Prisoners as Citizens

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Introduction

Late in the year 2000, millions of people around the world followed the US Presidential election cliff-hanger. They were introduced to the mysteries of the 'hanging chad' and left wondering at the absence of both a federal electoral agency and a uniform ballot paper, and the fact that the electoral processes in the vital State of Florida appeared to be in the partisan hands of one of the two candidate's brothers. They watched aghast as the US Supreme Court demonstrated that its decisions could be read off in advance on straight party political grounds, mocking the actual practice of the separation of powers (insert case ref Bush v Gore). Meanwhile a massive disenfranchisement of potential voters passed largely unnoticed. While the Florida electoral college vote and the entire election hung on a few hundred votes, 436,900 Florida citizens, predominantly black, were denied the vote because of a prior conviction for a felony.

Figures provided by The Sentencing Project, a private research organisation which promotes electoral reform, in its report *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998) indicate that 46 US States currently prohibit inmates from voting while serving felony sentences; 32 prohibit felons from voting while on parole; 14 disenfranchise all ex-offenders who have completed their sentences and 10 of these disenfranchise ex-felons for life. Disenfranchisement occurs even where the offender was convicted of a relatively minor crime or was not imprisoned.

The impact of the disenfranchisement of prisoners is staggering. The Report estimates that 3.9 million Americans, one in every 50 adults, have currently or permanently lost their voting rights as a result of felony conviction. This includes 1.4 million people who have completed their sentences. Nationally 1.4 million African American men, or 13% of black men are disenfranchised, a rate seven times the national average. The Report estimates that at current rates of incarceration three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime and that in States that disenfranchise ex-offenders around 40% of black men may permanently lose their right to vote. Florida, the State in the eye of the electoral storm, is one of the states which disenfranchises ex-offenders and there 31% of black men are disenfranchised. The figure is the same in Alabama, followed by 29% in Mississippi and 25% in Virginia, indicating the racially based gerrymander which flows from these policies.

There is a strong argument that to deny prisoners the vote is a feudal hang-over, a form of 'civil death' entirely out of place in a modern democracy. To deny the right to vote to ex-offenders is a permanent denial of citizenship, offensive to democratic principles, religious notions of redemption and secular notions of rehabilitation alike. The franchise is a fundamental cornerstone of democratic systems of government. Article 25 of the *International Covenant*

on Civil and Political Rights provides that "every citizen shall have the right and opportunity ... without unreasonable restrictions ... to vote ... at genuine periodic elections which shall be by universal and equal suffrage".

Australia, while avoiding the US excesses of disenfranchising ex-prisoners, does not comply with article 25, quite apart from our lack of commitment to one vote one value (Brooks 1993). Under Commonwealth law prisoners serving sentences of five years or more are disenfranchised. State provisions vary: Queensland, Victoria, the Northern Territory and the ACT follow the Commonwealth position. New South Wales and Western Australia deny the vote to anyone serving a sentence of one year or more. In South Australia all prisoners are entitled to vote and in Tasmania none. In practice there are all sorts of problems for those prisoners entitled to vote in actually exercising that right, in getting access to the ballot box (see generally Chapter 16 and Orr 1998).

Attempts by the writer to interest Australian newspapers in the issue of the disenfranchisement of felons in the US, even with the newsworthy 'hook' of the outcome of the US presidential election hanging in the balance, were entirely unsuccessful; indeed of insufficient interest even to warrant the courtesies of replying to emails or bothering to communicate a rejection. Approaches to usually sympathetic individual journalists were fruitless. A similar lack of interest was evident in 1998 when the Howard government attempted in the *Electoral and Referendum Amendment Bill (No. 2) 1998* to deny all prisoners the right to vote. The attempt was defeated in the Senate by the combined votes of the ALP, Democrats, Greens and Senators Harradine and Colston.

Why is it that there is so little interest in even discussing, let alone remedying, the denial of a fundamental right in modern democracies, the franchise, to prisoners and ex-prisoners? A cryptic answer might be that provided in the title of Bruno Latour's *We Have Never Been Modern* (1993). Indeed feudal remnants such as the notion of 'civil death' and a variety of practices it spawned are clearly evident in relation to prisoners. In addition to the current Australian government's attempt to remove the franchise altogether for serving prisoners in Federal elections, there are common State practices such as the denial of the right to serve on juries to ex-prisoners and more recent additions such as the 1996 NSW statutory provision (*Victims Compensation Act 1996* (NSW) s24(4)) by which "convicted inmates" were made ineligible to receive victims' compensation for "an act of violence if it occurred while the person was imprisoned", despite the fact that the incidence of assault in prisons is much higher than in the general community. What this last example shows is that the issue is not just the persistence of feudal remnants but their constant refreshment.

Going Backwards: from Kable to Dugan

Indeed the doctrine of 'civil death' throws up examples which illustrate not just 'uneven development' or 'remnants', in short the notion of a stubborn persistence of the pre-modern, but of its overt resurrection in the common law

of democratic states in conditions of late modernity. The saga of Susannah and Henry Kable in the late 18th century stands in counterpoint to the Australian High Court decision in *Dugan v Mirror Newspapers* (1979).

David Neal in the opening pages of his *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) traces the engaging story of first fleet convicts, Susannah Holmes and Henry Kable. Susannah and Henry came together in Norwich Castle jail after both had been sentenced to death for (separate) housebreaking. Both had their capital sentences commuted to that of transportation to America after the judge petitioned the king, in the manner described so richly by Douglas Hay in his famous essay in *Albion's Fatal Tree* (1975). In the more crowded and less segregated atmosphere of late 18th century prisons Susannah and Henry's liaison led to a union and thence to the birth of a son in 1786. They applied for permission to marry in jail but it was denied. Meanwhile transportation to America ceased with the American revolt and in 1786, the year of the birth, a fleet of ships was prepared to transport 750 convicts to Botany Bay in the colony of New South Wales on the east coast of the continent of Australia, where Cook had landed some 16 years earlier.

The fleet was short of women prisoners and Susannah and child, along with other women convicts from Norwich jail were transferred to the hulk Dunkirk at Plymouth on 5 November 1786. But the captain of the hulk refused to accept the baby on board and the baby was left in the hands of the Norwich jailer, a Mr Simpson, who had accompanied the women prisoners. Simpson was evidently a humane fellow and one of some determination and resourcefulness. He travelled with the baby to London and laid in wait outside the house of Lord Sydney, the Home Secretary, accosting the peer as he left his abode and pleading the case not only for the reunion of mother and child but of father as well. Lord Sydney agreed and Henry Kable was in turn transferred from Norwich and after 10 days' separation the family were reunited. Somehow this heart rending story attracted the attentions of the press and much was made of "John Simpson, the humane turnkey" and of the alacrity with which Lord Sydney attended to the "happiness of even the meanest subject in the kingdom" (Neal 1991, p5). Such stories touched a philanthropic nerve and Lady Cadogan organised a public subscription which yielded twenty pounds which, as Neal points out, was "twice the annual salary of a labourer at that time, and four times the value of the goods Susannah had stolen - enough money to buy clothes and other items for their new life in New South Wales" (ibid).

The voyage took 8 months, the ships arriving in Sydney harbour in January 1788. Susannah and Henry were married in February in one of the first marriage ceremonies in the new colony. However the parcel of goods bought with the subscription money and loaded in Plymouth seemed to have disappeared on route. So on the first of July 1788:

> *a writ in the names of Henry and Susannah Kable was issued from the new Court of Civil Jurisdiction in New South Wales. The writ recited that the parcel loaded on to the Alexander had not been delivered to the*

Kables in Sydney despite many requests, and sought delivery of the parcel or its value. It named the ship's captain, Duncan Sinclair, as defendant (Neal 1991, p5).

In what was the first civil case ever heard under English law in the Australian colonies a verdict was entered for the plaintiff in the sum of fifteen pounds. Henry Kable became a constable and then chief constable in the new colony before moving on to become a merchant and ship owner.

As Neal notes, this case was extraordinary in many ways. Not least of these was that having been convicted of a capital felony Susannah and Henry were clearly covered by the common law doctrine of civil death, suffering 'attainder' and 'corruption of the blood', which would have prevented them from bringing a civil action in England. Neal notes that at first they were described in the writ as 'New Settlers of this place' but this had been crossed out and nothing substituted. He notes that "the fact that Henry and Susannah were convicts and the legal consequences of that fact must have been obvious to some of those concerned; maybe the description 'New settlers' was too close to a fabrication, and hence this part of the writ was altered to maintain a discreet silence" (p6). Staples puts the point more forcefully asking,

how was it that Sir Garfield Barwick's "fundamental" relationship between a felon and a free man was breached in the full view of the whole colony and in a court constituted by the deliberate direction of Governor Arthur Phillip to try the grievance of two felons in his charge. Their status could not have escaped the notice of a single person in the settlement. They went before educated men. How was it that Sinclair at least whose mind was surely attuned to this minor crisis was not advised of or did not take the point which would have saved him in the High Court of Australia in 1978, one hundred and ninety years later?

The answer may perhaps lie in this: the rule, if its suggestion was known, was regarded by the mass of Englishmen as unjust, even absurd, inappropriate in the conditions of the colony and in any event totally inconsistent with the practice of the authorities in permitting the transportees to equip themselves to some degree with property to sustain themselves in their new place of confinement. Thus the community repudiated the rule at the outset (Staples 1981, p31).

Staples's reference to the High Court 190 years later is a reference to *Dugan v Mirror Newspapers* (1979) in which the doctrine of civil death was held to apply in NSW in the late 1970s to prevent convicted capital felon Darcy Dugan suing for defamation. The trial judge, the NSW Court of Appeal and the High Court by six to one (with Murphy J dissenting) all upheld the applicability of the doctrine of civil death in NSW in 1978. Barwick CJ said (p167):

If the Court decides that the common law in England, properly understood, did deny a prisoner in the situation of the applicant the right to sue during the currency of the sentence and that law was introduced into and became

part of the law of the colony, there is no authority in the Court to change that law as inappropriate in the opinion of the Court to more recent times during which capital felony remained ... I can see no basis on which it could be said that a law which in its time was fundamental to the relationship to the community of those convicted of capital felony was not suitable to the community of the colony, both at its inception and in 1828.

Murphy J, the sole dissentient in *Dugan*, described the doctrine of civil death as "anachronistic" (p176).

> *The main objection to recognizing the civil death principles as existing common law principles is that in treating persons as non-persons, that is, dehumanising them, the principles violate the fundamental standards of human rights and are inconsistent with the rehabilitative goals of our criminal justice system* (p177).

The NSW legislature partially overturned the doctrine in 1981 by passing the *Felons (Civil Proceedings) Act* (see Zdenkowski 1981; Zdenkowski & Brown 1982).

David Neal uses the Kables' story to reflect on the 'rule of law' debate, revisiting Edward Thompson's famous conclusion to *Whigs and Hunters* (1975, pp258-69). Neal identifies the key elements of the rule of law as "general rules laid down in advance, rational argument from those principles to particular cases and, at least in a developed form, a legal system independent of the executive for adjudication of disputes involving the general rules" (p67). Echoing Thompson's view that "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me an unqualified human good" (p266), Neal argues that "the rule of law tradition gained a foothold" with the Kables' case.

> *The case meant that exercise of power in the penal colony would be open to scrutiny against a legal standard, not the standards of prison discipline or martial law, or the arbitrary standard of the governor. This did not mean that power would always be exercised lawfully; power was used brutally and illegally by convicts against one another, by settlers against Aborigines, by police against Aborigines, by masters against assigned convicts, by magistrates against suspects and so on. The point is that the rule of law offered a check against 'power's all-intrusive claims'. While the foothold was small, the guarantees against abuse were also small. But people in the colony soon saw the possibilities for exercising and augmenting their power over one another in a legitimate way: through the courts* (p190).[1]

However such "footholds" can be covered over in the sands of time, as the *Dugan* case shows. The doctrine of 'civil death', "repudiated" according to Staples in the Kable context of the fledgling NSW penal colony, is resurrected in 1978 as "fundamental to the relationship to the community of those

convicted of capital felony" in 1788 and still in operation in 1978 by Barwick CJ of the Australian High Court. Once again it is tempting to see in the shift between *Kable* and *Dugan* the lingering effect of the 'convict taint' and the 'criminal class', immanent feudal relics waiting to burst forth in suitable modernist conditions. But conceptions of immanence tend to obscure the extent to which various ideologies and practices of exclusion are not only rediscovered but also refashioned and recreated, clothed in a popular legitimacy. A legitimacy stitched up in contemporary sentiments of desert, of forfeiture, of impurity and of exclusion, evident especially in the US in popular support for the death penalty, mandatory sentencing regimes and a politics of highly racially inflected mass incarceration.

'Convict taint' and the campaign for trial by jury in NSW

David Neal notes that Susannah and Henry Kable went on to have 11 children in all. By 1840, 52 years after their arrival in the first fleet "those of Henry and Susannah's progeny who owned a house worth more than 200 pounds and were male were, eligible to sit on juries and vote for the first representative assemblies". Indeed "Henry himself could have served as a juror, voted or even stood for the new Legislative Council" (p189). But the 'convict taint' of Henry's convict origins did not just dissipate naturally in the new penal colony, nor was it simply ignored as the doctrine of civil death had been in the first civil case in 1788.

While most contemporary debate around the jury is conducted in the language of its practicality, rationality, expertise, economy or efficiency as a legal institution its heritage in Britain and in the infant NSW penal colony can only be understood in terms of politics and the organisation of power. For as Neal points out:

> *The jury issue provided the arena of conflict for rival theories of citizenship. The jury issue, with its powerful rhetoric about the Magna Carta and the rights of British subjects, translated from an issue of direct power via the jury box into a symbolic one which did serve to qualify the Emancipists for their share of political authority in the colony* (p187).

The struggle for trial by jury was played out between the first governors, the English government and the Colonial Office, and the Emancipist (ex-convict) and Exclusivists (free settler) factions (pp167-187). The penal colony's early courts consisted of panels of military officers and the assessors of the Civil Courts. These were partial to the military. The Magistracy proved to be the initial base for the Exclusivists. In the absence of a parliament the courts were a major political forum.

> *The undemocratic state of New South Wales, together with the vexed question of the emancipists' civil status, heightened the political significance of the jury issue in the penal colony. Property qualifications – applicable to both jury service and the right to vote – could be relied upon as a measure of civic virtue in England. That was not true in New South*

Wales – at least according to the Exclusives – because many emancipists easily satisfied the property qualification. The Exclusives would have to rely on the convict taint as a mark of disqualification. The jury issue became a crucial test of status, especially as the prospect of a colonial legislature came closer ...Competence to serve on juries meant competence to vote for and to be a member of the representative political institutions which would eventually be granted to the colony (Neal 1991, pp169-70).

The centrality of the trial by jury issue can be seen from the fact that it "stood at the head of the Emancipists first-ever petition to the king" in 1819. By 1833 trial by jury was extended to all criminal cases and in 1839 the option of trial by military panel was abolished. "The convict taint would not operate to disqualify emancipists from the political franchise" (Neal 1991, p186).

Contemporary jury service and the persistence of 'convict taint'

While the colonial emancipists gained the right to sit on juries, that right and mark of citizenship is not available in an unqualified form to current ex-prisoners. The Australian States vary somewhat but NSW is typical in the disqualifications found in Schedule 1 to the *Jury Act 1977* (NSW). These include those who at any time within the last ten years have served a sentence of imprisonment, within the past three years have been detained in a detention centre or who are currently bound by an order of the court (Sch 2 s6(b)). Admittedly these disqualifications lapse in time, but only the last, currently bound by an order of the court, manifests an absence of the lingering traces of 'convict taint'.

In a recent case in which the Australian High Court finally declared the pernicious practice of jury vetting as carried out in Victoria over many years illegal, a majority of the judges seemed little concerned that the process of jury vetting operated, by the back door, to exclude those with prior criminal convictions from jury service well beyond the existing statutory exclusions.

In *Katsuno* (1999), on the basis of a list provided by the Chief Commissioner of Police, a peremptory challenge was exercised by the Crown to exclude a potential juror with non-disqualifying prior convictions for minor offences 25 and 20 years earlier. The High Court was unanimous in finding that the provision of information by the Chief Commissioner of Police to the DPP was impliedly prohibited by ss21(3) and 67(b) of the *Juries Act 1967* (Vic). Despite the finding of illegality, a majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ) went on to hold that the use of the information by the DPP, obtained in contravention of the *Juries Act*, in making peremptory challenges did not constitute a failure to observe the requirements of the criminal process in a fundamental respect and dismissed the appeal. "Once it is accepted that a peremptory challenge may be made for any reason, whether good or bad, it follows that the challenge to the potential juror in this case cannot be viewed as a defect in the criminal process" and the breaches of the *Juries Act* were held not to cause a miscarriage of justice. The breaches of the Act "took place

at a point anterior to the actual selection of the jury and did not deny the accused his constitutional right to trial by jury" (Gaudron, Gummow and Callinan JJ, pp1467-9).

McHugh J and Kirby J entered strong dissents. Kirby J pointed out that the effect of the arrangement between the Chief Commissioner and the Crown was an "enlargement of the categories of disqualification beyond those which Parliament has created" (p1483). The first offence of the excluded juror occurred when he was a juvenile, had no current effectiveness and could not be treated as a conviction by law, yet it was treated as relevant to the juror's suitability to serve on a jury. The second occurred more than 20 years previously and was not a formal conviction in that sentence was suspended. Kirby J pointed out that:

> *Upon the basis of the returns of the Sheriff illustrated by this case, approximately 8 per cent of the citizens eligible for jury service had some form of past conviction. If, whatever the exact detail of the matter (the seriousness of the conviction, its antiquity and irrelevance), persons are to be effectively removed from jury service on the basis of the bald statement contained in the Chief Commissioner's list – even when considered with the associated documentation – it is for Parliament to enlarge the disqualifications. It may not be done by the back door arrangement between police and prosecutors extraneous to the Act* (p1483).

The majority judgments illustrate both a lack of concern with the importance of jury service as a mark of citizenship and the continued pertinence of notions of 'convict taint'.

Citizenship and exclusion

The stories told thus far contain mixed messages about citizenship, 'convict taint' and 'civil death'. Susannah and Henry Kable managed to avoid the Norwich gallows after conviction for capital felony, were transported en famille and upon arrival successfully prosecuted the first civil case in the NSW penal colony unhindered by the operation of the civil death doctrine. Henry and his male children lived to enjoy the full rights of citizenship, including the right to sit on juries and to vote, and prospered financially.

Note the gender exclusion here in relation to Susannah, an exclusion achieved not through convict taint but through being a woman and the requirement of property qualifications for full rights of citizenship. It would be well over a century after Susannah's arrival before her female descendants would be entitled to vote. Here is the far from universal underside of the historical development of categories of citizenship which for many years to come in NSW and throughout Australia excluded Indigenous inhabitants completely and women partly from full citizenship, to say nothing about the racially based exclusions from citizenship of 'aliens' in the form of the White Australia Policy lasting until the mid 20th century. In relation to juries, a property qualification in the form of compilation of jury rolls from lists of

ratepayers persisted in NSW right up until 1947 and it was only after the passage of the *Jury Act* in 1977 that women came en masse onto juries.

In 1978 Darcy Dugan was unsuccessful in his civil action for defamation after the Australian High Court decided by 6 to 1 that the doctrine of civil death for capital felonies had been received into NSW, had never been expressly repealed, and that therefore Mr Dugan was civilly dead and had no right to sue at common law. Prisoners in NSW can only vote if they are serving sentences of less than 12 months and ex prisoners can not serve on juries for a period of ten years after their release. Prisoners cannot, subject to limited exceptions, claim criminal injuries compensation for injuries sustained in assaults upon them while in prison. In 1999 in *Katsuno* a majority of the Australian High Court did not seem to think it objectionable that a person was excluded from jury duty on the basis of non-disqualifying convictions as a juvenile over two decades earlier. And, as noted in the introduction, in the US millions of ex-prisoners, or 'ex-felons' to use the formal antiquated terminology, are denied the vote to little apparent consternation.

Citizenship is central to some of 'our' most foundational colonial struggles 'from penal colony to free society' yet, as shown in the small number of examples discussed, is far from universal and is replete with exclusions. Exclusions which at least in relation to prisoners are not withering away in the long march of enlightenment civilisation, as a Whig history would have it, but in some instances are being revived and resurrected, given new and brutalist forms. But in relation to prisoners, exactly how important are notions of citizenship? Is it a useful conceptual vehicle for the promotion of prisoners' rights and for the promotion of improvements in the conditions of imprisonment?

Citizenship, lawbreaking and punishment

Citizenship is usually defined formally as a membership or group status, the group being variably defined as a political community, nation state or civil society. The key components of citizenship are rights, duties, participation and identity and the various theories of citizenship tend to place emphasis on certain of these components at the expense of others. The theories or models of citizenship can be roughly divided into two main tendencies: liberal and republican/communitarian. Liberal theories of citizenship tend to emphasise rights, duties and responsibilities; rights in the more left wing versions of liberalism, duties and responsibilities in the more conservative liberalism. Republican and communitarian traditions tend to emphasise participation, with the emphasis on participation in civil society. Identity is central to some communitarian traditions and also to nationalist conceptions of citizenship. Radical democratic theories provide not so much a theory of citizenship as a critique of liberal and communitarian positions, emphasising what Delahunty describes as "the politics of voice, difference and justice" (2000:46; see also Marshall,1992; Faulks, 2000; Isin and Wood, 1999).

Many of the commentaries on and discussion of theories of citizenship seek to identify the differences between liberal, communitarian, republican,

democratic and other approaches. But what is perhaps of more interest for a discussion of prisoners and citizenship is their commonalities. Most if not all theories and models of citizenship emphasise principles of equality, freedom, participation, identity and so on, frequently according a different meaning or emphasis to these terms. But theories of citizenship typically fail to provide an explicit account of how citizenship, how membership of a political or civic community is acquired and lost. In this respect they tend to presuppose membership and the boundaries or limits of the relevant community and then go on to describe the content of citizenship – what membership entails or should entail. This question of boundaries or limits – of admission to and exclusion from citizenship – would seem to be the central one when it comes to considering punishment.

In 1994 an ANOP Opinion Poll on Community Knowledge and Understanding of the Constitution, Citizenship and Civics was conducted as part of a Civics Expert Group Report to the Keating Labor government (CEG, 1994). In response to a question "What is a good citizen/what sort of things does a good citizen do?" the three leading answers were: "obey laws" 62%; "show care and consideration for others" 38%; and be involved in community activities" 30% (p156). That by far the most common answer to the question about what is a good citizen focussed on obedience to law raises the question of how the relationship between citizenship, law-breaking and punishment is popularly viewed and understood. If in the view of many, "good citizens" are those who obey the law, this suggests a public ambivalence about the citizenship status of those who break the law.

One of the leading writers on citizenship, T H Marshall, emphasised equality and the need for the social democratic state to promote an equality of opportunity undermined by the market in a class based society. "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed" (1992, p8 quoted in Delahunty 2000, p15). This begs the question who are "full members" of the community and more specifically, are prisoners "full members"? Popular opinion as reflected in the ANOP survey suggests that "full membership" of a community may be viewed as linked to and even dependant upon obedience to the law. This view gives rise to arguments that by virtue of the offence committed the individual who has been convicted and imprisoned thereby forfeits any claim to citizenship and to be the bearer of rights.

The most extreme version of this argument is apparent in the death penalty, where the forfeit is not only to citizenship, but to the very right to exist. Less extreme versions involve the loss or forfeit of particular rights or incidents of citizenship, such as the franchise, or the right to be a legal subject in general or for particular purposes. At a lower level and in relation to the more concrete and specific issues associated with prison conditions, which tend to be seen as more important than the symbolic issues by prisoners themselves, the key arguments are those of the 'they deserve nothing', 'they are being pampered in motel conditions while their victims suffer' sort, which are essentially contemporary tabloid media versions of Jeremy Bentham's "principle of lesser

eligibility" whereby prisoners should always be held in conditions worse than those of the honest, non-criminal poor.

The 'forfeit' argument is evident in the notion of civil death and has its roots in an amalgam of retributivist desert, conceptions of impurity, taint and pollution, the visceral attractions of revenge, and the desire to exclude and render 'other'. An increased emphasis on the 'duties and responsibilities' part of the rights, duties and responsibilities criteria, stressed in various neo-liberal variants of conservative liberalism have perhaps given some succour to the 'forfeiters'. As perhaps has some of the conservative communitarians' emphasis on community, religion, family and nation, an appeal to an organic consensus open to populist, nationalist and ethnic based excesses.

Setting the extreme versions of exclusion and denial of full membership of a community and hence of citizenship aside, the more prevalent position is what Vaughan (2000, p26) calls "conditional citizenship". By this he means that prisoners are more typically 'partial citizens', neither enjoying full citizenship nor entirely outside it. Punishment

> *is used on those who are conditional citizens, people who may be moulded into full citizens but who are, at present, failing to display the requisite qualities expected of citizens. This is one of the great animating impulses behind modern punishment, the desire to convert people into proper citizens rather than excluding them as with transportation, or making a spectacle of them, as with capital punishment. Yet for punishment to be meaningful, it must entail that some rights and privileges are forgone; the process of inclusion cannot be total* (p26).

Vaughan's view that some rights and privileges must be forgone for punishment to be meaningful would be challenged by prisoners' advocates, those who see citizenship in universal forms and many who cite the oft-quoted liberal doctrine that 'people are sent to prison *as* punishment not *for* punishment'. On this view, the only qualified, as against absolute rights would be those that are necessarily qualified as a consequence of the irreducible conditions of imprisonment, such as the freedom of movement. Yet clearly in practice the 'pains of imprisonment' involve far more than merely restrictions on freedom of movement, as the whole history of the origins and development of the prison, the sociology of imprisonment and penology show. As David Garland and Peter Young have argued :

> *Individual penal sanctions condense a number of different relations and it is necessary to acknowledge this, if an analysis capable of supporting political action is desired. An offender who is sentenced to imprisonment becomes the object of a relation of force (resistance will be met with physical coercion and violence 'if necessary'), which is at one and the same time legal (it is an authoritative order of the court, the prison is a legally authorised place of detention, its officers have legal powers at their disposal, the law specifies that prisoners shall not have the rights and capacities available to other citizens, etc.); political (the basis and limits of that authority and that force are ultimately political, as is the definition and*

enforcement of the criminal law; the form of the sanction is politically conditioned, etc.); ideological (the prison carries specific symbolic connotations which mark the prisoner, his act and his family; prison architecture and practices carry particular signifiers – isolation, work, reward, discipline, obedience, etc.); and economic (the prisoner will be made to labour, his family will be financially disadvantaged, his work record and national insurance contributions will be interrupted, he will have difficulty regaining employment, the 'free' labour-market will be deprived of his labour, he will be deskilled, etc.). Of course, if the offender happens to be female, she will be subjected to a number of differential practices (as indeed will male 'sex offenders'), indicating the pertinence of sexual relations in this realm ... Clearly then the penal sanction of imprisonment is a complex condensation of a whole series of relations (1983, pp22-3).

The complex and condensed nature of these various relations does not, except at the most formal legal level, translate into a simple status of citizen or non-citizen. Vaughan's characterisation of prisoners as "partial" or "conditional" citizens is arguably a much more accurate rendering of their situation than the either/or of universal citizen/non-citizen 'outlaw'. The notion of 'partial' citizen also has the advantage of calling attention to the fluid and unfinished nature of the prisoner's status and ability to participate in public discourse as a fully fledged democratic subject; a subject in the process of becoming.

Certain forms of punishment such as exile and transportation, were consciously intended to temporarily or permanently expunge citizenship. This was the punishment. The position of imprisonment in modern societies is more ambivalent. Many of the chapters in this collection have illustrated the "conditional" or "partial" nature of current prisoners' claims to full citizenship. The earlier discussion of limitations on prisoner suffrage, right to serve on juries, and ability to be a full legal subject, indicated the continued pertinence of notions of convict "taint" or "stain".

Conclusion

We are left then with somewhat of a paradox in relation to the issue of prisoners as citizens. However desirable in a utopian sense, the current prospect of prisoners enjoying full or universal citizenship is unlikely. Not only because it would be politically preposterous to conservatives and populists who demand that some form of 'forfeit' attach to conviction, what Pratt (2000: 417) calls "emotive and ostentatious punishment", ranging from the extreme of capital punishment through to the more mundane subterranean forms of disqualification and denial. But also because forms of modernist penality and notions of rehabilitation are premised on the idea of personal improvement, to be achieved through calculated regimes of graded and partial citizenship within which incentives and rewards can operate, especially under the tutelage of neo-liberal notions of responsibilisation and offender contractualism. Universal or 'full' citizenship of prisoners is also unlikely because whatever a formal legal status might imply, sociologically and in

reality the complex and condensed relations involved in imprisonment do not simply play upon or constitute a unitary legal subject, the citizen-prisoner.

As a political aim partial or conditional citizenship should be rendered fuller and more complete. In that push the emphasis should be placed not on the formal legal status of prisoners or on a particular unitary identity of prisoners, but on the necessary conditions under which prisoners might participate fully in a democratic citizenship. Such participation includes the ability to challenge the legal processes which led to their imprisonment and to call attention to and reflect upon the social and economic conditions in which their offending and criminalisation occurred. That reflexivity needs also to encompass the various strategies: institutional, cultural and personal, of denial and neutralisation of often patently anti-social and damaging behaviour, hyper-masculinity and cultures of violence and predatory assault and sexual assault which sometimes led to imprisonment and which are reproduced and amplified under current prison conditions.

The conditions under which prisoners can participate in a democratic citizenship lie in a discursive citizenship, an ability to participate in the public realm. Such participation is premised on acts and a language of recognition, the articulation of a voice and access to public means of communication of those voices. The voices should be plural precisely because, as many feminists point out, imprisonment is far from all of a piece. Its histories, meanings and experiences differ on racial, gender and other fault lines; Indigenous prisoners, women prisoners and other specific groups such as non-English speaking and prisoners with disabilities have specific interests and voices which are not helpfully essentialised into a unity, particularly as often represented by white, masculine-dominated vanguardist ' organisations (see Zdenkowski and Brown, 1982 pp 355-364; Brown 1998 and, on the particularities of Australian penality for Indigenous people, Finanne & McGuire 2001 and Hogg 2001).

Russell Hogg and I have argued previously (Brown & Hogg 1985) against seeing prisoners as inhabiting a fixed location, defined largely by their relation to the means and forces of production, an approach that characterises prisoners as therefore essentially "unproductive" (Mathiesen (1974, pp173-7). Mathiesen and others use this economic criterion to postulate an essential if not yet realised unity between workers and prisoners. Along with Laclau and Mouffe (1985, p181) we argue that there are multiple ways of constituting subject positions in attempting to create a proliferation of new and different political spaces in a series of constantly shifting alliances with various social movements. As other chapters in this collection have illustrated, the point of entry, connection or concern with prison issues arises from a plurality of positions and identities. These include the specific and differential meanings, experiences and problems of Indigenous prisoners, women prisoners, those suffering from intellectual or physical disabilities, drug addicted prisoners, prisoners with specific health needs, transgender prisoners, non-English speaking prisoners, prisoners subject to forms of administrative segregation, prisoners who lack basic levels of literacy, prisoners in private prisons, and so on. The social movements, community

support groups, government and non-government organizations and families which take up prison related issues are fluctuating, multi-vocal and diverse.

To be able to voice these diverse concerns, to participate in a "discursive citizenship" in the public realm prisoners must be secured under regimes which are healthy, not conducive to or tolerant of violence; conditions which promote contact with family and friends and the various associations of civil society; conditions which promote the maximum ability to participate in public discourse through access to all forms of media, including the internet; conditions which encourage participation in meaningful literacy, education, work skills and other programs; and conditions which do not permit the isolation and segregation of prisoners for the purposes of punishment or convenience, except on justifiable grounds which can be tested against clearly articulated legal standards.

The extent to which claims of citizenship advance these conditions is a moot point. Claims of citizenship can lead to the assertion of false unities, obscuring significant differences between different groups in terms of the conditions of criminalisation and the histories and experiences of imprisonment. More significantly, citizenship is often asserted in universalist forms which bear little relation to the denied and contested nature of key elements of citizenship; as we have seen in relation to prisoners for example, with reference to the vote, legal subjectivity, and ability to sit on juries. As argued above, theories of citizenship are strong on affirmations of equality, freedom and participation, but weak in that they fail to provide an explicit and concrete account of how citizenship, how membership of a political or civic community, is acquired and lost. This failure is particularly acute in relation to prisoners, leaving much citizenship theory sounding abstract and rhetorical, disconnected from popular and political discourse where the 'forfeit' argument plays strongly to disqualify or dis-entitle prisoners from full citizenship.

If there is any advantage to claims of citizenship over claims of rights it might lie paradoxically in their indeterminate and incomplete nature. At a popular level claims of rights are readily comprehended but also easily characterised as claims of particularistic self interest. A democratic citizenship is less a place, a status, a possession or a demand, and more a process: a process through which participation in a public discourse takes place; a process through which identities are recognised, equalities asserted, differences acknowledged and voices communicated and heard.

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Notes

1 For a range of assessments of Thompson's and Neal's arguments see Zdenkowski & Brown 1982; Merritt 1980; Anderson 1980, pp197-207; Fine 1984, pp169-189); Hirst 1983; Davidson 1991; Hirst 1980, p94; Byrne 1993.