Citizenship Revocation as Punishment:
On the Modern Bond of Citizenship and its Criminal Breach

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Introduction

The revocation of citizenship and its legal justification have resurfaced in recent years as a source of public debate and legal controversy.[2] Several countries, including the United Kingdom and Israel have amended their laws making it easier for the state to revoke citizenship of both naturalized and born citizens.[3] Other countries including the US and Canada have rejected similar proposals, but only after fervent political and legal dispute.[4]

The revocation of citizenship has a long history, and dates in the common law tradition at least as far back as the second half of the nineteenth century. The American Civil War and later the Two World Wars and the Cold War gave rise, each in its turn, to discussions of citizenship and its revocation.[5] The current discussion of the revocation of citizenship is associated with the

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[2] For a discussion of different justifications for the revocation of citizenship, see T. A. Aleinikoff, "Symposium on Law and Community: Theories of Loss of Citizenship" 84 Mich. L. Rev. 1471. Emanuel Gross, "Defensive democracy: Is it Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against his own State?" 72 UMKC L. Rev. 51 (2003). C. H. Hooker, "Comment: The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization" (2005), 19 Emory Int'l L. Rev. 305. For a general discussion of citizenship in the United Kingdom, see Lord Goldsmith's report, “Citizenship: Our Common Bond”. For a more critical appraisal, see Walker Clive, "The Treatment of Foreign Terror Suspects," *Modern Law Review* 70, no. 3 (2007).). See also, L. Volpp, "Symposium: New Dimensions of Citizenship: Contribution: Citizenship Undone. 75 Fordham L. Rev. 2579 (2007).

[3] For the United Kingdom, see Section 56(1) of The Immigration Asylum and Nationality Act, 2006 Chapter 13.

[4] N. Grahm, "Note: Patriot Act II and Denationalization: An Unconstitutional Attempt to Review Stripping Americans of their Citizenship," *52 Clev. St. L. Rev. 593* (2004)

[5] For a thorough study of American history, see Rogers M. Smith, *Civic Ideals : Conflicting Visions of Citizenship in U.S. History* (1997), 102-03.

so-called "war against terror" and more broadly with national security, and stricter regulations of migration and naturalization. This new context and the new regulations offer us the opportunity to return to the fundamental questions of law and jurisprudence that lie at its core.

May the state revoke a citizenship that has been legally attained? Is such an act a punitive measure or an administrative one? When punitive, what crime could justify such a severe punishment? What unique duty, if any, do citizens owe the state, the breach of which may justify banishment from the political community?

The revocation of lawfully attained citizenship is currently regulated in a variety of ways, and a high level of heterogeneity exists even within common law countries. Three different models can be identified, though they rarely exist in their pure form in any given country.[6] The first model limits the revocation of citizenship to its voluntary relinquishment. The state cannot revoke a citizenship that was legally attained without at least implicit consent. This model has been dominant in North America. In the United States, for example, following a series of path-breaking decisions of the Warren court in the 1960s, only the explicitly stated wish to relinquish citizenship may justify expatriation.[7] Under the second model of citizenship revocation, which lies at the extreme opposite, the state is allowed to revoke citizenship whenever it has an interest in doing so. This is currently the state of law in the United Kingdom, whose 2006 amendment of the British Nationality Act 1981 Chapter 61 allows the Home Secretary to revoke British citizenship whenever he is satisfied that "deprivation is conducive to the public good." [8] The third model for the revocation of citizenship employs the traditional common law notion of “breach of allegiance.” In 2008 the Israeli parliament introduced a new amendment to section 11 of "The Nationality Law (5712-1952)" according to which, Israeli citizenship can be revoked for a "breach of allegiance," defined as an act of terror, treason or acquiring citizenship in an enemy state or permanent residency in an enemy land.

[6] I have developed this tripartite division and offered a critique of the different models in S. Lavi, "Punishment and the Revocation of Citizenship in United Kingdom, United States and Israel" (forthcoming).

[7] The leading case is Afroyim v. Rusk, 387 U.S. 253 (1967). See also Warren's earlier dissenting opinion in Trop v. Dulles, 356 U. S. 86, especially 92-93 (1958), and his first majority opinion in Perez v. Brownell, 356 U.S. 44 (1958). For a more recent development along similar lines, see Vance v. Terrazas, 444 U.S. 252 (1980).

[8] The provision was introduced by Section 56(1) of the Immigration the Asylum and Nationality Act, 2006 Chapter 13.

In what follows, I wish to offer a different understanding of citizenship revocation and a different model for its practice and justification. I will argue that contrary to existing regulations, the revocation of citizenship can and can only be justified as punishment.[9] This extraordinary punishment may be justified only in the extreme case of a fundamental breach of the duty of citizenship, a duty that will be referred to as "the constitutional bond." This duty radically differs from the traditional common law duty of allegiance, and is grounded in the modern political conditions of *equality*, *self-government*, and *public deliberation*.[10] Furthermore, since revocation of citizenship has implications not only for the status of a person within the national community and under national law, but may also have implications for her status under international law, additional conditions must be met for the revocation of citizenship to take place. The paper first seeks to ground the punitive nature of the revocation of citizenship (Part I), second to establish the existence of a unique duty of citizenship (Part II), the conditions for its fundamental violation (Part III), and the justification of its punishment by the revocation of citizenship (Part IV) and finally to briefly address the additional conditions for its application under international law (Part V).

On a deeper level of analysis the revocation of citizenship concerns the relationship between criminal law and constitutional law, and our inquiry into the revocation of citizenship seeks to further the understanding of this relationship. The scholarship that has examined the interrelationship of constitutionalism and criminal law commonly falls under one of two perspectives (or their combination). Under the first, the two legal branches are viewed as inherently distinct.[11] Penal law grounds the sovereign's prerogative to enforce social order, whereas constitutional law protects the rights of the individual from the unjust application of state power. The legislator is free to impose criminal prohibitions and sanctions as long as these do not violate concrete constitutional rights, such as fundamental human liberties and human dignity. Constitutional law, in other words, prescribes the external boundaries and limits of the practice of criminal law. Whereas punishment may have certain internal limits that follow from the inner logic of criminal law, such as the culpability requirement, constitutional

[9] I refer here to revocation of citizenship in its strict sense, as the non-voluntary revocation of legally attained citizenship.

[10] Compare with Kant's concepts of lawful freedom, civil equality and civil independence, in *Kant: Political Writings*, 139.

[11] See, for example, D. Husak, Overcriminalization: The Limits of Criminal Law (2008).

law provides the external limits on the practice. Criminal law under this perspective is both distinct from and subordinate to constitutional law.

A different perspective views constitutional law not as external to criminal law, but rather as requiring criminal to adhere to its own principles.[12] Constitutional law does not prescribe new values, which would otherwise be foreign to criminal law, but rather guarantees the validity of existing criminal law principles, by providing them with a constitutional footing. Thus, for example, constitutions have been interpreted as upholding *mens rea* and *actus reus* requirements.[13] Constitutional law, under this model, commonly limits positive criminal law, but may also demand the expansion of criminal law as German constitutional law has done in enforcing the prohibition on abortion.[14] By recognizing these values, constitutional law grounds the universal values of human dignity and equality that already exist implicitly or explicitly within criminal doctrine.

The following inquiry into the revocation of citizenship will provide yet another perspective on the relationship between criminal law and constitutional law. This perspective emphasizes the significance of the constitution as the binding of the political community as a self-governing community. The constitution stands in this context not as the shield guarding the vulnerable individual from the coercive power of the state, as in the first perspective, nor as the solid ground of human dignity from which this coercive power derives its legitimacy, as in the second, but rather as the commitment of the political community to govern itself in accordance with self-given law.[15]

As we shall see, this additional perspective has clear implications for understanding the revocation of citizenship as punishment. In contradistinction to the first perspective, the

[12] See, for example, M. Dubber, "Toward a Constitutional Law of Crime and Punishment," Hastings Law Journal, Vol. 55, 2004.

[13] On *actus reus* see, for example, the American case, Robinson v. California, 370 U.S. 660, and on *mens rea* see, for example, the Canadian case, Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

[14] See the recent discussion of the matter in K. Günther, xxx.

[15] The perspectives are not necessarily exclusive. Here I put emphasis on the component that seems most relevant for the revocation of citizenship. For a discussion of the compatibility of these different perspectives, see A. Brudner, "Punishment and Freedom: A Liberal Theory of Penal Justice" (forthcoming). For an emphasis on the democratic aspects of criminal law, see K. G

revocation of citizenship is not a means for promoting social order within given constitutional boundaries, but rather guards the constitutional bond understood as a commitment to self-government. Unlike the second perspective, the revocation of citizenship (or its limitations) does not follow from the violation of abstract universal norms, but rather from the breach of the bond of a concrete political community. Finally, the revocation of citizenship as punishment is neither a mere means to prevent or deter threats to the social order, nor is it simply a retributive measure for the violation of the rule of law, but is rather a fundamental consequence of the breach of the constitutional bond leading to the severance of the ties between the individual and the political community.

I. Revocation of citizenship as Punishment

Considering the revocation of citizenship as punishment may have an intuitive appeal, but is in fact commonly practiced as an administrative measure. The revocation of citizenship is commonly seen as the flip side of the power of the state to grant citizenship, namely as an administrative power enforced by the executive branch. In the US it has been recognized as part of the plenary power of the State and a similar condition prevails in other countries.[16] Though in most jurisdictions designated tribunals overview the process, these tribunals are administrative and do not follow the rules of criminal law, evidence and procedure.[17]

Of course, some cases of citizenship revocation are and should remain administrative procedures. The prime examples are cases in which citizenship has been fraudulently acquired, typically by falsifying testaments concerning a criminal past or membership in an illegal organization. Citizenship revocation in such instances may better be thought of as citizenship annulment, an administrative procedure, which will not concern us in what follows.[18] A second set of cases involves voluntary expatriation. A citizen may wish to give up her citizenship, for example, in order to acquire the citizenship of another country that does not allow dual citizenship. Like annulment, so too voluntary relinquishment will not be discussed here. Our interest lies exclusively in cases in which legally attained citizenship may be non-voluntarily

[16] xxx
[17] xxx
[18] It should be noted that the border between annulment and revocation is not always clear in reality, especially since government has a broad discretion in cases of annulment and may use its powers *de facto* to revoke citizenship

revoked. The revocation of citizenship in such cases (hereafter, simply referred to as the revocation of citizenship) is wrongly treated as an administrative procedure, and can only be justified as punishment.

A few preliminary remarks should be made in support of the characterization of citizenship revocation as punitive. First, even as a matter of positive law, the fact that citizenship revocation is classified as an administrative act cannot in itself determine the legal nature of the act. The status of expatriation depends on a correct interpretation of the law and not on its classification in the law books.[19] Whether a State act is punitive or administrative should be determined according to substantive considerations. Indeed, the US Supreme Court recognized the punitive nature of the revocation of citizenship at least in some cases. Thus, for example, in the matter of Mendoza-Martinez, the court held unconstitutional an Act of Congress that divested citizens, who deserted the army in times of war, from their citizenship. The court concluded that the revocation of citizenship in this case was indeed punitive, and enumerated a list of relevant criteria, including "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned …"[20]

These criteria may be helpful to strengthen the intuition that the non-voluntary revocation of citizenship is punitive, but such lists cannot substitute for a comprehensive understanding of the criminal nature of citizenship revocation. In what follows, I will offer such an account, and argue that the non-voluntary revocation of legally attained citizenship *can and can only* be justified as a punishment. The major part of the article will be devoted to showing that expatriation is a just punishment, but first, a few words should be said on the significance of citizenship and consequently how its revocation, if justifiable, can only be justified as punishment.

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[19] In a case involving this very issue, namely, whether the revocation of citizenship is punitive, Justice Warren remarked ironically, "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" Trop v. Dulles, 356 U.S. 86, 94 (1958).

[20] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), 168-169.

Citizenship has two meanings, concrete and foundational. The concrete sense of citizenship concerns a variety of privileges, powers and immunities that are associated with citizenship.[21] Of those, two are worthy of special consideration. First, citizens have the power to elect their representatives and to be elected to office. Citizens, in other words, have the power to give law to themselves and to govern themselves politically. Second, citizens have the liberty to enter their country and the immunity not be removed from it involuntarily.[22] The first concerns the active sense of citizenship, while the second concerns the passive sense of citizenship. There are many other privileges, powers and immunities (hereafter, rights of citizenship) that citizens may have, many of which, however, are contingent and none of which is as fundamental as the two mentioned.[23]

In addition to this concrete sense, citizenship has a second more fundamental meaning. Citizenship designates membership in the legal and political community, and is the ground from which the concrete rights of citizenship, as those mentioned above, are derived. Citizenship, in this sense, has been signified as "the right to have rights," that is, as a fundamental status that gives rise to concrete rights.[24]

The revocation of citizenship operates on both levels and denies the citizen concrete rights and divests her from membership in the legal and political community. Even if one concedes that the deprivation of certain rights, even fundamental ones, such as property rights, or the right to bodily integrity may be sacrificed in the name of a higher common good or an overwhelming national necessity, things are different when it comes to the very membership in the political community. Whereas the deprivation of concrete rights may, at times, be justified in the name of membership in the legal and political community, the very belonging to the political community cannot be justified in such a way without leading to self-contradiction. If the denial of

[21] I use these terms in their Hohfeldian sense, see, Hohfeld, Wesley. *Fundamental Legal Conceptions*. Arthur Corbin, ed. (1978)

[22] Though aliens may legally enter the country and may have some right to reside in it, their right is always contingent and in any event is not guarded as such by the constitution. Only for the citizen is residency a matter of constitutional right.

[23] See xxx.

[24] Arendt, *Origins of Totalitarianism*,

such fundamental rights can be justified, it can only be justified as a punitive measure, namely, as its own self-negation. The remainder of this article will be devoted to clarifying if and under what conditions does self-negation take place.

It is important to clarify from the outset that even if one concedes the punitive nature of expatriation there are at least three contrasting conclusions that may follow. One possibility is to acknowledge that the revocation of citizenship is punitive and precisely for this reason to deny the legitimacy of the practice. This conclusion was indeed drawn by the majority opinion in the Mendoza-Martinez case cited above. The second possibility is to claim that a citizen that has violated the law in such a fundamental way, should indeed be punished, but not as a citizen, but rather as an enemy. This would entail the application of extraordinary criminal law procedures on the assumption that by her own acts the criminal denied herself the right to be prosecuted as a member of the community. A position similar to this has been developed by the German scholar Günther Jacobs, albeit not in the specific context of citizenship revocation, but more generally as part of criminal law jurisprudence.[25] The third possibility, and the one which I wish to advocate, deems the revocation of citizenship as a legitimate form of punishment, without viewing the criminal as an exception to the rule of law. The revocation of citizenship punishes the citizen qua citizen by denying citizenship.

This position may seem at first paradoxical. Either the citizen is tried as a citizen, and should consequently be punished as a citizen by ordinary criminal sanctions.[26] Or, if her actions cannot be punished in accordance with ordinary criminal law, then there is good reason to suspect that the ordinary criminal process may not be adequate to try such crimes. Put differently, how can a criminal process that is premised on the fact of citizenship, conclude in a denial of this premise? A one-sided resolution of this alleged Gordian knot would lead to either of the two positions just discussed. Anthony Duff, who has recently raised a similar concern, offered a more nuanced solution. For Duff national criminal courts may not be able to maintain

[25] See Carlos Gómez-Jara Díez, Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and its Relevance to the Anglo-American Discussion of the Legal Status of Unlawful Enemy Combatants, New Criminal L. Rev. Fall 2008, Vol. 11, No. 4, 529.

[26] Compare with Coke's famous opinion in the Calvin case (see below note 25), who claims that "Even if the subject were a traitor, he had a right to his king's protection against lawless violence up to the moment when the duly authorized executioner's blade fell", quoted in, Rogers M. Smith, *Civic Ideals : Conflicting Visions of Citizenship in U.S. History*, *The Yale Isps Series* (New Haven: Yale University Press, 1997), 46.

their neutrality when a citizen is charged for committing acts of terror against the political community. To resolve this tension Duff suggests that these cases be tried by an international criminal tribunal.[27]

Quite to the contrary, I wish to argue that there is no paradox or tension when a national court tries a citizen for a crime, which puts into question her belonging to the community. The reasons will be explored at length in what follows, and here I only wish to hint at one important aspect. The paradox is based on the assumption that punishment is added to the wrong as a further consequence for either preventive, deterrent or retributive ends. The paradox disappears once it becomes clear, as we shall see, that the revocation of citizenship is not a further consequence of the breach of the constitutional bond, but is rather one and the same with the deed itself. The breach of the constitutional bond and the revocation of citizenship are two sides of the same coin, namely, the "falling out" of the citizen from the political community.

II. The Law: The Constitutional Bond

The justification of citizenship revocation as a punishment must begin with the identification of a duty of citizenship the breach of which would justify such a severe punishment. But do citizens qua citizens have any obligations under criminal law? The traditional Common Law answer to this question was unequivocal.[28] The duty, which had its origins in the feudal relationship of serfdom, was known as liegance (later incorrectly named "allegiance"). "Liegance," explained the court in the famous Calvin Case of 1608, "is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to

[27] A. Duff, "Citizens, Enemies, Outlaws: The Criminal Law and its Addressees", unpublished paper presented at Hebrew University, 21 May 2008, appears online http://law.huji.ac.il/eng/calendar.asp?act=event&event_id=54&cat=776&thepage=iruim

[28] D. A. Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" 15 Melb. U. L. Rev. 664 (1985-1986).

obey and serve him; and he is called their liege lord, because he should maintain and defend them."[29]

The duty of allegiance was owed by all subjects who were born under Sovereign rule, as well as by all naturalized person, who were often required (and in many countries still are) to pledge their allegiance. Under traditional Common Law the duty of allegiance was perpetual. The rule that no subject could cast off her duty of allegiance without the consent of the Crown existed in the Common Wealth for centuries, and was abandoned only in the second half of the nineteenth century.[30] Since the duty of allegiance was reciprocal, guests and residents too owed this duty as long as they enjoyed the protection of the Crown.

The duty of allegiance, though a relic from past centuries, continued to play a role long into the modern era, and can still be found today in certain Common Law jurisdictions. First and foremost, this duty has played a central role in the revocation of citizenship from naturalized citizens.[31] Revocation of citizenship could take place when the subject "showed himself to be disloyal or disaffected to his Majesty." The duty to be loyal to the Crown was prevalent in pre-WWII across the British Common Wealth including Canada, New Zeland and India. [32] Gradually with their growing independence, the former Common Wealth countries replaced the duty of loyalty to the British Crown with a duty of loyalty to the state.[33] Some countries, including Israel and India, continue to base their laws of citizenship revocation on the breach of

[29] Calvin´s Case (1608) 2 St. Trials 559, at 614. The case concerned a legal question of utmost importance at the time, concerning the nature of this the duty of allegiance and whether it was owed to the King´s natural body or to his political persona.

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[31] It is important to note that in common law countries most cases of citizenship revocation during the first half of the twentieth century concerned naturalized rather than born citizens.

[32] In Indian, for example, the central government may deprive citizenship under section 10 of the Indian citizenship Act, 1955 "if it is satisfied that… The citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established." http://www.scribd.com/doc/4049633/Indian-Citizenship

[33] Even though in the United States allegiance was rejected as the criterion for the revocation of citizenship, the duty of allegiance continued to prefigure in the definition of treason. Only a person, who owes the state a duty of allegiance, may be tried for treason. A person, who performs acts of treason without owing such duty will not face criminal charges, but will rather be treated as an enemy. Compare with the definition of treason in Section 46 of the Criminal Code of Canada.

allegiance,[34] but most common law countries have rejected this duty as archaic, and have devised new criteria for the revocation of citizenship.

The United Kingdom jurisprudence is a good case in point. In recent years, the old formulation which required the state to prove "disloyalty" or "disaffection" was viewed as insufficient to confront new challenges to national security in the age of global terror. Consequently in 2002 the UK parliament adopted a new criteria, requiring that a citizen act in a way "seriously prejudicial to the vital interests of the United Kingdom." But soon, this formulation too was seen as insufficient, and the legislator settled on the all inclusive formulation of "public good". [35]

If the old common law duty of allegiance belongs to the past, as indeed it does, this is not because the duty of allegiance cannot fulfill the modern needs of national security, but rather because it is in compatible with the political and legal justifications of the modern democratic state. The duty of allegiance, and similar notions such as loyalty, fidelity, and fealty, presuppose the hierarchical subordination of subjects to the sovereign, an idea alien to modern democratic sensitivities.[36] The notion that citizens are passive subjects, who offer their allegiance in exchange to protection, is at odds with the modern notion of democratic politics and self-government.

But the rejection of the common law notion of allegiance should not necessarily lead to either of the two common legal conclusions: denying the power of the state to revoke citizenship altogether, or enhancing the state's power to revoke citizenship in the name of the public good, without requiring it to first prove a fundamental breach of law. Rather one should inquire whether a new civic duty should be acknowledged, and what new content would its breach, and punishment have?

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[34] See above, note xxx.

[35] Secretary of State for the Home Department v David Hicks: CA (Civ Div) (Lords Justice Pill, Rix, Hooper): 12 April 2006. Law Society Gazette, 27 April 2006, LSG 103.17(23)

[36] See M. D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005) 22-24.

Even under modern political conditions citizens qua citizens have unique legal obligations. The modern duty of citizenship is grounded in the notion of an *egalitarian, free* and *deliberative polity*.[37] Rather than a duty of allegiance (Lat., liege), which entails passive submissiveness to an individual ruler or to the state, the new duty is a bond (Lat., ligare), which binds the citizens together as equal citizens committed to self-govern. Rather than owing allegiance to the Crown or the State, citizens are bound to the constitution, giving rise to their legal and political co-existence as equal individuals in a free polity.

This constitutional bond should not be confused with the notion of "constitutional patriotism" commonly associated with the writings of Jurgen Habermas. The constitutional bond unlike constitutional patriotism is limited to the formal aspects of self-rule and self-government and does not refer to any substantive constitutional content such as human dignity. [38] The focus here is on the more limited notion of self-government and deliberation is appropriate since our concern is with the most fundamental grounds of the legal community as a political community. This foundational understanding of citizenship can be traced back to the Greeks, who saw the essence of citizenship in active political participation.[39] It is only the violation of the constitution at its foundation, which may justify the exclusion from the political community.[40]

Most criminal law offences apply equally to citizens, residents and aliens, and it may seem that citizenship does not bare any relevance to substantive criminal law.[41] This may indeed be true for all criminal law duties with the exception of one. Citizens have

[37] See above, note 10.

[38] Nor do the two concepts have the same aim. Consequently, the notion of the constitutional bond is not vulnerable to the same kind of criticism that has been rightfully leveled against Habermas´s theory. See, for example, M. Kumm, "Thick Constitutional Pateriotism and Political Liberalism: On the Role and Structure of European Legal History,"6 GLJ No. 2 (2005)

[39] Aristotle, for example, writes "As soon as a man becomes entitled to participate in authority, deliberative and judicial, we deem him to be citizen." Aristotle, Politics iii, 1.

[40] Violation of other aspects of the constitution may have other consequences, which do not concern us here, such as exclusion from civil society. See A. Ripstein forthcoming book on Kant, xxx.

[41] See M. Dubber, "The Citizen in Criminal Law" (forthcoming).

a unique duty to the constitutional bond itself. Whereas the rule of law in Feudal and Monarchical polities derives its validity and legitimacy from the power invested in the ruler, the modern rule of law derives its validity and legitimacy from the fact that it is a self-given law. Whereas traditional common law imposed a duty on subjects to keep allegiance to the King modern criminal law should recognize the duty of citizenship to keep their constitutional bond. They should not act in a way that would advertently undermine the power of the political community to self-govern. How precisely can such duty be violated will be our concern in the following section.

III. The Crime: A Breach of the Constitutional Bond

What crime, if any, could justify the revocation of citizenship? Treason, sedition, espionage, residency in an enemy country, crimes against humanity, military desertion during war, and the incitement of terror have all been employed, at one time or another, to justify the revocation of citizenship.[42] But which can actually justify such a radical punishment? Clearly it is not the severity of the crime as such that would justify the revocation of citizenship. The unique punishment must correspond to the uniqueness of the crime and the violated duty. Only a fundamental breach of the constitutional bond can justify exclusion from a self-constituting polity.

One may argue, and indeed some have,[43] that all crimes constitute such a breach. The public character of criminal law suggests that criminal offences do not only violate individual rights, but are an offence against the public as a whole. The criminal sets himself advertently against the law, and thus manifests utter disrespect to the rule of law. Arguably, all crimes that manifest such disrespect would constitute a breach of the constitutional bond and should be punished by exclusion from the political community. Indeed, most US jurisdictions have

[42] Aleinikoff, "Symposium on Law and Community: Theories of Loss of Citizenship" 84 Mich. L. Rev. 1471.

[43] Compare with J. G. Fichte, *The Science of Rights,* 490.

denied felons the right to vote, and have occasionally justified the penalty along this line of argumentation.[44]

We shall return to this argument and offer a more elaborate critique of disenfranchisement at a later stage. It should suffice for the time being to acknowledge that not all crimes are the same. Not all directly concern the existence of the political community as a community. Not all constitute a fundamental breach of the constitutional bond, the principle on which the community is founded. A clear distinction can be drawn between specific violations of the law, and a breach of the principle that underlies all law as such, namely the power of the political community to give law to itself. All crimes oppose some aspect of the community's self-government, but only a fundamental breach of the constitutional bond sets to undermine self-government as such.

The constitution unites the citizens in a self-governing polity grounded in the principles of political equality, autonomy and public deliberation. The breach of the constitutional bond should entail the violation of these essential elements. But how so? Here again a reflection on the history of the common law may shed light on the necessary transformation that the breach of allegiance should undergo in a modern democracy.

For centuries, the violation of the traditional duty of allegiance was self-evident, though its exact contours were often blurred and highly disputed. The duty was owed to the King and any offence aimed at undermining His rule could be regarded, in principle at least, as a fundamental breach of this duty. The paradigm for the breach of allegiance was high treason, and first and foremost, an attempt at the life of the King. Though the common law prohibition of treason predates the Treason Act of 1351, the latter served as its most authoritative formulation up to modern times. The act defined numerous ways in which the offense may be committed, the most important of which was "compassing the death of the King." Others included, "levying war against the King in his Realm" or "adhering to the King's enemies in his Realm, giving them aid and comfort in his Realm or elsewhere."[45] The loose term, "compassing death" which did not specify any actus reus requirement, allowed courts to deem

[44] See, for example, M. Tonry, "Symposium: The Future of Punishment Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia." 46 UCLA L. Rev. 1895 (1998-1999).

[45] See, W. Hurst, "Treason in the United States" 58 Harv. L. Rev. 226, 252 (1944-1945)

any offense to the public a political threat, and hence an act of treason. By the time of the American Revolution this common law doctrine of "constructive treason" became an infamous means to suppress political dissent.[46]

The old common law crime of treason, which was grounded in the feudal duty of allegiance, is incompatible with modern democracy. Treason was the feudal *ur*felony and was based on hierarchical relationship between ruler and subjects, on their subjugation to the ruler, and on the notion that one voice must represent the political community as a whole. The new breach should correspond to the radically different conditions of *equality*, *autonomy* and *public deliberation*.

First, the breach of the constitutional bond cannot center on the ruler. The modern democratic constitution is based on a bond between *equal* citizens and its breach should take into account this equality. There is much more to the modern democratic revolution, however, than merely cutting off the king's head. The equality of citizens requires more than the substitution of the figure of the King with that of the head of the State, or even more generally the State. Breach of allegiance no matter how its object is defined can no longer be the paradigm for the fundamental breach.

Second, and closely related, the ground of the duty of allegiance can no longer be based on the passive and subordinate status of the ruled. The feudal duty of allegiance emerged as a reciprocal duty of the protected subject to the protecting rule of law. Furthermore, the modern democratic polity is based on active participation, rather than passive subordination. The breach of the modern bond must violate the capacity of autonomous self-rule. Namely, it must consist of a violent attempt to determine the political process in an attempt to replace the self government with heteronymous rule.

Third, one of the preconditions of modern democracy is public deliberation. It does not suffice that the views of the citizens are represented in the government. The citizens should be actively involved not only through the ballot but through the possibility of an open discussion and a public exchange of opinions.[47] The breach of the constitutional bond should pose a threat to the

[46] Ibid, xxx.

[47] See above, note xxx.

public aspect of self-government, and threaten to foreclose the possibility of free public deliberation.

When the political bond is based on fidelity to the ruler the paradigm crime is breach of allegiance. When the political community, however, is based on a constitutional bond between equal, autonomous and deliberating citizens, the paradigm breach is terror. Though not all acts of terror constitute a fundamental breach of the constitutional bond, terror is the paradigm for such a breach. This is the case not because terror undermines national security and personal safety, but rather because it introduces violence into the public sphere seeking to undermine the very possibility of a self-governing polity. Terror, or more accurately, political terror, targets citizens rather than the rulers. It is commonly indiscriminating and treats all citizens as equal, albeit in a negative way. It attempts to impose with violent means an external position on the political process, and seeks through individual acts of violence to spread overall public fear and bring to a halt the open public debate. Only acts of terror of a certain magnitude, namely, those which have the capacity to fundamentally undermine the possibility of self-government and which are performed with such intent constitute a fundamental breach of the constitution.

Terror is not the only way to breach the constitutional bond, but it is its paradigmatic manifestation. Constitutional crimes could include other violent attempts to fundamentally undermine self-government. An assassination of the head of state, for example, may constitute a breach of the constitutional bond as long as it is understood within the new paradigm, namely as a political assassination aimed at undermining political self-government. However, other crimes that in past times constituted a breach of allegiance can no longer be included in the breach of constitutional bond. These would include all attempts to undermine national security without introducing violence to the public political sphere. Thus, for example, espionage would not comprise a constitutional breach for it does not involved violence.[48]

[48] Not all those tried for treason have committed violent acts. In 1947, Hans Max Haupt was convicted of treason and sentenced to life in prison for aiding his son who was a spy for Germany during World War II. The son, Herbert Hans Haupt, was tried, convicted, and executed by a military tribunal. The elder Haupt helped his son find a job, gave him a place to live, and bought him a car, all while knowing that his son was working as a German spy. The government argued that the father supported his son's espionage by committing acts of aid and comfort to the enemy. Haupt's trial was the last treason case heard by the U.S. Supreme Court.

One further limitation on the definition of the constitutional breach concerns the public nature of the crime. Since the offence is not defined by its threat to national security, but rather to political self-government and free public deliberation, the offence must not only be directed against the public but must take place in public. This may require special evidentiary requirements as exist, for example, in the American constitute with respect to treason. Out of fear that the expansion of treason accusations would infringe not only on individual rights, but also on the possibility of having an open public discussion, the American Constitution requires according to Article 3, section 3 that: “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court…” The requirement of two witnesses or confession in open court does not only limit the possibility of abuse of state authority, but is part of the substantive definition of the crime. A crime against the public must manifest itself in public. The American Revolutionist fully understood the importance of the public dimension of this crime, as Chief Justice John Marshall explained in his decision in Ex parte Bollman:

> "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that ... it has been determined that the actual enlistment of men to serve against the government does not amount to levying of war."[49]

A detailed delineation of the crimes that constitute a constitutional breach will not be attempted here. Such a mapping would require a more precise definition of the nature of and terror, and would need to address, among others, the precise nature and magnitude of a terror attack that would constitute a breach of the constitutional bond. Such decisions depend to an extent on what the given political community defines as a fundamental breach of its constitution. Clearly, as in other criminal offences, the motivation of the crime should not be considered, and only intentions, which become manifest in the crime itself, should be taken into consideration. Furthermore, due to the extremity of the punishment, inchoate crimes such as conspiracy should not be included.

[49] 8 U.S. (4 Cr.) 75 (1807).

IV. The Sanction: Banishment

Even if one concedes the existence of a unique duty of citizenship and the conditions of its violation, the question remains as to the proper punishment. May the breach of the constitutional bond be punished with the revocation of citizenship? To answer this question we must have a better understanding of both the revocation of citizenship and its punitive character.

The first thing to be noted about the revocation of citizenship is its severity. In one of the most powerful condemnations of revocation of citizenship as punishment, Justice Warren explained that though expatriation does not involve the infliction of physical pain, it is nevertheless a cruel and unusual punishment, for "[t]here in, instead, the total destruction of the of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development... This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress."[50]

Without doubting the severity of the punishment, I wish to argue that under the circumstances of the breach of the duty of citizenship, as discussed above, it is the criminal who violates the constitution, not the act of punishment. It should be noted, however, that the main concern of Justice Warren was that the revocation of citizenship would leave the citizen stateless. This is a valid concern of international law to which we shall return in the next section. Our primary concern, however, is with the national community and national criminal law.

The revocation of citizenship has two different meanings, which correspond to the two senses of citizenship discussed above, concrete and fundamental. In its concrete sense, the revocation of citizenship deprives a person from his privileges, powers and immunities as citizen. These can be further divided into active and passive rights. Since citizenship entails both living under the law and giving the law, the revocation of citizenship entails, both deportation, that is banishment from the right to live under

[50] Trop v. Dulles, 356 US 86 (1958), 101-102.

the law, and disenfranchisement, that is banishment from active membership in that political community. The revocation of citizenship is thus a denial of both the active and the passive rights of citizenship, and we should first ask whether the denial of these concrete rights can be justified.

The denial of citizenship rights can be understood and justified as a retributive measure. The citizen who has breached the constitutional bond has violently attempted to undermine the power of the community to self-govern. The proper punishment for such an act would be to deny her the right of membership in the political community. The criminal offender attempted to exclude herself from the general duty of all citizens to respect the rule of self-government, and in turn, will be excluded from the general rights of citizenship and be denied the right to self-govern.

The application of the rule of *lex talionis* to the case of citizenship revocation may seem at first quite straightforward, but in fact raises certain difficulties that in the final analysis will lead us to abandon the notion of retributive justice for a different justification of punishment.

The first problem with the retributive justification of citizenship revocation is that it is unclear why citizenship rights should be revoked *in toto*, rather than the more limited right to actively participate in self-government. In other words, it is unclear why the breach of the constitutional bond should be punished by citizenship revocation rather than by disenfranchisement. The question is especially acute since punishments of disenfranchisement exist in certain jurisdictions, primarily in the United States.

The solution to this problem requires a deeper understanding of the legal structure of citizenship, and though the solution can be reconciled with notions of retributive justice, it opens the possibility for a different understanding of the punitive character of citizenship revocation. While it is true that in theory citizenship rights can be divided into their passive and active components allowing the latter to be denied without denying the former, such a division is at odds with the egalitarian ethos of the modern democratic polity. Feudal and early modern societies had political classes, and granted some but not all citizens (or subjects) the right to actively participate in the political processes. Still in the nineteenth century and early twentieth century,

owners of property had voting rights whereas women and slaves were disenfranchised. Within a political structure, which already recognized two different classes of citizens, one could perhaps justify disenfranchisement as punishment. Under current notions of egalitarianism such a distinction must be ruled out. If the revocation of citizenship can be justified it can only be justified in its totality.

Furthermore, under modern democratic conditions of self-government the active sense of citizenship is logically and normatively prior to the passive right of citizenship. It is only because citizens have the right to participate in the giving of the law, that they also have constitutional rights to live on the land and to be governed by the law.[51] Once the active constitutional right of citizenship has been revoked there is no longer a basis to ground the passive constitutional right of citizenship. The citizen becomes a mere resident, and may enjoy only the non-constitutional rights of residency that the latter enjoys. In other words, with the loss of citizenship the citizen loses her constitutional right not to be deported.

The second problem is even more fundamental. How can the unique punishment of citizenship revocation be justified in a retributive system in which all felonies are in principle punished by the same kind of measure, namely, by imprisonment? The system of imprisonment assumes that all felonies are of the same nature and differ only in degree.[52] Why would the breach of the constitutional bond not be punished in a similar way and matched by a punishment that would correspond to the severity of the deed? What makes the breach of the constitutional bond so unique as to justify a unique type of punishment?

The answer that has already been alluded to is that the breach of the constitutional bond is indeed a unique crime. It is not simply different from other crimes, but it is more fundamental. The crime is directed against the very foundation of the law and

[51] The emphasis here is on constitutional rights, rather than other recognized privileges of residents and other aliens.

[52] Of course, the one important exception is the death penalty in systems in which this punishment is allowed. There is a certain analogy that could be drawn between the death penalty and the revocation of citizenship understood as a verdict of political death. This idea requires further development and exceeds the current discussion.

therefore gives rise to a radical punishment, namely to the banishment of the criminal from the political community.

Though the punishment of citizenship revocation may still be construed as retributive, its unique nature raises the possibility that the revocation of citizenship is not only a different punishment, but punishes differently. Perhaps the revocation of citizenship is not a retributive measure, through which the crime is countered by an equal and opposite force that seeks to negate it, but is rather a self-contradiction and a "falling out" of the legal community.

The notion of punishment as a "falling out" can be best understood through a familiar example. A lawyer, or any other member of a professional association, who breaches the rules of professional ethics in a fundamental way will be disbarred. Disbarment is a punitive measure, but is not retributive. It is simply a finding by the court that the deeds performed disqualify an individual from continuing to belong to the respectable ranks of his profession. Such punishment does not aim to correct the wrong, nor to price it. Furthermore, whereas in retribution after the criminal "pays the price" for his actions she is forgiven, disbarment is not followed by forgiveness and reintegration into the community. Disbarment is not a legal response to the crime, but simply an official condemnation of the crime and a declaration of its self-evident legal consequences. Once the radical nature of the crime has been proven in open court, the verdict merely confirms what has already happened, namely that the convict has fallen out of the community.

V. International Law and the Stateless Person

The discussion, thus far, has focused on the political community and the violation of its constitution. The revocation of citizenship, however, has implications for membership in the international community as well. This is the case whenever the accused has only one citizenship, and will remain stateless, if his citizenship is revoked. The revocation of citizenship in such instances has bearing on the status of the person under international law, because membership in the international

community is mediated by membership in a specific national community. The revocation of citizenship in such a case, may be a violation of international law.

There are certain international law declarations and treatise concerning the revocation of citizenship. The 1930 Hague Convention recognizes the right of countries to determine their citizenship, but only to the extent that it is practiced within the confinements of international law. The 1948 Universal Declaration of Human Rights declares more specifically that "no one shall be arbitrarily deprived of his nationality" whereas the 1961 Convention on the Reduction of Statelessness requires contracting states not o deprive people of their nationality "so as to render them stateless." And yet, the Convention includes several exceptions including in cases of "disloyalty to the Contracting State."

Though under current international law, states seem to have the right to create stateless people, this right should be challenged. Citizenship in a political community is a political right and can be revoked as punishment for the breach of allegiance to a civic community. However, since citizenship is not only a political right secured in a political community, but is also a human right grounded in international law, citizenship in a political community can only be revoked if the convict is not left stateless, i.e. without any citizenship. This consideration requires further elaboration, but should not be forgotten. There should be no exceptions to this rule, and no legal construction, such as permanent residency in a foreign country should be used as substitute.[53]

Conclusion: Citizenship Revocation and Punishment

The revocation of citizenship is an extraordinarily harsh punishment. It excludes a person from the political community, deprives her of active membership in the political sphere, and makes her vulnerable to deportation. The non-voluntary revocation of legally attained citizenship has consequently been rejected by many countries, including the United States, Canada and Germany, out of concern for individual rights. In contradistinction, it has been applied by

[53] Compare with the Israeli law mentioned above in the introduction.

countries, which in the name of "national security" or “war against terror” have been willing to deprive citizens from their fundamental rights through administrative procedures. Still other countries have relied on traditional and arguably archaic justifications for the denial of citizenship such as "breach of allegiance" to the state.

In this current legal and political constellation, a defense of citizenship revocation may be perceived by the liberal minded as wrong headed and perhaps dangerous. Even if the arguments discussed above seem reasonable, and even if under the very limited and extreme circumstances which have been prescribed the punishment may seem justified, one may still wonder whether concern over the exploitation and abuse of state power especially in times of emergency should not have a decisive weight in such delicate matters, leading perhaps to a pragmatic rejection of citizenship revocation.

Though citizenship revocation must first and foremost be considered on its own merits, and though scholarly thinking should proceeds in its course regardless of any state of emergency, pragmatic concerns may still have their place. But here too citizen revocation as discussed above has something to offer. This is self-evident in countries in which citizenship revocation is practiced with very little, if any, substantive legal limitations, and where the introduction of the considerations discussed above may bring to an end the abuse of state power. But this is also true for states in which currently citizenship cannot be legally revoked. Thinking of citizenship as a natural fact, which lies beyond the reach of law, may seem to secure the ideal of citizenship, but in the final analysis may undermine it. If citizenship can be maintained despite the most fundamental attempt to undermine its very foundation, what good is citizenship for?

In the final analysis, the revocation of citizenship raises the most fundamental question of punishment: is punishment an infringement on human rights, which requires an external justification or is punishment the very vindication of right.