Schall (2006), pp 81, 89.

¹²⁹ Roger Clegg, testimony given to Civic Participation and Rehabilitation Act of 1999 Hearing on HR 906 Before the Subcommittee. on the Constitution of the House Committee on the Judiciary, 106th Cong. 41 (1999), cited in Ewald (2002), pp 1080, 1099.

electorate they lived in prior to imprisonment.¹³⁰ Second, there is no evidence that prisoners are single-issue voters, or indeed, that they vote any differently from others of their demographic circumstances.¹³¹ Such research as there is suggests the opposite.¹³² As Schall observes, just as not all sinners are heretics, not all offenders reject the rule of law.¹³³

Some concerns about the way prisoners will vote are more minimalist, but no less implausible. Some are worried that offenders might taint the electoral process by committing voter fraud.¹³⁴ If this concern were legitimate, a ban on voting by all prisoners, or even one limited by length of sentence, would seem to be massively over-inclusive.¹³⁵ It would also be a poorly adapted response to a type of wrongdoing that, in recent Australian history, is more attributable to our 'respectable' politicians, rather than criminals.¹³⁶ Another concern emanates from the British government, which has expressed disquiet that prisoners might vote to improve prison conditions – which, presumably, it thought would be inconvenient if not improper.¹³⁷ One facet of a liberal democracy is the inherent legitimacy of voters pursuing their own self-interest through the ballot box. We do not require other citizens to cast their votes for the benefit of the community as a whole. Indeed, one of the purposes of universal suffrage is to resolve the diversity of values, interests and biases that are represented in the community. Excluding one group of voters because of presumptions about how they would vote would be decidedly anti-democratic.¹³⁸

Limitations of space prevent a thorough canvassing of restrictions on offenders' political rights, but a couple more points can be made. Our Constitution expressly excludes people imprisoned, or subject to be imprisoned, for one year or longer from standing for federal parliament.¹³⁹

¹³⁰ Ewald (2002), p 1099; Schall (2006), pp 82, 89; Anon. (1989), p 1302. *Commonwealth Electoral Act 1918* (Cth), s 96A.

¹³¹ Ewald (2002), p 1099; Schall (2006), p 82.

¹³² Casper (1972), cited in Schall (2006), pp 78, 82; and Ewald (2002), pp 1100–01.

¹³³ Schall (2006).

¹³⁴ Demleitner (1999), p 157; Anon (1989), p 1302; Ewald (2002), pp 1115–16. See also *Kronlund v Honstein* 327 F Supp 71, 72 (ND Ga 1971), which concerned a challenge to the application of Georgia's disenfranchisement of offender laws to a woman convicted of heroin smuggling when she was eighteen years of age. After noting the need for electoral integrity, the court said at 73: 'A State may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses.'

¹³⁵ Ewald (2002), p 1117; Anon (1989), p 1302; Schall (2006), p 90.

¹³⁶ Shepherdson (2001). The events giving rise to the Shepherdson Inquiry involved convictions against a number of Queensland politicians for forging and uttering electoral documents: pp 1–2. The inquiry also revealed numerous instances of conduct that would constitute electoral offences, but which were time barred from prosecution: p 163.

¹³⁷ Cheney (2008), p 137.

¹³⁸ Schall (2006), pp 83, 89.

¹³⁹ Constitution of Australia, s 44(ii).

The incongruity was noted in *Roach* that stricter standards had been imposed on the franchise than on eligibility to serve as a parliamentarian, but that incongruity connoted no limit on the Commonwealth's legislative power to regulate the franchise.¹⁴⁰

Designated groups of ex-offenders are also excluded from jury service in all Australian jurisdictions.¹⁴¹ Although originally prevented by attainder from serving on juries, emancipated convicts became eligible to serve in the 1830s.¹⁴² Since then, eligibility provisions have been retightened.¹⁴³ Eligibility for jury service has been described as one of the 'basic rights of citizenship',¹⁴⁴ although others prefer to characterise it as a duty.¹⁴⁵ Whether right or duty, the High Court has preferred to see broad-based eligibility for jury service not in terms of citizenship, but as an expression of the representativeness requirement for juries for the purpose of administration of justice.¹⁴⁶ The scope of the disqualification of ex-offenders differs in each state with the result that the hallmarks of citizenship vary in different parts of Australia.¹⁴⁷ The most comprehensive disqualification occurs in Queensland, where all ex-prisoners are permanently excluded from jury service along with all persons convicted of indictable offences, including in the summary jurisdiction.¹⁴⁸

Social Rights

As noted above, the idea that full citizenship requires access to social rights derives from the notion that certain social rights are essential to the full and meaningful enjoyment of civil and political rights. Among these rights is the right to a reasonable quality of health care, defined in accordance with prevailing social standards.¹⁴⁹ It has long been recognised that prisoners suffer from poorer health and poorer standards of health care than those in the broader community.¹⁵⁰ In 2009, a National Prisoner Health Census was conducted in 87 of the 93 prisons in Australia.¹⁵¹ It should be noted that there are differences between states. However, to generalise across jurisdictions,

¹⁴⁰ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 180, per Gleeson CJ.

¹⁴¹ *Jury Act 1977* (NSW), s 6; *Jury Act 1995* (Qld), ss 4(3)(m), (n), 12(4); *Juries Act 1967* (Vic), s 5; *Juries Act 1957* (WA), s 5; *Juries Act 1927* (SA), s 12; *Juries Act 2003* (Tas), s 6; *Juries Act 1967* (ACT), s 10; *Juries Act* (NT), s 10.

¹⁴² Hughes (1986), p 329; Brown (2002), p 315.

¹⁴³ Brown (2002), p 316.

¹⁴⁴ *Lockhart v McCree* 476 US 162 (1986) at 176.

¹⁴⁵ Kalt (2003), p 119.

¹⁴⁶ *Katsuno v R* (1999) 199 CLR 40; Brown (2002), p 316.

¹⁴⁷ Rubenstein (1995), p 520.

¹⁴⁸ *Jury Act 1995* (Qld), s 4(3)(m), (n). The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) does not apply: *Jury Act 1995* (Qld), s 12(4).

¹⁴⁹ Kymlicka and Norman (1994), pp 354, 357.

¹⁵⁰ Levy (2005), p 73; Australian Institute of Health and Welfare (2010), p xi.

¹⁵¹ Australian Institute of Health and Welfare (2010), p xi.

the Census found that prisoners suffered from much higher rates of mental disorders, including psychotic, affective, anxiety and substance abuse disorders; serious head injuries; communicable diseases, including hepatitis B, hepatitis C and HIV; and chronic conditions such as diabetes and asthma.¹⁵² Prisoners are also more likely to smoke cigarettes and abuse alcohol and illicit drugs.¹⁵³ It is known that some prisoners continue to use illicit drugs in prison but there are no needle exchange programs within prisons anywhere in Australia.¹⁵⁴ In fact, some experts believe that preventative health care remains an important failing of prisoner health care.¹⁵⁵ Condoms are only available in some states' prisons; few prisons have programs to assist with quitting smoking; and immunisations against hepatitis B and influenza are not available in any Australian prisons.¹⁵⁶ Deaths in custody, although trending downwards over the past two decades, continue to be a significant problem. The most common cause of death is hanging, followed by natural causes, drug overdose and traumatic injury.¹⁵⁷ What the dispassionate cause-of-death data don't reveal is the extent to which delays in getting appropriate treatment or summoning life-saving help, not to mention deliberate violence, have contributed to the loss of life.¹⁵⁸

Australian prisons are dangerous, overcrowded and unhealthy places.¹⁵⁹ Under those circumstances, one would expect to find a high standard of health care to manage prisoner health problems. Instead, prisoner health care falls well below minimum standards stipulated by the United Nations.¹⁶⁰ A referral must be obtained to see a doctor, so the vast majority of clinical services are delivered by nurses. Doctors attend at only 18 per cent of cases at prison clinics.¹⁶¹ There is no medical confidentiality; usually a guard is required to be present at the clinic. Moreover, prisoner medical records are

¹⁵² Australian Institute of Health and Welfare (2010), pp 99, 101, 102.

¹⁵³ Australian Institute of Health and Welfare (2010), pp 104, 106.

¹⁵⁴ Australian Institute of Health and Welfare (2010), pp 15. Needle and syringe programs in the community have been found to be successful in diminishing the spread of blood-borne diseases. Similar programs operate inside prisons in a number of countries and have been shown to consistently reduce needle-sharing and improve prisoner health without compromising institutional safety or security: Australian Institute of Health and Welfare (2010), p 15. Levy (2002).

¹⁵⁵ Levy (2002), p 248; Sweet (2009), p 17.

¹⁵⁶ Australian Institute of Health and Welfare (2010), pp 16, 14, 75.

¹⁵⁷ Australian Institute of Health and Welfare (2010), pp 50–51.

¹⁵⁸ Levy (2002), p 250; Curnow and Larsen (2009), pp 9, 27.

¹⁵⁹ Australian Institute of Health and Welfare (2010), p 14; Levy (2005), p 66.

¹⁶⁰ United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, Arts 22–26, www.unhcr.org/refworld/docid/3ae6b36e8.html, 30 June 2010. The Rules were adopted by the United Nations but are not legally binding on member countries; Levy (2002), p 240.

¹⁶¹ Australian Institute of Health and Welfare (2010), pp 80–81.

not subject to privacy laws, so can be inspected by prison authorities.¹⁶² Despite recommendations from the Australian Medical Association that health care be provided independently of custodial authorities, provision of health services remains under the control of the corrections departments.¹⁶³ This can lead to clinicians confronting conflicting loyalties between duties to their employer and duties to their patients. Often, health care provision is forced to yield to the administrative and security needs of the institution. Hospital visits are subject to availability of guards and vehicles, and it is not unusual for medical decisions to be overruled on security grounds. Prisoners do not have Medicare cards and must pay for their own treatment if a private specialist is required. Treatment for non-urgent medical matters will often be deferred until after release.¹⁶⁴ In other words, the prisoner will simply not be treated at all.

Mental health service provision is a particular problem. There is clear evidence that the prevalence of mental disorder among prisoners is significantly higher than among the general population.¹⁶⁵ Despite that, only a few jurisdictions specifically screen for mental health problems at admission, and of those that do, not all use mental health clinicians to conduct the screening. Nowhere in Australia is the mental health of prisoners assessed on an ongoing basis.¹⁶⁶ Once a prisoner has been diagnosed with a mental disorder, there is relatively easy access to medication; however, access to other types of psychiatric treatment services is poor.¹⁶⁷ Despite the publicity given to these shortcomings in correctional health systems, it seems that there is scant concern in the medical community and even less in the general community.¹⁶⁸

Limitations of space prevent a thorough canvassing of the limited social rights of prisoners. Were it otherwise, this section would go on to discuss the limited scope of educational, training and rehabilitative opportunities inside prisons.¹⁶⁹ This section might also discuss the rudimentary nature of services – where they exist at all – designed to assist with the reintegration of prisoners into the community, including in relation to housing, employment and priming prisoners with current social knowledge necessary for a normal life in the community.¹⁷⁰ Naturally, all of these services cost money. And

¹⁶² Levy (2002), p 248. These concerns remain current: Anti-Discrimination Commission Queensland (2006), pp 104–5; Indig et al (2009), pp 134, 152–53.

¹⁶³ Levy (2002), pp 242–43; Australian Medical Association (2006), p 2.

¹⁶⁴ Levy (2002), pp 244–45; Anti-Discrimination Commission Queensland (2006), p 104.

¹⁶⁵ Ogloff et al (2006), p 11.

¹⁶⁶ Ogloff et al (2006), pp 33–34.

¹⁶⁷ Ogloff et al (2006), p 21. Some 21 per cent of prisoners take medication prescribed for mental health problems: Australian Institute of Health and Welfare (2010), p 94.

¹⁶⁸ Levy (2002), p 241.

¹⁶⁹ Australian National Training Authority (2001); Australian Institute of Criminology (2008).

¹⁷⁰ Walsh (2004), p 137; Kinner (2006); Matthews (2006).

spending money on offenders is the one area of prison life in which the media *does* take an interest.¹⁷¹

Is the Imposition of Second-Class Citizenship on Offenders Justifiable?

This section considers whether the practice of imposing collateral consequences on offenders is justifiable. Collateral consequences need to be justified because they impose detriment on a specific group of citizens. In any other context, imposing unjustified detriments on a specific group would constitute intolerable discrimination. Here, I consider whether collateral consequences can be justified using penological or sentencing theory or alternatively, using a liberal contractarian theory.

Penology

Penological theory, also known as sentencing theory, provides that sentences should be individuated according to the seriousness of the offence and the culpability of the offender. Each sentence must be aimed at achieving one or more of a limited range of sentencing purposes: deterrence, denunciation, incapacitating the offender from committing further crimes, rehabilitation and proportionate punishment.¹⁷² This principle is extremely well accepted in Australia, and is reflected in common law¹⁷³ and in sentencing legislation in all Australian jurisdictions.¹⁷⁴

The two theories underpinning sentencing theory are utilitarianism and retributivism.¹⁷⁵ Deterrence, denunciation, incapacitation and rehabilitation are utilitarian purposes. Their Benthamite aim is to promote community welfare by reducing crime.¹⁷⁶ The theory assumes that there will be less crime if the offender and others rationally eschew committing crime because they believe that crime is likely to be punished and/or because their criminal conduct will be publicly denounced through the sentencing process. Alternatively, or perhaps additionally, offenders won't commit further offences either because they are incarcerated or because they have been rehabilitated.¹⁷⁷ The normative basis of utilitarian sentencing is that the pain

¹⁷¹ Lumby (2002), p 104.

¹⁷² Edgely (2007), pp 379–80; Edgely (2009), p 245.

¹⁷³ *Veen v R (No 2)* (1988) 164 CLR 465; *Chester v R* (1988) 165 CLR 611.

¹⁷⁴ *Crimes (Sentencing) Act 2005* (ACT), s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act* (NT), s 5(1); *Penalties and Sentences Act 1992* (Qld), s 9(1); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(j), (k), (m); *Sentencing Act 1997* (Tas), s 3(b), (e); *Sentencing Act 1991* (Vic), s 5(1); *Sentencing Act 1995* (WA), s 6(1).

¹⁷⁵ Bagric (1999), p 598.

¹⁷⁶ Bentham (1907 reprint of 1823 edition), paras 1–3.

¹⁷⁷ One might be tempted to think that rehabilitation emerges from a humanistic, rather than utilitarian tradition: Gaylin and Rothman (1976), pp xxix, xxxvii. But cf Von Hirsch, who makes it clear at pp 12–13 that the exclusive measurement of rehabilitative success is reduced recidivism, not improved outcomes for offenders: Von Hirsch (1976), pp 12–13.

inflicted on the offender through punishment is outweighed by the benefits to the community in terms of reduced crime.¹⁷⁸

The other theory underpinning sentencing is retributivism. There are a variety of retributivist theories.¹⁷⁹ The one that dominates Western criminal justice systems is 'just-deserts' retributivism.¹⁸⁰ This theory provides that criminals deserve punishment because of the moral wrongness of the criminal act. The severity of punishment is limited by the just deserts principle, which provides that punishment must be proportionate to the crime and to the criminal's culpability. Notions of individual moral responsibility and autonomy are supported because punishment is related directly to choices made by the criminal. The law operates prospectively in relation to both the offence and the sentence, is promulgated and is binding on the criminal by virtue of the social contract. So the criminal putatively knows the results promised to flow from her choice. According to retributivism, therefore, punishment is not only justified, it has been earned by the criminal. Societal benefits are not of consequence.¹⁸¹ Morris explains why it is morally permissible, in punishing an offender, to inflict what would otherwise be breaches of his or her fundamental rights. In Morris's (essentially Kantian) conception, criminal law constitutes a restraint on the behaviour of all members of the community; collective restraint benefits all because it protects members' persons and property from unwanted interference by others. The unpunished criminal is a free rider who has received the benefit of the restraint of others. He has thus received an unfair advantage over others because of his failure to share the burden of restraint. Punishment is morally permissible because it restores the equilibrium of benefits and burdens by imposing on the criminal an obligation to compensate for the original burden owed to the community. The punishment is analogous to or a proxy for an unpaid debt – hence the notion that, in prison, offenders 'pay their debt' to society.¹⁸²

Morris also explains why the criminal is bound to this social contract. Our criminal justice system attempts to maximise freedom by constraining conduct through law (usually) only when it adversely affects others. Furthermore, punishment is (usually) imposed exclusively for voluntary and proven conduct in breach of that law. This system provides greater capacity for people to predict and control institutional responses to their choices about non-compliance with law than any other type of crime regulation system, such as ones driven by strict liability or therapeutic models. The

Moreover, even Gaylin and Rothman accept that the rehabilitative model tolerated 'treatments' that were more cruel and punitive than an openly punitive model would have permitted: p xxxviii.

¹⁷⁸ Bagric (1999), p 599; Edgely (2007), p 379.

¹⁷⁹ Bagric (1999), p 599.

¹⁸⁰ Dolinko (1992), p 1623; Bagric (1999), 599; Potas (2001), p 18.

¹⁸¹ Dolinko (1991), p 542.

¹⁸² Morris (1968), p 478; Dolinko (1991), p 545; Von Hirsch (1976), p 47; Murphy (1979), p 77.

system therefore institutionalises respect for the choices of the criminal as an autonomous agent.¹⁸³ In Kant's view, retribution was a superior philosophical foundation for punitive power, not only because it respected autonomy but, unlike utilitarianism, because it did not subordinate individual criminals for the collective purposes of others. That would be inconsistent with the innate human dignity that we all share, including criminals.¹⁸⁴

The contractarian foundations of Morris's analysis are manifest. Sentencing theory has solid liberal credentials. In his famous *Second Treatise*, Locke wrote about the permissible purposes of punishing crime.¹⁸⁵ In Locke's view, the power to punish crime was enjoyed by humankind even in the state of nature, and the power to punish in civil society derives from that aggregated power.¹⁸⁶ Locke specifically recognised the power to punish for purposes of deterrence, both of the offender and of others, for purposes of community safety and for inducing repentance or rehabilitation.¹⁸⁷ Locke also recognised the legitimacy of retributive punishment. He stipulated that utilitarian purposes must be limited by reference to the notion of just deserts:

[I]n the state of nature, one man comes by a power over another; but yet no absolute or arbitrary power, to use a criminal, when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own will; but only to retribute to him, so far as calm reason and conscience dictate, what is proportionate to his transgression.¹⁸⁸

Common law sentencing doctrine echoes that view of the hierarchy of sentencing purposes.¹⁸⁹ When sentencing purposes come into conflict, as they inevitably will in particular cases, the final sentence is limited by reference to proportionate retributive punishment.¹⁹⁰

Deterrence is an important purpose of sentencing. Most people would accept that deterrence works when considered absolutely – that is, we recognise that there is a nexus between sanctions for criminal conduct generally and the overall level of crime. The marginal efficacy of deterrence is extremely doubtful.¹⁹¹ However, research has shown that judges take this sentencing purpose very seriously.¹⁹² So, apparently, does the British government. One of the limbs of its defence of the wholesale

¹⁸³ Morris (1968), pp 485–86.

¹⁸⁴ Kant (1887), p 195.

¹⁸⁵ Locke (1690), paras 7–12.

¹⁸⁶ Locke (1690), para 7.

¹⁸⁷ Locke (1690), paras 11–12.

¹⁸⁸ Locke (1690), para 8.

¹⁸⁹ *Veen v R (No 2)* (1988) 164 CLR 465; *Chester v R* (1988) 165 CLR 611.

¹⁹⁰ *Veen v R (No 2)* (1988) 164 CLR 465 at 476–77.

¹⁹¹ Edney and Bagaric (2007), pp 58–59.

¹⁹² Mackenzie (2005), p 99.

disenfranchisement of prisoners before the Grand Chamber of the European Court of Human Rights was the claim that disenfranchisement served a deterrent purpose.¹⁹³ Another – very different – collateral consequence in the United States was implemented partly for its deterrent value. This measure involved evicting first-time drug-offenders and their households from public housing.¹⁹⁴

A number of commentators have expressed doubts about the capacity of collateral consequences to deter would-be offenders from committing crime. Their claim is that the main criticism of deterrence generally applies with particular cogency to collateral consequences – most offenders don't carefully weigh the costs and benefits prior to offending.¹⁹⁵ Even more axiomatically, most collateral consequences must fail as deterrents because of their low visibility.¹⁹⁶ These consequences are not at all well known – and it is difficult to imagine that offenders, being undeterred by prison, would instead be deterred by the knowledge of additional civil consequences arising from criminal conduct.¹⁹⁷

The same arguments could be directed against claims that collateral consequences serve a denunciation purpose. Denunciation is related to deterrence because it can only prevent crime by persuading people to eschew criminal conduct. Denunciation works by publicly attaching moral blame to the offender's conduct, concomitantly causing shame.¹⁹⁸ If collateral consequences are not highly visible, they cannot operate as effective denunciation. Moreover, because of the diverse array of collateral consequences and the covert way in which they arise, they lack the public censuring quality required for effective denunciation.¹⁹⁹ In cases where collateral consequences are inflicted in the full glare of community, the effect is just as likely to stigmatise the offender by attaching an enduring label of moral inferiority. Demleitner argues that offenders so labelled become internally outcast and are less able to reintegrate and become fully functioning members of society.²⁰⁰

Stigmatisation and labelling are also reasons why collateral consequences are unlikely to succeed in achieving rehabilitation. Denying offenders their civil, political and social rights risks separating them symbolically from the community, causing further alienation and frustrating

¹⁹³ Cheney (2008), p 136. The case was *Hirst v United Kingdom (No 2)* [GC] no. 74025/01, ECHR 2005-IX – (6/10/2005).

¹⁹⁴ Spencer (1995), p 344.

¹⁹⁵ Demleitner (1999), p 161.

¹⁹⁶ Demleitner (1999), p 161; Schall (2006), p 75; Anon (1989), p 1307; Ewald (2002), p 1106.

¹⁹⁷ Ewald (2002), p 1106.

¹⁹⁸ Edney and Bagaric (2007), p 71.

¹⁹⁹ Von Hirsch and Wasik (1997), p 612.

²⁰⁰ Demleitner (1999), p 160.

attempts at reintegration.²⁰¹ There has been scant scholarly attention given to the impact of collateral consequences on rehabilitation.²⁰² This author knows of no studies in Australia. In the United States, however, studies have been undertaken.²⁰³ Archer and Williams reviewed a range of studies demonstrating that denial of social services leads directly to recidivism. The example is especially stark for felony drug offenders, who may be barred from living with family in public housing, denied eligibility for welfare and food stamps, denied financial aid for higher education, have far-reaching limits placed on employment opportunities and even be barred from driving. The impact of these measures, which are on the increase, is felt not only by the offenders, but by their families as well.²⁰⁴

Von Hirsch and Wasik examined the impact of various civil disqualifications on rehabilitation in the United Kingdom.²⁰⁵ As in the United States, they have noted the trend towards more disqualifications of ex-offenders, especially regarding employment and driver's licensing.²⁰⁶ While the links between crime and unemployment are complex, the denial of employment opportunities creates direct economic incentives to recidivate.²⁰⁷ Barring ex-offenders generally from various types of employment is, with few exceptions, over-inclusive. Generally, these disqualifications are not targeted according to the type of criminality and the nature of the risk of abuse.²⁰⁸ The result is a label of moral deviance that cannot simply be shrugged off.²⁰⁹

Disenfranchisement has attracted similar criticisms.²¹⁰ In Europe, seventeen jurisdictions have no restrictions on prisoner voting.²¹¹ The exercise of the franchise is seen as enhancing the formative, rehabilitative effects of prison. Voting helps connect individuals to the community and current affairs, even as they serve their sentences. It also sends them the message that they still have civic responsibilities because they are still part of the community.²¹²

Some collateral consequences are, we are told, directed at achieving the legitimate sentencing purpose of protecting the community by incapacitating

²⁰¹ Demleitner (1999), pp 154, 160; Anon (1989), p 1315; Ewald (2002), p 1105; Schall (2006), p 75; Von Hirsch and Wasik (1997), p 605; Pinard (2006), p 633.

²⁰² Pinard (2006), p 667.

²⁰³ Archer and Williams (2006), p 528.

²⁰⁴ Archer and Williams (2006), pp 529–30.

²⁰⁵ Von Hirsch and Wasik (1997).

²⁰⁶ Von Hirsch and Wasik (1997), pp 599, 600.

²⁰⁷ Von Hirsch and Wasik (1997), p 605.

²⁰⁸ Von Hirsch and Wasik (1997), p 601.

²⁰⁹ Anon (1989), p 1315.

²¹⁰ Demleitner (1999), p 154; Cheney (2008), pp 138–39; Anon (1989), p 1315; Schall (2006), p 75; Ewald (2002), p 1105.

²¹¹ American Civil Liberties Union (2006), p 6.

²¹² American Civil Liberties Union (2006), pp 5–6.

offenders from further offending. One example is the continuing detention of sex offenders after expiry of their sentences.²¹³ Restraining criminals who are certain to commit further violent or sexual offences is unquestionably sensible.²¹⁴ All such schemes operating in Australia rely on psychiatric assessments of the offender's dangerousness.²¹⁵ The problem with these schemes is that there is a well-understood tendency of psychological assessments to over-predict dangerousness.²¹⁶ This fact has disturbing implications. Where there is a 'true positive' – that is, an offender predicted to be dangerous who actually would have committed more violent offences if released – the equation is simple. His rights to liberty are properly sacrificed to uphold the rights of others not to be violated. But what of the 'false positives' – those who were predicted to be dangerous, but who would not have offended had they been released?²¹⁷ Recidivism statistics reveal that false positives make up the majority of offenders preventatively detained.²¹⁸ On what normative basis can we justify sacrificing the right to liberty for this group of offenders after their proportionate sentence has been expiated? The obvious answer is utilitarianism. But one wonders whether, in the imprecise task of weighing the net social utility gains (savings of victim disutility minus offender disutility),²¹⁹ the well-recognised phenomenon of demonisation and dehumanisation of sex offenders has led to discounts in the value of their utility.²²⁰ If so, that would be imposing not only a form of second-class citizenship on offenders, but – like attainder – a form of second-class humanity as well.

²¹³ Edgely surveyed studies of sex offender recidivism rates and found that the likelihood of recidivism depended predominantly on the follow-up period. In her paper, she discussed Hanson and Bussiere's analysis of 61 sexual offender recidivism studies from six different countries, including Australia, which identified an average of 13.4 per cent of recidivists in the sample of over 23 000 offenders in the average four- to five-year follow-up period. Thornton's study of sex offenders in Britain found a rate of about 20 per cent over a ten-year follow-up period. Lievore's report reviewed studies from a number of countries and found recidivism rates of between 10 and 20 per cent. In studies with follow-up periods of between fifteen and twenty years, recidivism rates never exceeded 40 per cent: Edgely (2007), p 367.

²¹⁴ Von Hirsch (1976), p 20.

²¹⁵ All schemes for preventative detention of violent offenders in Australia rely on psychiatric or psychological assessments of dangerousness. See, for example, *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), ss 11, 13(4); *Penalties and Sentences Act 1992* (Qld), s 163(4); *McGarry v R* (2001) 184 ALR 225; *Thompson v R* [1999] HCA 43.

²¹⁶ Edgely (2007), p 371; McSherry (2004), p 2; Shea (1996), p 157; Von Hirsch (1976), pp 20–26. The tendency to over-predict is also understood by judges who rely on psychiatric assessments to make dangerousness determinations: *Attorney-General (Qld) v Francis* [2005] QSC 381 at [73] (Mackenzie J, citing evidence of Prof Nurcombe).

²¹⁷ Von Hirsch (1976), pp 24–25.

²¹⁸ Von Hirsch (1976), p 25.

²¹⁹ Bentham (1907 reprint of 1823 edition), para 1.4.

²²⁰ Gavin (2005), p 397.

The vast majority of collateral consequences serve no legitimate protective purpose. Interfering with prisoners' freedom of speech, their rights to vote, their access to health care, education, vocational training and rehabilitative services serves no proper incapacitative function.

In Australia, the High Court has held that measures inflicted on convicts, including imprisonment, should be characterised according to their purpose, despite any punitive effect.²²¹ In the United States, courts have similarly denied that collateral consequences are punitive, because to characterise them as punitive would trigger a raft of constitutional protections.²²² Despite the view of the courts, if on analysis collateral consequences cannot be reasonably characterised as deterrent, denunciatory, rehabilitative or incapacitative, then one is drawn inevitably to the notion that they are punitive in character.²²³ In relation to a misdemeanour conviction for passing a bad cheque, an American judge recognised that:

Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly.²²⁴

A number of commentators have expressed the view that the true character of many collateral consequences is punitive.²²⁵ If that is correct, then these measures are flouting the fundamental sentencing principle of proportionality of punishment.²²⁶ Indeed, collateral consequences cannot be proportionate, because they are not calibrated according to the circumstances of the offence or the offender.²²⁷ Given that collateral consequences can be severely punitive, it seems incongruous that they are not held to the same standard of proportionality required of sentences generally.²²⁸ And because they are not imposed by or even visible to the sentencing judge, the risk emerges that these measures constitute a form of impermissible double punishment.²²⁹ The conclusion seems unavoidable that collateral consequences are not supported by penological theory.

²²¹ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 653–54; Edgely (2007), p 381.

²²² Pinard (2006), p 687.

²²³ Ewald (2002), p 1058; Brown (2002), p 320.

²²⁴ *McLaughlin v City of Canton*, 947 F Supp 954 at 971 (SD Miss 1995).

²²⁵ Demleitner (1999), p 160; Ewald (2002), p 1059; Brown (2002), p 320.

²²⁶ Ewald (2002), p 1096.

²²⁷ Demleitner (1999), p 160; Von Hirsch and Wasik (1997), p 616.

²²⁸ Ewald (2002), p 1103.

²²⁹ Edgely (2007), p 381.

Liberalism and the Citizenship of Offenders

Liberals believe that serious crimes are a violation of the social contract.²³⁰ The contractarian argument is that the criminal, as an autonomous agent who has breached the social compact, becomes disentitled to some or all of the fruits of citizenship.²³¹ This argument has a distinguished liberal provenance. Locke, Hobbes and Kant all considered that violent criminals had, by their crimes, renounced common rule and forfeited their entitlement to membership of the commonwealth.²³² Rousseau went so far as to declare that criminals waged war on the state.²³³ Most of these early liberals were keen supporters of both capital punishment and attainder.²³⁴

The influence of these early liberals on modern American jurists is manifest, especially in relation to the disenfranchisement of offenders.²³⁵ Judge Friendly in *Green v Board of Elections*²³⁶ quoted Locke directly and observed that:

a man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.²³⁷

It is doubtful, however, that collateral consequences can be justified under a modern conception of liberalism. First, to the extent that collateral consequences impose second-class citizenship status on offenders, it is questionable whether people would agree to a social contract in this form.²³⁸ Under the contract suggested by this analysis, damages are imposed for the breach (the sentence), but the contract is not terminated because the offender remains subject to all original obligations, unlike the non-breaching party, who claims entitlement to unilaterally decide which of its original obligations it will continue to honour.²³⁹

One of the concerns of liberalism is to provide normatively justifiable limits to uses of state power.²⁴⁰ However, collateral consequences would seem to be imposed pursuant to an impermissible penalty clause. Under ordinary contract principles, the breacher is liable for damages, the quantum measured by reference to actual losses or a genuine pre-estimate of losses.

²³⁰ Ewald (2002), p 1051.

²³¹ Schall (2006), pp 76–77.

²³² Locke (1690), para 11; Kant (1887), p 194; Anon (1989), p 1306.

²³³ Rousseau (1923 [1761]), Chapter V.

²³⁴ For example, see Kant (1887), p 195.

²³⁵ Ewald (2002), p 1078; Anon (1989), p 1303; Schall (2006), p 76.

²³⁶ *Green v Board of Elections of City of New York* 380 F2d 445 (1967).

²³⁷ *Green v Board of Elections of City of New York* 380 F2d 445 (1967) at 451.

²³⁸ Anon (1989), p 1305.

²³⁹ Schall (2006), pp 77–78.

²⁴⁰ Ewald (2002), p 1102.

By analogy, sentencing of offenders is tied to that 'genuine pre-estimate' because it is limited by pre-legislated maximum penalties and the doctrine of proportionality; just deserts assessed by reference to the seriousness of the offence and the culpability of the offender. Collateral consequences are, by definition, additional to the sentence. They should, therefore, be treated with utmost suspicion by contractarian liberals because proportionality represents an important term of the contract which safeguards citizens from government excesses.²⁴¹

An alternative analysis is suggested by the decision of the Grand Chamber of the European Court of Human Rights in the *Hirst* case.²⁴² Caflisch J noted that it does not automatically follow that everyone who has been imprisoned for a criminal offence has breached the social contract.²⁴³ The rights and duties subsisting between the citizen and the state are reciprocal. Arguably, the citizen's rights must precede the duties because the fulfilment of rights is necessary for discharge of the duties, for full participation as a citizen.²⁴⁴ Or, to put it in contractarian terms, the rights must precede the duties for consideration under the contract to pass to the citizen.

The use of the social contract and the language of 'breach' also tends to obscure the complex, social causes of crime. Placing blame exclusively on the offender is self-affirming for the remainder of the community, but it undermines community by facilitating the 'othering' of the offender, allowing his citizenship to be eroded.²⁴⁵

Ewald has argued that modern liberalism is no longer tied to an imaginary contract. Instead, following Dworkin, he argues that the overarching concern of liberalism is with protecting fundamental individual rights.²⁴⁶ In the latter part of the twentieth century, rights have been liberated from the narrow 'freedom from' conception, exemplified by Isaiah Berlin in his famous essay 'Two Concepts of Liberty'.²⁴⁷ Berlin's was the classical conception of constitutional rights which proudly protected citizens, not only against the Crown, but against the tyranny of majoritarian democracies. Nowhere are those rights needed more than for the protection of unpopular and politically vulnerable groups.²⁴⁸

²⁴¹ Ewald (2002), p 1053.

²⁴² *Hirst v United Kingdom (No 2)* [GC] no 74025/01, ECHR 2005–IX – (6/10/2005). The *Hirst* case concerned a challenge to UK legislation providing for the disenfranchisement of all prisoners.

²⁴³ *Hirst v United Kingdom (No 2)* [GC] no. 74025/01, ECHR 2005–IX – (6/10/2005) at [7], Caflisch J. See also Schall (2006), p 78; Cheney (2008), p 138; Sawyer (2003), p 10.

²⁴⁴ Kymlicka and Norman (1994), p 355.

²⁴⁵ Anon (1989), pp 1310–1311; Schall (2006), p 79.

²⁴⁶ Ewald (2002), p 1097; see also Dworkin (1977).

²⁴⁷ Berlin (1958). Sawyer notes that the concept of positive liberty was developed by TH Green in the late nineteenth century: Sawyer (2003), p 10.

²⁴⁸ Ewald (2002), pp 1098, 1108.

Since Berlin's time, rights discourse has moved towards elaboration of positive freedom. Raz has argued that the value of negative freedom lies mainly in its capacity to promote positive freedom.²⁴⁹ This conception of rights is less concerned with disabling governments than with enabling people to pursue their own vision of the good life.²⁵⁰ Positive freedoms are the instruments for achieving Marshall's third tier rights: social rights.²⁵¹

Kant would have approved of this rights-based conception of liberalism. Kant wholeheartedly rejected utilitarianism as a justification for punishment because it required using people as a means to a societal end. In his view, a retributive approach to sentencing was mandated by the inherent dignity of humans, which required respect for their autonomy and the rejection of their use as mere instruments of social policy.²⁵² The concept of the intrinsic dignity of humans is the key idea that underpins his work.²⁵³ The social contract, by contrast, was a mere heuristic device: an 'idea ... [that] enables us to conceive of the legitimacy of the state'.²⁵⁴

The 'rights' vision of liberalism is wholly consistent with Marshall's exposition of citizenship discussed above, with its emphasis on civil, political and social rights.²⁵⁵ I have already demonstrated that many of those rights are stripped away from offenders, resulting in a form of second-class citizenship. Arguably, the above analysis has dismantled any explanation for such treatment based on the social contract. The conclusion suggested to this author is that liberalism is unable to justify the imposition of collateral consequences on offenders.

Conclusion

This article has discussed the citizenship of offenders in Australia. It argued that offenders are reduced to a form of second-class citizenship that is plausibly explained as a cultural remnant of attainder. Using TH Marshall's conception of citizenship as a status that clothes citizens with civil, political and social rights, this article has reviewed some of the ways in which offenders are stripped of those rights through the imposition of collateral consequences. Examples were considered where, beyond the curtailment of rights necessarily involved in the sentence, offenders have their civil rights impaired. This was demonstrated by considering the detention of some offenders beyond the expiry of their proportionate sentences and the abrogation of offenders' freedom of communication (or freedom of political communication), even after their release from prison and even when the

²⁴⁹ Raz (1986), p 410.

²⁵⁰ Moller (2009), p 757.

²⁵¹ Sawyer (2003), p 10.

²⁵² Kant (1965), p 100.

²⁵³ John Ladd, 'Introduction: The Spirit of Kant's Moral and Political Philosophy' in Kant (1965), p xi.

²⁵⁴ Kant (1965), p 80.

²⁵⁵ See above in this article; Marshall (1998).

purpose of communication involves pursuing a claim of wrongful conviction. The curtailment of offenders' political rights was also discussed. The examples considered included the disenfranchisement of certain classes of prisoners, the restrictions on some offenders from standing for parliament and excluding offenders from jury service. The impact of collateral consequences on offenders' social rights was also considered. The illustrative example used was prisoner health care. Finally, the article considered whether these collateral consequences could be justified using penological or liberal theories. The conclusion was reached that collateral consequences are unable to be explained using these theories.

Offenders are relegated to a form of second-class citizenship. Certainly, offenders have broken the law and are subject to sentencing, where they will properly be required to endure their just deserts. But it is not clear why they should also have their citizenship rights delimited beyond that. Penological and liberal theories don't satisfactorily account for this phenomenon.²⁵⁶ Ewald has suggested that any policy which further degrades and punishes offenders enjoys popular support.²⁵⁷ But double punishment is impermissible. The only conclusion left is that collateral consequences are a cultural remnant of attainer.

References

Secondary Sources

- American Civil Liberties Union (2006) *Out of Step with the World: An Analysis of Felony Disfranchisement in the US and Other Democracies*, www.aclu.org/voting-rights/out-step-world.
- Anon (1989) 'The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box' 102 *Harvard Law Review* 1300.
- Anti-Discrimination Commission Queensland (2006) *Women in Prison: A Report by the Anti-Discrimination Commission Queensland*, Anti-Discrimination Commission Queensland.
- Deborah Archer and Kele Williams (2006) 'Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders' 30 *NYU Review of Law and Social Change* 527.
- Australian Citizenship Council (2000) *Australian Citizenship for a New Century: A Report by the Australian Citizenship Council*, www.citizenship.gov.au.
- Australian Institute of Criminology (2008) *Reducing Recidivism Through Vocational Education and Training Programs*, Australian Institute of Criminology.
- Australian Institute of Health and Welfare (2010) *The Health of Australia's Prisoners 2009*, Australian Institute of Health and Welfare.
- Australian Medical Association (2006) *Undue Punishment? Aboriginal People and Torres Strait Islanders in Prison: An Unacceptable Reality*, Australian Medical Association.

²⁵⁶ Anon (1989), p 1310.

²⁵⁷ Ewald (2002), p 1106.

- Australian National Training Authority (2001) *National Strategy for Vocational Education and Training for Adult Prisoners and Offenders in Australia*, Australian National Training Authority, www.acea.org.au/Content/Links/National_Strategy_VET_Corrections.pdf.
- Mirko Bagric (1999) 'Sentencing: The Road to Nowhere' 21 *Sydney Law Review* 597.
- Jeremy Bentham (1907 reprint of 1823 edition) 'Chapter XIII: Cases Unmeet for Punishment', in *An Introduction to the Principles of Morals and Legislation*, Clarendon Press.
- Isaiah Berlin (1958) *Two Concepts of Liberty*, Clarendon Press.
- Sandra Berns (1998) 'Law, Citizenship and the Politics of Identity: Sketching the Limits of Citizenship' 7 *Griffith Law Review* 1.
- E Blaauw et al (2002) 'Traumatic Life Events and Suicide Risk Among Jail Inmates: The Influence of Types of Events, Time Period and Significant Others' 15 *Journal of Traumatic Stress* 9.
- William Blackstone (1979 [1769]) *Commentaries on the Laws of England*, Vol 4, University of Chicago Press.
- David Brown (2002) 'Prisoners as Citizens', in David Brown and Meredith Wilke (eds), *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press.
- Jonathon Casper (1972) *American Criminal Justice: The Defendant's Perspective*, Prentice Hall.
- Deborah Cheney (2008) 'Prisoners as Citizens in a Democracy' 47 *The Howard Journal* 134.
- Civics Expert Group (1994) *Civics Expert Group Report*, Civics Expert Group.
- Jane Curnow and Jacqueline Journo Larsen (2009) *Deaths in Custody in Australia: National Deaths in Custody Program 2007*, Australian Institute of Criminology.
- Mirjan Damaska (1968) 'Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study' 59 *The Journal of Criminal Law, Criminology and Police Science* 347.
- Nora Demleitner (1999) 'Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences' 11 *Stanford Law and Policy Review* 153.
- Department of Immigration and Citizenship, 'Citizenship: The Australian Citizenship Pledge', www.citizenship.gov.au/ceremonies/pledge.
- 'Deportee to Serbia Can Call Australia Home Again' (2008) *Sydney Morning Herald*, 23 February, www.smh.com.au/news/national/deportee-to-serbia-can-call-australia-home-again/2008/02/22/1203467388862.html.
- David Dolinko (1991) 'Some Thoughts about Retributivism' 101 *Ethics* 537.
- David Dolinko (1992) 'Three Mistakes of Retributivism' 39 *UCLA Law Review* 1623.
- Ronald Dworkin (1977) *Taking Rights Seriously*, Harvard University Press.
- Michelle Edgely (2007) 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' 33 *University of Western Australia Law Review* 351.
- Michelle Edgely (2009) 'Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency' 16 *Psychiatry Psychology and Law* 240.
- Richard Edney and Mirko Bagaric (2007) *Australian Sentencing*, Cambridge University Press.
- Alec Ewald (2002) "'Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States' 2002 *Wisconsin Law Review* 1045.
- Steve Foster (2000) 'Prisoners and the Right to Free Speech Under the European Convention' 5 *Coventry Law Journal* 14.
- Michel Foucault (1977) *Discipline and Punish: The Birth of the Prison*, Penguin.

- Herbert Gans (1994) 'Positive Functions of the Undeserving Poor: Uses of the Underclass in America' 22 *Politics and Society* 269.
- David Garland (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' 36 *British Journal of Criminology* 445.
- David Garland (2000) 'The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies' 40 *British Journal of Criminology* 347.
- Helen Gavin (2005) 'The Social Construction of the Child Sex Offender Explored by Narrative' 10 *The Qualitative Report* 395.
- Willard Gaylin and David Rothman (1976) 'Introduction', in *Doing Justice: The Choice of Punishments*, Hill and Wang.
- Robert Hughes (1986) *The Fatal Shore*, Vintage.
- Devon Indig et al (2009) *2009 NSW Inmate Health Survey: Key Findings Report*, Justice Health.
- Brian Kalt (2003) 'The Exclusion of Felons from Jury Service' 53 *American University Law Review* 65.
- Immanuel Kant (1887) *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as Science of Right*, T & T Clark.
- Immanuel Kant (1965) *The Metaphysical Elements of Justice*, Bobbs-Merrill.
- Ratna Kapur (2007) 'The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion' 8 *Theoretical Inquiries in Law* 537.
- Stuart Kinner (2006) 'The Post-Release Experience of Prisoners in Queensland' 325 *Trends and Issues in Crime and Criminal Justice*,
www.criminologyresearchcouncil.gov.au/reports/200304-27.html
- Will Kymlicka and Wayne Norman (1994) 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' 104 *Ethics* 352.
- Michael Levy (2002) 'Prisoners Rights to Health and Safety', in David Brown and Meredith Wilke (eds), *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press.
- Michael Levy (2005) 'Prisoner Health Care Provision: Reflections from Australia' 1 *International Journal of Prisoner Health* 65.
- John Locke (1690) 'Of the State of Nature', in *Second Treatise of Civil Government*, Hackett.
- Catharine Lumby (2002) 'Televising the Invisible: Prisoners, Prison Reform and the Media', in David Brown and Meredith Wilke (eds), *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press.
- Susanne MacGregor (1999) 'Welfare, Neo-Liberalism and New Paternalism: Three Ways for Social' 67 *Capital and Class* 91.
- Geraldine Mackenzie (2005) *How Judges Sentence*, Federation Press.
- TH Marshall (1998) 'Citizenship and Social Class' in Gershon Shafir (ed), *The Citizenship Debates: A Reader*, University of Minnesota Press.
- TH Marshall and Tom Bottomore (1992) *Citizenship and Social Class*, Pluto Press.
- Bernie Matthews (2006) *Intractable: Hell has a Name: Katingal: Life Inside Australia's First Super-Max Prison*, Macmillan.
- Bernadette McSherry (2004) 'Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour' 281 *Trends and Issues in Crime and Criminal Justice* 1.
- Kai Moller (2009) 'Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights' 29 *Oxford Journal of Legal Studies* 757.
- Herbert Morris (1968) 'Persons and Punishment' 52 *The Monist* 475.

- James Mudie (1837) *The Felonry of New South Wales*, Whaley and Co.
- Jeffrie Murphy (1979) 'Three Mistakes About Retributivism', in *Retribution, Justice, and Therapy: Essays in the Philosophy of Law*, D Reidel.
- Georgina Murray (2007) 'Who is Afraid of TH Marshall? Or, What are the Limits of the Liberal Vision of Rights?' 2 *Societies Without Borders* 222.
- 'The Night Before Christmas' (2010) *Australian Story*, ABC TV, 29 March.
- James Ogloff et al (2006) *The Identification of Mental Disorders in the Criminal Justice System: Report to the Criminology Research Council*, Centre for Forensic Behavioural Science, Monash University and Victorian Institute of Forensic Mental Health.
- 'Out-of-Touch Deportation Rules Need Review' (2005) *The Age*, 28 November, www.theage.com.au/news/editorial/outoftouch-deportation-rules-need-a-review/2005/11/27/1133026346745.html.
- 'Palm Island Rioter's Lawyers Appeal Media Gag' (2010) *ABC News*, ABC TV, 19 June, www.abc.net.au/news/stories/2010/07/19/2958385.htm?site=news.
- Parliament of Australia Parliamentary Library (2000) 'Mutual Obligation/Work for the Dole E-Brief', www.aph.gov.au/library/intguide/sp/dole.htm.
- Michael Pinard (2006) 'An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals' 86 *Boston University Law Review* 623.
- Ivan Potas (2001) *Sentencing Manual – Law and Principles in New South Wales*, Judicial Commission of New South Wales and Law Book Co.
- Joseph Raz (1986) *The Morality of Freedom*, Clarendon Press.
- Jean-Jacques Rousseau (1923 [1761]) *The Social Contract and Its Discourses*, JM Dent & Sons.
- Kim Rubenstein (1995) 'Citizenship in Australia: Unscrambling its Meaning' 20 *Melbourne University Law Review* 503.
- Kim Rubenstein (2000) 'Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia' 24(3) *Melbourne University Law Review* 577.
- Marian Sawyer (2003) *The Ethical State? Social Liberalism in Australia*, Melbourne University Press.
- Jason Schall (2006) 'The Consistency of Felon Disenfranchisement with Citizenship Theory' 22 *Harvard Blackletter Law Journal* 53.
- Mark Schuilenburg (2008) 'Citizenship Revisited: Denizens and Margizens' 20 *Peace Review: A Journal of Social Justice* 358.
- Peter Shea (1996) *Psychiatry in Court: The Usefulness of Psychiatric Reports and Psychiatric Evidence in Court Proceedings*, 2nd ed, Hawkins Press.
- Thomas Shepherdson (2001) *The Shepherdson Inquiry: An Investigation into Electoral Fraud*, Queensland Criminal Justice Commission.
- Margaret Spencer (1995) 'Sentencing Drug Offenders: The Incarceration Addiction' 40 *Villanova Law Review* 335.
- Melissa Sweet (2009) 'NSW Indigenous Prisoner Health: Where is the Prevention Focus?' 17 *Australian Nursing Journal* 17.
- Margaret Thornton (1996) 'The Legocentric Cltizen' 21 *Alternative Law Review* 72.
- 'Valid Visa Means Deported Addict Can Return' (2006) *Sydney Morning Herald*, 7 January, www.smh.com.au/news/national/valid-visa-means-return-for-deported/2006/01/06/1136387627974.html.
- Andrew Von Hirsch (1976) *Doing Justice: The Choice of Punishments*, Hill and Wang.

- Andrew Von Hirsch and Martin Wasik (1997) 'Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework' 56 *Cambridge Law Journal* 599.
- Tamara Walsh (2004) *Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety*, UnitingCare Centre for Social Justice.
- Tamara Walsh (2007) 'Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK' 33 *Monash University Law Review* 72.
- Michael Walton (2005) *The Death Penalty in Australia and Overseas: A Background Paper*, NSW Council for Civil Liberties, www.nswccl.org.au/issues/death_penalty/australia.php.
- Don Weatherburn (2004) *Law and Order in Australia: Rhetoric and Reality*, Federation Press.
- Victor Windeyer (1962) "'A Birthright and an Inheritance": The Establishment of the Rule of Law in Australia' 1 *University of Tasmania Law Review* 635.

Reported Cases

- Bullock v Dodds* (1819) 106 ER 361
- Chester v R* (1988) 165 CLR 611
- Dugun v Mirror Newspapers Ltd* (1978) 142 CLR 583
- Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575
- Green v Board of Elections of City of New York* 380 F.2d 445 (1967)
- Hirst v United Kingdom (No 2)* [GC] no. 74025/01, ECHR 2005–IX – (6/10/2005)
- Kronlund v Honstein* 327 F. Supp. 71 (ND Ga 1971)
- Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- Lockhart v McCree* 476 US 162 (1986)
- McGarry v R* (2001) 184 ALR 225
- McLaughlin v City of Canton*, 947 F Supp 954 (SD Miss. 1995)
- Pearce v R* (1988) 194 CLR 610
- Pell* 417 US 817 (1974)
- R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115
- Saxbe* 417 US 843 (1974)
- Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28
- Veen v R (No 2)* (1988) 164 CLR 465
- Washington v State* 75 Ala. 582 (1884)

Unreported Cases

- Attorney-General (Qld) v Francis* [2005] QSC 381
- Cable v Sinclair* [1788] NSWKR 7
- Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329
- Katsuno v R* [1999] HCA 50
- Police v Delaney* (2005) Western Districts Magistrates Court, (unrep, 22 Dec 2005)
- R v Einfeld* [2009] NSWSC 119
- R v Stafford* [2009] QCA 407
- Renwick v Bell* [2001] QDC 006
- Vicki Roach v Electoral Commissioner* [2007] HCA 43
- Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68
- Thompson v R* [1999] HCA 43

Legislation

Australian Citizenship Act 2007 (Cth)
Australian Constitutions Act 1842 (Imp)
Australian Citizenship Amendment Act 1984 (Cth)
Canada Elections Act 2000
Commonwealth Electoral Act 1918 (Cth)
Correctional Services Act 1982 (SA)
Corrections Act 1997 (Tas)
Corrections Act 1986 (Vic)
Corrective Services Act 2006 (Qld)
Crimes Act 1914 (Cth)
Crimes (Administration of Sentence) Act 1999 (NSW)
Crimes (Serious Sex Offenders) Act 2006 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Criminal Code (Qld)
Criminal Code (Tas)
Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)
Criminal Law (Sentencing) Act 1988 (SA)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)
Dangerous Sexual Offenders Act 2006 (WA)
Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth)
Forfeiture Act 1870 (UK)
Juries Act 1967 (ACT)
Juries Act 1927 (SA)
Juries Act 2003 (Tas)
Juries Act (NT)
Juries Act 1967 (Vic)
Juries Act 1957 (WA)
Jury Act 1977 (NSW)
Jury Act 1995 (Qld)
Migration Act 1958 (Cth)
Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 (Cth)
Nationality and Citizenship Act 1948 (Cth)
Penalties and Sentences Act 1992 (Qld)
Prisons Act 1981 (WA)
Prisons (Correctional Services) Act (NT)
Representation of the People Act 1983 (UK)
Sentencing Act 1991 (Vic)
Sentencing Act 1991 (Tas)
Sentencing Act 1995 (WA)
Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)

National and International Instruments

Canadian Charter of Rights and Freedoms
Constitution of Australia
European Convention on Human Rights
International Covenant on Civil and Political Rights