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Should citizenship be conditional?

Denationalisation and liberal principles

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Abstract

While political theorists have recently paid a great deal of attention to the question of whether states have a moral duty to grant citizenship to non-citizen residents, this paper examines the normative issues associated with the state's withdrawal of citizenship. My discussion focuses on whether the practice of denationalization, as a punishment for certain types of behaviour (e.g., disloyalty) or to protect the vital interests of the state (against terrorists, for example), can be compatible with liberal principles. The ethical issues raised by denationalisation have not been explored in great depth hitherto, despite that fact that citizenship stripping (in the form of banishment) was endorsed by many of liberalism's foundational thinkers, including Kant, Montesquieu, Vattel and Beccaria. More recently, denationalization powers have emerged as a controversial political issue in the UK, France, the US, and a number of other liberal states. This paper begins by considering the prehistory of denationalization by briefly tracing the evolution of banishment as an idea and as a practice. It then turns to consider how denationalization power emerged and became consolidated in the UK and the US in the first half of the twentieth century. Its focus then shifts to the nature of liberal objections to the power, in particular to concerns about denationalisation's link to statelessness, its creation of two classes of citizenship, and its arbitrariness. In an effort to disentangle contingent from intrinsic objections to the practice, the revocation of citizenship provisions in the UK's Nationality, Immigration and Asylum Act of 2002, which attempted to create a denationalisation power that takes account of liberal objections, are considered. In the final section of the paper, I consider the effectiveness of this Act in accommodating liberal concerns in order to shed light on the likelihood of reconciling liberal principles with forms of conditional citizenship.

Introduction*

In recent years there has been a flourishing of interest by political theorists in normative issues around admission to citizenship. Much of this literature has focused on the question of whether and under what conditions non-citizens might be considered to have a right to be admitted as full members (citizens) of liberal societies. Early manifestations of this work were motivated in part by the treatment of guest-workers in Western Europe and the consequences of ethnic citizenship policies for their social and political integration into the societies in which they had come to live (Carens 1989; Walzer 1983). However, more recent literature has been informed by the claims of illegal migrants and others, like asylum seekers, residing in but not fully admitted to Western states. Using democratic and liberal principles, several academics (Carens 2009, Baubock 2007 & 2008, Miller 2008, Shachar 2009, Gibney 2011b) have examined the case for admitting non-citizens into the societies in which they are making their lives in depth.

In this chapter, I want turn the question of inclusion into citizenship around and discuss the normative issues associated with the *withdrawal* rather than the acquisition of citizenship. In particular, I want to consider the practice of revoking citizenship – what I will call “denationalisation” – as a punishment for certain types of behaviour (such as, disloyalty or serious criminal behaviour) or to protect the vital interests of a state (against terrorism, for example). My principal aim will be to consider whether the stripping of citizenship either as a punishment or as a protective measure can be compatible with liberal principles. Put another way, is it legitimate for continued possession of citizenship in the liberal state to be made contingent upon a certain standard of behaviour?

The ethical issues thrown up by denationalisation have not been explored in great depth hitherto for an obvious reason (but cf. Alienikoff 1986): apart from cases where it is lost due to the acquisition of another nationality, citizenship has generally been considered an irrevocable or non-contingent status in most Western states, in practice if not always in law. But this neglect of denationalisation obscures the fact that irrevocable citizenship in liberal societies is a relatively new idea, a product in particular of the last fifty years. Most of liberalism’s foundational thinkers, including Kant, Montesquieu, Vattel and Beccaria, endorsed the analogous punishment of banishment, which involved not merely the loss of citizenship but also the forfeiture of any right to continued residence in the state (or city) an individual called home.

More importantly perhaps, denationalisation has emerged recently as a controversial political issue in several countries. The *Terrorist Expatriation Act* is currently winding its way through the US Congress. This Act proposes to strip citizenship from individuals who fight for terrorist organisations against the US. It has been defended by Senator Scott Brown (its

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co-sponsor along with Senator Joseph Lieberman) as necessary because “[w]ar has moved into a new dimension. Individuals who pick up arms... have effectively denounced their citizenship, and this legislation simply memorialises that effort” (New York Times, 6 May 2010). When asked her view of the bill, the US Secretary of State, Hilary Clinton, stated that “United States citizenship is a privilege. It is not a right. People who are serving foreign powers... are clearly in violation... of the oath which they swore when they became citizens” (New York Times, 6 May 2010).

Concerns about terrorism and anxiety about the loyalty of domestic Muslim populations in particular have led to similar proposals in Australia. The Howard government toyed with the idea of new denationalisation legislation in 2006. Defending the call for new legislation at the time, the Australian Treasurer Peter Costello proclaimed in a widely reported speech that:

We [Australians] have a compact to live under a democratic legislature and obey the laws it makes... Those who are outside this compact threaten the rights and liberties of others. They should be refused citizenship if they apply for it. Where they have it they should be stripped of it if they are dual citizens and have some other country that recognizes them as citizens (The Age, 24 February 2006).

Europe has not been immune to denationalisation’s appeals either. In July 2010, the French President, Nicholas Sarkozy, gave a speech in the wake of riots in the French city of Grenoble proposing that “French nationality should be stripped from any person of foreign origin who voluntarily tries to take the life of a policeman, gendarme, or other figure of public authority” (Bloomberg Media, 30 July 2010). The focus of the proposed new law on the vague category of citizens of “foreign origin” was clarified helpfully by Sarkozy’s Interior Minister, Brice Hortefeux. He proposed adding polygamy and genital mutilation to the list of proposed grounds for citizenship loss, a move clearly focused on France’s Muslim citizens (Newsweek, 17 August 2010).

While the French, Australian and US supporters of denationalisation have yet to see their proposals enshrined into law, the UK has been the site of some profound changes in the state’s power to strip citizenship in recent years. *The Nationality, Immigration and Asylum Act (2002)*, passed in the wake of September 11, gave the British state, for the first time in its history, the power to denationalise native born citizens (with a second nationality) if they were deemed to be acting in a manner “prejudicial to the vital interests” of the UK. A law passed two years later, the *Immigration, Nationality and Asylum Act*, revised the state’s denationalisation powers again. This Act, passed soon after the July 2007 underground bombings in London, significantly reduced the standard required by the Home Secretary to make a denationalisation order.

There are, then, both theoretical and practical reasons for exploring the state’s right to strip citizenship in the light of liberal principles. In what follows, I begin by considering briefly the prehistory of denationalisation through a discussion of the related punishment of banishment. I then turn to consider how denationalisation power emerged and became consolidated by drawing upon the experiences in the first half of the twentieth century of two states: the UK and the US. My focus then shifts to the nature of liberal objections to the power, in particular to concerns about its generation of statelessness, its creation of two classes of citizenship, and its arbitrariness. In an effort to disentangle contingent from intrinsic objections to the practice, I turn then to consider the revocation of citizenship provisions in the UK’s *Nationality, Immigration and Asylum Act (2002)*, which attempted to

create a denationalisation power that reckons with liberal objections. In the final section of this paper, I consider how successful the *Act* is in accommodating these objections to assess the prospects for reconciling liberal principles with contingent citizenship.

Before proceeding it is important to note two issues. First, I use the terms “nationality” and “citizenship” interchangeably in this chapter. Hence, I consider denationalisation (the withdrawal of nationality) and the stripping (or revocation) of citizenship to be equivalent. While the two are typically associated with different rights and obligations (those associated with nationality establish an individual’s membership in a particular state *vis à vis* other states, whereas those associated with citizenship involve the domestic relationship between individuals and the state and between fellow citizens), in most liberal states all nationals are citizens and all citizens are nationals. Hence, nothing of significance rests on the distinction between the two in this piece.

Second, my focus in this piece is on the loss of citizenship as a punishment for certain crimes or to deal with individuals who (due to their character or potential behaviour) are deemed a danger to the state or society. I will not discuss loss of citizenship that results from the acquisition of another nationality (that is, laws that forbid the holding of dual nationality). This distinction is not always easy to draw in practice. US officials, for example, during the 1950s attempted to characterise the actions of some unwanted citizens as indicating a transfer allegiance to another country equivalent to taking up another citizenship (e.g. American communists were sometimes deemed to be loyal to the Soviet Union). In this case, the state effectively used the supposed transfer of allegiance as a way of achieving denationalisation as a punishment by stealth. While I will not consider the ethical issues arising from an individual’s loss of nationality due to the formal and voluntary acquisition of another nationality, denationalisation as punishment by stealth does fall within my domain here.

1 The banishment of banishment

The idea and practice of stripping citizenship has a long pedigree. The revoking of citizenship, almost inevitably accompanied by physical expulsion through banishment, was a common practice in the ancient world. Indeed, the word “deportation” comes from the Roman practice of *deportatio*, in which citizens were expelled, typically in chains, to the outer edges of the empire (Starn 1982, 21). However, it is in ancient Greece that banishment’s role is most striking. In contrast to contemporary states, the main focus of expulsion power in democratic Athens was on citizens and not resident foreigners, who incurred significant financial and military obligations in the societies that hosted them but enjoyed few political or legal privileges (Gray 2011). Athenian justifications for banishment and loss of citizenship were, as Benjamin Gray has noted, quite varied. Communitarian and civic republican claims were evident in calls to expel cowards, military deserters, and even arrogant individuals, whose behaviour was perceived as threatening civic virtue (Gray 2011). The disenfranchisement of those who became “indebted to the state, through failure to pay fines, to pay public rents, or to repay public loans” spoke to a more social contractual view of the state that stressed individualistic contributions and self-interest (Gray 2010).

Part of banishment's appeal to the ancients was that it was a form of punishment and social control that while inflicting a kind of civic death fell short of ending an individual's life. The link between banishment and moderation is drawn to great effect by Sara Forsdyke (2005) in her recent work on exile in democratic Athens. She argues that the distinctiveness of the democratic politics of Athens was, paradoxically, very much evident in its procedures for expelling citizens. "Whereas", she argues, "power in the archaic period had been exercised in the frequent and violent expulsion of elites by their rivals", the power under democracy was used collectively and through lawful institutions and with only infrequent and largely symbolic resort to expulsion" (Forsdyke 2005, 144). Ostracism was a form of expulsion power made fit for the democratic state: one that could be exercised lawfully and prudently. Furthermore, through its operation via democratic procedures, it served to remind ambitious elites of the power held by the democratic community. Rather than being a side-show to political practice, ostracism was "a key theme in legitimization of democratic rule over other forms of political organization" (Forsdyke 2002, 258).

The legitimacy of banishment, both as a punishment and a mechanism of social control, survived the emergence of the early modern state. Perhaps unsurprisingly, Thomas Hobbes (1996 [1660]) did not question the Sovereign's right to banish subjects (though he did point out that expulsion severed any duty of allegiance owed by the subject and complained that it was no real punishment at all). Cesar Beccaria (1764), the eighteenth century Italian philosopher, knitted together a range of liberal and republican justifications for the practice when he opined that "[a]nyone who disturbs the public peace, who does not obey the laws which are the conditions under which men abide with each other and defend themselves, must be ejected from society – in other words, he must be banished" (Beccaria 1995 [1764], 56). Seventeenth and eighteenth century writers on international law such as Grotius and Pufendorf drew upon the practices of Ancient Greece and Rome to affirm banishment's acceptability. Pufendorf believed that while atheists who kept their beliefs to themselves should "not [be] punishable by the law", public atheists "may lawfully be banished... for the... public safety" (quoted in Benke and Grenda 2010, 315). These scholars did not play down the punishment's severity. In the words of Beccaria, permanent banishment "sever[s] all the ties between the society and the malefactor. In such a case, the citizen dies and the man remains as far as the body politic is concerned, this should have the same effect as natural death" (Beccaria 1995, 58).

In his *Philosophy of Law* of 1790, Immanuel Kant strongly endorsed the state's right to banish citizens. A state cannot prevent a citizen from emigrating, Kant argued, for that would be to treat him "as if he were its property". But a state does have the right to expel a subject "who has committed a crime that renders all society of his fellow-citizens with him prejudicial to the state" (2002, 205). Banishment, which turns the citizen into "an outlaw within the territory of his own country" is legitimate whether it be it to a particular country (transportation) or to the "wide-world" (2002, 205).

But the affirmation of banishment was not shared by all. Some thinkers were concerned less about its effects on the banished individual than on the countries to which they were banished. Voltaire believed the practice to be both irrational and corrosive of the comity of nations. In his *Philosophical Dictionary* of 1764, he complained that the banishment of criminals was akin to "throwing into a neighbour's field, the stones that incommode us in our own" (1843, 192). Voltaire's concerns were shared by a number of other international

law writers, including the Dutch international lawyer, Cornelius van Bynkershoek. He described the practice as “useless and contrary to the dictates of kinship” in his *Questions of Public Law* of 1737. It would be better, he argued, “to confine such criminals in workhouses than to impose them on others because we fear them” (Bynkershoek 1930, Book II, Chap 17).

In practice, the banishment of citizens occurred in a range of different guises. In eighteenth century France, banishment was a common way of dealing with criminals when courts believed there were mitigating factors or doubts about their guilt (Kingston 2005). Banishment could be permanent or temporary, applied to a single jurisdiction or to the Kingdom as a whole. While there were moves to eliminate the practice in France in the aftermath of the Revolution, the regimes’ desire to expel political enemies proved irresistible (Kingston 2005). Moreover, by 1810, a desire for harsher punishments for criminals resulted in banishment taking on an even crueler complexion. Many other continental countries, like Holland (Spierenburg 1986) and Germany (Coy 2009), operated banishment in a similar way to pre-Revolutionary France. In England, however, the system of transporting convicts to North America and, then, Australia meant that convicts were effectively banished without ever losing their subject status or leaving His Majesty’s realms. The transported could not return to Britain and were completely separated from their families and the lives they knew (Hughes 1988).

During the late eighteenth to mid-nineteenth century a number of changes occurred that made the practice of deporting citizens much less common. The rise of nationalism hardened the state into more defined membership unit in which insiders needed clearly to be distinguished from outsiders. As a consequence, receiving states became more conscious of foreigners being dumped on their territory and less willing to accept these rejects (Kingston 2005). The dramatic growth in the peopling of territories also played a role. The international law writer Fischer-Williams indelicately noted, “it is no longer possible to send undesirables abroad. Slops may be thrown out of the window of a settler’s hut on a prairie; in a town such practice is inadmissible” (1927, 57).

The effect of nationalism in reorienting the relationship between the state and its citizens also affected expelling states. The claim that each state was the state of a particular and unique people made it more difficult for states to engage in the kind of absolution of responsibility for a citizen central to banishment. Moreover, the right of states to expel non-citizens from their territory required a correlative duty on the part of states to accept their nationals back from other states. These duties and obligations began to congeal into international practice during the nineteenth century when a number of international treaties included duties to accept the return of nationals (Noll 2005, 495).

At the same time as these changes were occurring, a new emphasis on the reform and eventual reintegration into society of criminals was beginning to undermine the use of capital punishment and banishment as common practices in Western states. Along with a growing administrative centralisation, the changing attitude towards malefactors was central to the appeal and the development of the modern penitentiary as an alternative to expulsion in the UK, and in parts of the continent and North America (Bentham 1839; Vaughan 2000). The penitentiary provided a way of punishing offenders in a consistent, measured and supervised way that was in line both with emerging principles of democratic equality and the shaping of men’s souls (Willis 2005). Moreover, it provided an answer for state officials to

the question of how to punish citizens within state territory without jeopardizing the security of the public.

2 Denationalisation and denaturalisation

By the late nineteenth century, these developments had largely delegitimised the idea that a liberal state could dissolve itself of its obligations to its members through banishment. Simultaneously, expulsion power came to be concentrated almost exclusively on the *non-citizen*, who became subject to new laws restricting their entrance and facilitating their departure across many Western states. In 1879 in the United States, 1901 in Australia, and 1905 in the UK, legislation appears that directs deportation power against certain categories of aliens. Deportation power is, in its initial modern form, an extended arm of immigration or border control and, only later, evolves into a social control and punishment measure (Kanstroom 2007, Torpey 2000).

But this new-found focus on non-citizens did not entirely usher in a period of irrevocable citizenship. Even if citizenship was beginning to become a more secure status, there remained the problem of liminal cases, such as those of individuals who had acquired their citizenship fraudulently or who held two (or more) nationalities simultaneously. Early revocation of citizenship legislation focused on these borderline cases. In 1914 the British state was given, under the *British Nationality and Status of Aliens Act*, the power to revoke the nationality certificate of anyone who had acquired their citizenship fraudulently, a change driven largely by concerns about nationals who took up British nationality simply to avoid conscription without any intention to live within the realm (Gibney 2011). The 1907 *Expatriation Act* in the US had a similar focus. It created “a rebuttable presumption” (Aleinikoff 1988, 1476) that any naturalised alien who resided for two years or more in his native country “has ceased to be an American citizen” (quoted in Aleinikoff 1988, 1476).

Important as these developments were, it was war that really pushed the boundaries of denationalisation power, legitimating new forms of contingent citizenship that acted either as a prelude to deportation or future residence in the state without citizenship. This was evident in the UK during the Great War. World War I gave birth to huge distrust and hostility towards Germans residing in the UK, fanned by daily newspaper reports of enemy spies living and working in England and events like the sinking of the *Lusitania* in 1915. Public anxiety initially concentrated on so-called “enemy aliens” (non-citizens of hostile countries) resident in Britain, with calls for the mass internment and deportation of these aliens. As the war proceeded, however, more attention turned to naturalised citizens of German and Austrian descent (Panayi 1991, Gibney 2011). Beginning in 1915, a parliamentary campaign led by a coterie of Conservative politicians began calling for the stripping of their citizenship (and sometimes their deportation) of some or all naturalised Germans, focusing primarily on those who had gained citizenship since the start of the war. According to the Conservative MP, James Mason, the naturalised German is more dangerous even than the unnaturalised one: “if a man came to this country with mischievous intentions, he would take the precaution to become a naturalised Britisher in order to facilitate the objects he had in view” (HC Deb (3 March 1915) c.849).

Out of this febrile political environment, a series of amendments to UK nationality legislation emerged. A 1918 Act enumerated wide-ranging grounds for denaturalisation, including: effective transfer of loyalty (e.g., being in a foreign country for five years or more), bad character (being sentenced to a prison term of over a year), disloyalty to the sovereign (trading with the enemy or being a subject of a country at war with His Majesty), and treason. A committee was also established to make recommendations to the Home Secretary on revocation cases. Between 1918 and 1926, 163 Britons were denaturalised. Ironically, most of them lost their citizenship not because of disloyalty or treason, but due to continued residence outside His Majesty's dominions (Gibney 2011).

In the US, by contrast, there was a widespread belief that the power to denationalise was unconstitutional because of the fourteenth amendment which pronounced that “[a]ll persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside” (Anon 1955, Alienikoff 1986). Indeed, some of the US Founding Fathers were explicitly hostile to the practice of banishment, skeptical of its potential role in stifling political dissent.¹ But this did not stop denationalisation's proponents in the US Department of Justice in the 1930s from trying to use statements of support for communism or Nazism made by an individual years *after* naturalisation to annul citizenship by arguing in court that the initial application had been invalid (Maloney 1956). Neither did constitutional concerns prevent Congress from passing legislation that deemed certain acts of disloyalty or criminal or threatening behaviour as demonstrating that an individual had transferred their allegiance to a foreign power, and thus had effectively abandoned their US citizenship. The key moment here was WWII when Congress created a range of new grounds leading to the loss of nationality.

Citizenship under the *Nationality Law* of 1940 could be lost “by formally renouncing it overseas, serving in the armed forces of a foreign state if the person also had acquired the nationality of such state, voting in a political election of a foreign state, or accepting the duties of an office or employment under the government of a foreign state for which only nationals of that state were eligible” (Aleinikoff 1986, 1477). Two other grounds were also included, which extended the parameters of denationalisation power beyond clear displays of changing (or at least divided) allegiance: “conviction of desertion in time of war and conviction of treason or attempting to overthrow the US government by force” (Aleinikoff 1986, 1477). The latter rules applied to all US citizens regardless of how they acquired their citizenship. They were supplemented in 1944 by a denationalisation provision “for persons who departed the US in a time of war to avoid military service” (Aleinikoff 1986, 1477). These powers were typically employed without any attempt to deny the individuals involved residence in the US. Any such denial would have been problematic because the laws affected native born US citizens without the right to reside in another country.

The Cold War and widespread anxiety over the communist threat led to an even deeper extension of denationalisation powers. In his 1954 State of the Union address, President

¹ Alexander Hamilton, for example, wrote in 1784 of the “dangerous consequences” of the power of banishment. If a legislature, he argued, can “banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense” (Hamilton 2010).

Eisenhower stated his intention to “recognise by law a fact that is plain to all thoughtful citizens...—that when a citizen knowingly participates in the Communist conspiracy he no longer holds allegiance to the United States”. Any citizen, he announced:

who is convicted ... of hereafter conspiring to advocate the overthrow of the government by force or violence [will] be treated as having...renounced his allegiance... and forfeited his United States citizenship (Eisenhower 1954).

Congress soon backed up his words with legislation. The Expatriation Act of 1954 provided for “automatic loss of United States nationality by persons convicted of existing crimes, including rebellion and insurrection, seditious conspiracy, and advocating to overthrow the government in the manner proscribed by the Smith Act” (Anon 1955, 1164).

The number of people who lost their citizenship through penal forms of expatriation in the US over this period was substantial, though not huge. According to the INS annual reports, between 1945 and 1953 (before the implementation of the expansive new act of 1954), some 1,281 people were denationalised for avoiding the draft, 11 for desertion, and another 146 on other grounds. There were no denationalisations for treason or conspiracy to overthrow the state (Anon 1955, 1165). In virtually all of these cases, no attempt was made to deport the individuals concerned.

3 The Liberal defence and critique of denationalisation

It is evident from this brief look at the UK and the US that liberal states have long had powers to transform citizens into aliens and that they have exercised them on the grounds of disloyalty, lack of commitment, bad character and (ostensibly) to protect society from “dangerous citizens”. The question I will turn to now is whether it is legitimate for a liberal state to possess (and to exercise) such powers.

At first glance, a liberal state possessing the power to revoke citizenship seems relatively uncontroversial. If one views the state as an association of free, rights-bearing individuals who contract with each other to further their common goals, it is plausible to concede to the state the right to withdraw citizenship from (and, if appropriate, expel) anyone who seriously or wantonly threatens the achievement of these goals. In this view, the state should be considered analogous to other collective organisations in civil society. Virtually all associations, including golf clubs, churches and universities, are recognised as having the right to withdraw membership from those who flagrantly disregard their rules or set themselves at odds with the key principles of the association in question. Not uncommonly, such organisations “expel”, “excommunicate”, “strike off the register” or “terminate the contract” of those adjudged to have brought the association into disrepute or have otherwise threatened its good standing or continued existence.

The analogy between the state and other associations has recently been drawn by Christopher Wellmann (2009) in a defence of the right of states to control immigration on to their territory. Wellmann argues that states, like other associations in liberal society, have freedom of association rights (derived from the rights of individuals) that ground a right to

exclude non-members. While he concedes that states are different in important respects from other associations, Wellmann argues that failing to recognize the freedom of association rights of states would lead to some perverse outcomes. It would, for example, seem to make unproblematic the forcible annexation of smaller states into larger ones or forcing states to join regional trade or security organisations against their will (2009, 112). Wellman does not directly consider whether there is a corresponding right for political communities also to *exclude* (or expel) members they no longer want. But as this is a right typically granted to other associations (like clubs, as suggested above), it could be seen as a logical extension of the individual (and collective) right not to be forced into association with others.

More commonly, the liberal justification of the state's right to strip citizenship has relied on the view that the state involves an (implicit) contract amongst individuals. Hence, Cesar Beccaria's position that banishment (inclusive of temporary or permanent loss of citizenship) was the appropriate response to those "who do not obey the laws which are the conditions under which men abide with each other and defend themselves" (Beccaria 1995 [1764], 56). As the statement indicates, the contract involves reciprocal rights and duties. If individuals had duties to the state (and society), the state also had duties to its citizens. The point was not lost on liberals like Kant and Vattel who supported the practice of banishment and the stripping of citizenship. They both explicitly connected the individual's right to quit (leave) society with the state's right to expel individuals, thus reinforcing the state's basis in consent. According to Vattel:

If the body of the society, or he who represents it absolutely, fails to discharge the obligation towards the citizen, the latter may withdraw himself. For if one of the contracting parties does not observe his engagements, the other is no longer obliged to fulfil his; as the contract is reciprocal between the society and its members. It is on the same principle also that a society may expel a member who violates its laws (Vattel 1844 [1758], 105).

It might be argued that the idea of conditional citizenship shows the limitations of a form of liberalism that views the state in individualistic and contractual terms. According to one strand of liberal political theory, indebted to republican and nationalist thought, modern states are not simply associations amongst freely contracting individuals: they are better conceived of as *communities* – as associations formed through birth not explicit consent – that are partly constitutive of the identities of members. Liberal nationalists, like David Miller (1995), Yael Tamir (1995) and Michael Walzer (1983), conceptualise states as "communities of character", where members share a common public culture and collective identity. This liberal nationalist view complicates the question of the right to denationalise because it raises the possibility that the broader community may be implicated in the acts of their members more deeply than more individualistic accounts of the state acknowledge. Just like parents cannot simply turn their back on their children when they do something wrong, so a state cannot simply palm off its own failures onto other states, in part because the state in question is in some measure responsible for the kinds of individuals it has generated (Aleinikoff 1986, 1496). However, this more intimate view of the state hardly delivers a knock blow to denationalisation. Even families have from time to time disowned their members (and perhaps have been justified in doing so when their kin commit particularly egregious acts) (cf. Aleinikoff 1986, 1497).

Moreover, while, in a more communitarian vision, the ties between an individual and a particular state may be deep and constitutive – no liberal nationalist could ever conceive of banishment as "a mere change of air", in the way Thomas Hobbes (1995, Chap 28) did –

more tightly-knit communities may have a stronger need to use banishment than more individualistic ones. The intimacy of such societies, their commitment to certain key shared values and understandings and the active civic engagement they require of members, make their way of life more vulnerable to dissent and multiply the reasons why loss of citizenship (and even expulsion) might be an important punishment.

One need not rely solely on analogies from other associations or organisations to establish the compatibility of different types of liberalism with the revocation of citizenship. Most liberal states – from the more individualistic to the more communitarian – have, until very recently, claimed the right to execute (after due process of law) those citizens who violate the fundamental rules of social order or threaten the state's existence. If a citizen can be *killed* by the state for violations of the law, it seems odd to say that he cannot be *deprived of membership* (and even deported) by the same state. Historically, the acceptance of the state's right to execute helps explain why the right to strip citizenship was rarely questioned. For most liberal thinkers the stripping of citizenship (in conjunction with banishment) was viewed as a humane alternative to the death penalty.

Despite the historical compatibility of liberalism with revocation powers, a number of important objections have been raised against the use of denationalisation in recent decades. Liberals have articulated three major objections based on concerns about statelessness, invidiousness, and arbitrariness. I will explain each of these in turn.

The first concern is that revocation of citizenship can lead to *statelessness*, which from a liberal perspective must be avoided because it is both unjust and cruel. Statelessness is *unjust* because it violates the right of each and every individual to claim full membership somewhere. Since the world is exhaustively divided between states and individuals have no choice but to live within and under the authority and power of a state, it is unjust not to grant an individual full membership rights in at least one state (Gibney 2009). This is particularly the case because, despite the growing reach of international human rights law in providing a legal basis for the treatment of non-citizens in recent decades, all states reserve some important rights, entitlements and privileges solely for citizens. For example, typically only citizens can vote in national elections, hold key government offices, and be freed from the strictures of immigration control, including deportation power, etc. Even if it does not condemn one to rightlessness, statelessness constitutes a significant deprivation. As John Finnis has commented, “statelessness is an anomaly, a disability, and presumptively an injustice” (Finnis 2008, 30).

Making someone stateless is *cruel* because it may be a recipe for exclusion, precariousness and general dispossession. Loss of membership in a state, as noted above, deprives one of a range of basic citizen rights. Moreover, as citizenship is in some states the *sine qua non* of even one's basic human rights, its impact upon an individual may even be far heavier. Focusing on the circumstances of those, like the German Jews and White Russians stripped of citizenship in the 1920s and 1930s, Hannah Arendt famously argued in the *Origins of Totalitarianism* that the stateless typically suffer not one loss but three: the loss of a home, the loss of government protection, and, finally, the loss of “a place in the world which makes opinions significant and actions effective”, a shared political community in which to act, initiate and form views of a common world (Arendt 1958, 293-296). Arendt's account may overstate the contemporary effects of loss of citizenship. Denationalisation, as the US case

shows, may not involve deportation and thus the literal loss of one's home. Moreover, the stateless now have some albeit minimal rights under international law to fall back upon (particularly when they are incorporated into domestic law in the state in question). But her account serves well enough remind one that being without citizenship can lead to a dangerous and precarious existence. If, as Judith Shklar has stated, a defining feature of liberals is that they are those who view cruelty as the worse thing we can do, the deliberate creation of statelessness must be unacceptable (1982).

Concerns about the injustice and cruelty of statelessness have had considerable influence in arguments restricting the use or urging the withdrawal of denationalisation powers. In a famous 1958 decision, the US Supreme Court drew upon Arendt to strike down the 1940 expatriation statute that stripped deserters of US citizenship. The majority in *Trop v. Dulles* argued that denationalisation was cruel and unusual because:

The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights..., no country need do so, because he is stateless...In short, the expatriate has lost the right to have rights (*Trop v. Dulles*, 1958, Section II).

In the UK, powerful denunciations against denaturalisation power have been rarer. Nonetheless, Home Office officials have shown some reluctance to recommend denaturalisation in cases where statelessness would result (regardless of whether or not deportation was to be sought). Since 1981, moreover, a number of pieces of legislation, including acts in 1981 and 2002 have dramatically reduced the ability of the government to strip citizenship when statelessness would result (Gibney 2011).

A second concern about denationalisation has been that it is *invidious*, violating liberal principles of equal respect and generating a group of second class citizens. The focus here has been on the fact that many denationalisation laws – such as those operative in the UK between 1914 and 2002 – enable governments to strip citizenship only from *naturalised* citizens, and not from the native born. The singling out of the naturalised has historically been linked to (in some cases racist) anxiety about the loyalty of those born outside the state. “The country of your birth is the one to which all your feelings and thoughts naturally go,” argued one British parliamentarian in 1918, in support of provisions to strip citizenship from naturalised citizens of German descent. Thus, “a man who comes here and is naturalised should not be given the same full privileges of citizenship or rights which might possibly be given safely to the sons that are born in this country” (HC Deb (11 July) 1918, c.587). In the same debate, no less than the Liberal Prime Minister, David Lloyd George, reminded his colleagues that “the call of blood overcomes everything else” (HC Deb (11 July) 1918, c.587).

This lack of trust in the naturalised has been all the more insidious because while it has often laid behind the push for denationalisation powers, official justifications for such powers have often appealed to liberal principles. The British government, for example, presented its case for measures to strip citizenship from naturalised citizens of German origin in 1918 by arguing that the naturalised, unlike the native born, held their citizenship by contract, the terms of which could be violated and thus rendered void (Gibney 2011). In the US, as I have shown, displays of “disloyalty” (like support for communist parties or ideologies) evinced many years after citizenship's acquisition were used to impugn the legitimacy of the original act of naturalisation (Maloney 1956).

Concerns about the invidious nature of targeting the naturalised have also served as practical arguments for undermining or at least reforming denationalisation powers. In *Schneider v Rusk* (1964), the US Supreme Court struck down a provision that enabled the government to strip the naturalised of citizenship if they resided abroad (in their country of original nationality) for an extended period. The majority argued, “[t]he discrimination [of the law] aimed a naturalised citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship” (*Schneider v Rusk* 1964). In 2002, the UK government eliminated any distinction between naturalised and native born citizens in its denaturalisation provisions. The government defended the change by arguing that the old distinction in British law had risked sending out the message that the naturalised held “a second class status” when compared to the native born.

A final liberal concern about denationalisation has been that it is *arbitrary*, and thus an illegitimate exercise of state power. This claim has had two main dimensions. The first and most fundamental is that the power has been, in the UK and many countries that share its legal system, effectively administrative in nature and subject to little or no judicial supervision. In the UK, for example, the revocation of citizenship has not been considered a punishment and does not require conviction for crime in a court of law. Before 2002, denationalisation certificates were issued on the judgment of the Home Secretary and, at best, reviewed only by an independent panel. The rules of evidence in such cases and the rights of those whose citizenship was in question have consequently been very different from those facing prosecution in a court of law.

The UK Home Secretary’s discretionary powers to denaturalise have long been a matter of concern. During a debate in which the House of Lords rejected provisions to enable the government to revoke citizenship in 1870, one peer described the revocation of citizenship as “a very transcendental power – more than ought to be entrusted to any man” (HL (March 10) 1870, c1618). More recently, Lord Goodhardt, speaking in the House of Lords in 2002, criticised denationalisation provisions by stating that: “[t]he Home Secretary cannot sentence people in this country to prison. He cannot extradite anybody who is lawfully in the United Kingdom. Those are decisions for the courts. Any removal of citizenship – if it is to be justified at all – should [also] be a matter for decision by the courts” (HL Deb (9 October) 2002, c.277).

In the US, where some forms of denationalisation power have, in contrast to the UK, been applicable only after a criminal conviction (such as those provided for under the 1940 and 1954 Acts), the criticism of arbitrariness has taken on a different form. Before the Supreme Court ended the use of denationalisation as a punishment, the practice was criticised as arbitrary in its effects rather than its procedures. The crux of this argument was that any punishment in a liberal society needs to be proportionate to “either to the seriousness of the offense or to the benefits that might derive from its imposition” (Anon 1955, 1193). The consequences of denationalisation, by contrast, were unpredictable and thus unmeasurable. As one legal observer noted, “nearly all ...[of its] concrete ill effects ... are possible or probable rather than certain. The individual made a stateless alien may suffer intolerable cruelties but he may on the other hand lead a relatively normal life, free of any inconvenience even comparable to a prison sentence” (Anon 1955, 1193). The arbitrariness of its consequences thus made it an unsuitable as a penalty for a liberal society.

These three concerns about denationalisation – its violation of the right to citizenship, its invidiousness, and its arbitrariness – appear to make the power difficult to square with liberal principles of justice, equality and fairness. But do they provide insurmountable barriers to the creation of a denationalisation power as a punishment that passes liberal muster? In the next section, I am going to consider a 2002 Act in the UK that might be seen as an attempt to create a power of denationalisation that meets liberal objections.

4 The UK’s Nationality, Immigration and Asylum Act of 2002

As I have shown, the UK has long had powers to strip citizenship from naturalised British citizens. The powers Britain possessed were vulnerable to the key liberal criticisms made above. They did not formally protect individuals from statelessness. They were applicable solely to naturalised citizens in a way that rendered them vulnerable to criticism that they involved invidious discrimination. Finally, they treated citizenship revocation as an administrative matter and one had no right to appeal to a court of law. In successive pieces of legislation in 1948 and 1981, British governments protected some categories of the deprived against statelessness and made minor changes to the review process of Home Secretary decisions. More significantly, perhaps, the power to revoke citizenship was used by the Home Secretary sparingly. Only 10 citizens were deprived of their citizenship status between 1949 and 1973, and no one between 1973 and 2001 (Gibney 2011).

In 2002, however, more radical changes to the state’s deportation powers were proposed by the Labour government of Tony Blair. These changes occurred under the shadow of two key events. Firstly, the Oldham race riots in northern England of May 2001, which impressed upon the government the need for greater integration of citizens into a set of key and commonly-held British values. The second event was the terrorist attacks of September 11, 2001, which sparked ongoing concerns about the loyalty and trustworthiness of Britain’s (citizen and non-citizen) Muslim population. Together these concerns fed into a significant tightening of the requirements for acquiring British citizenship signaled in a new government White Paper, “Secure Borders, Safe Haven” (Home Office 2002). Significantly, this paper also affirmed the government’s intention to update its deprivation laws and to use citizenship revocation provisions against individuals to illustrate the state’s “abhorrence” at certain crimes (Home Office 2002, 35).

The consequence of the White Paper was the *Immigration, Nationality and Asylum Act of 2002*. The act made three major changes to Britain’s denationalisation provisions. First, the new Act changed the standard required for deprivation from the clauses in the 1981 British Nationality Act (and previous acts) on disloyalty, trading with the enemy, and criminality (along with the further requirement that any denaturalisation also be “conducive to the public good”) to a single standard: that the Secretary State “thinks that” an individual’s holding citizenship is “seriously prejudicial to the vital interests” of the UK. This new standard was taken from Article 7 of the 1997 European Convention on Nationality.

A second change was that deprivation power was, for the first time, now to apply to *all* types of British citizen – native born as well as registered and naturalised. This dramatic change was, however, mitigated by a third: the Secretary of State now could not deprive if it would make an individual stateless (save for those cases in which an individual’s citizenship was gained through fraud or misrepresentation). The change thus extended the protection the 1981 Act granted to those facing deprivation because of a prison sentence to *all* non-dual national, naturalised citizens. A final noteworthy feature of the new Act was that those whom the Home Secretary deprived of their citizenship were given an automatic right of appeal, though in cases involving national security this would be to a court (the Special Immigration and Appeals Court) not bound by the usual rules of evidence and transparency.

In the House of Lords, the government stated that that deprivation was an important and necessary state power, though one that would be used sparingly. In presenting the Bill, Lord Filkin argued that deprivation power was necessary to express “public abhorrence at treasonable conduct and to demonstrate that the disloyalty shown is incompatible with being regarded as a member of the British family” (HL Deb (9 October) 2002, c.279). Lord Filkin went on to state that the new deprivation provisions would “deter and prevent future conduct” and provide “an additional sanction” against “treason and subversion”, even when an individual was not convicted of a crime (HL Deb (9 October) 2002, c.279). Connecting deprivation powers to the government’s new citizenship measures, he asserted, “we believe that it is consistent with our approach to citizenship...namely, that it is an extremely important privilege” (HL Debates (9 October) 2002, c.279).

A more detailed account of the government’s reasoning was evident in discussion of the Bill at committee stage in the House of Commons. The government justified parts of the new Bill by gesturing to the new terrorist threats associated with Al Qaeda’s attacks in the US. In Committee, where almost all of the House discussion on the Bill took place, the Home Office Minister, Angela Eagle, told members that “the Bill modernises the ... [deprivation] procedure in terms of national security threats and non-state threats, such as those from organisations that are organised globally but are not states” (HC Committee (30 April) 2002, c.56). Elaborating, she suggested that the old provisions did not cover “some of the potentially prejudicial activities that are worthy of deprivation, such as those to do with infrastructure, vital economic interests, or the general safety of the population” (HC Committee (30 April) 2002, c.60-62).

The justification for the extension of deprivation power to the native born, on the other hand, was presented entirely as an anti-discrimination measure. The new law, the government argued, would put all citizens “on an equal basis”. Because citizenship is so important to the government, “it ... should be respected without discrimination as to the route it was received.” The old deprivation laws, by singling out the naturalised, risked reducing their citizenship to “a second class status” (HL Debates (9 October) 2002, c.279). The specific character of the changes reflected the government’s desire to bring UK law into line with the European Convention on Nationality (ECN). In Committee, Angela Eagle, told members that the new deprivation grounds reflect the “1997 European Convention on Nationality, which the UK was instrumental in negotiating and we wish to ratify and sign.” “If the Bill is enacted”, she stated, “we will be able to sign it, so we are working to modernise and restructure our system to bring it in line with that Convention.” “This is”, she pointed out, “a wholly non-sinister approach” (HC Committee (30 April) 2002, c.55).

The government's desire to sign the ECN explains three distinctive – and ostensibly liberal – features of the new legislation. First, it explains the character of the new definition of the acts worthy of deprivation. The definition was taken wholesale from the ECN. Second, it clarifies why the protections against making individuals stateless were extended to all citizens. The Convention required, under article 7, that deprivation not be used when it would lead to statelessness (with an exception in the case of fraudulent acquisition). Finally, the Convention forbid, under Article 5, discrimination on the basis of how citizenship had been acquired (e.g. through birth or naturalisation). This meant that, if the government wanted to keep deprivation power, it had to extend it the native born or risk violation of the ECN.

5 Liberalising denationalisation?

The British legislation can be seen as an attempt to make deprivation power compatible with liberal principles, largely by bringing in the courts, applying the power to dual nationals, and eliminating the prospect of statelessness. Does it work? In this section, I want to explore the issues raised by the legislation across the three dimensions of liberal concern about revocation power: discrimination, cruelty and arbitrariness. In so doing, I will shed some light on the possibility of denationalisation power's compatibility with liberal principles.

Is it invidious?

At first glance, the 2002 legislation provides an answer to the problem of invidiousness by eliminating any distinction between the naturalised and the native born in the application of denationalisation power. Indeed, as noted above, the British government's stated motivation for expanding the power (or equalizing the misery, in Keynes' famous phrase) was a desire to get rid of the second class citizenship of the naturalised. However, in ending one form of discrimination, the government has created another by shifting denationalisation power onto citizens with a second nationality. Is this new form of discrimination legitimate?

Not all discrimination is invidious and illegitimate in the liberal state. Most countries, for example, have provisions that enable citizenship to be taken away if an individual acquired citizenship fraudulently, such as by lying about the length of period they had been resident on their application form. Yet the penalty of citizenship withdrawal in this case is one to which only naturalised citizens are vulnerable because only they – and not the native born – need to go through such procedures. This is, I think, a case where there is discrimination but it is not invidious or illegitimate. The way citizenship is acquired simply makes it possible to punish some citizens (the naturalised) for an act that it is not possible for other citizens (the native born) to commit.

By contrast, the 2002 British law is different. In this case, if a dual national and a single national commit the very same act – or, more accurately, if they each would threaten the state's vital interests – only the dual national will lose his or her citizenship. If dual national citizens can commit the same crime but not be subject to the same penalty as single national citizens, then, it seems, they can rightly claim that they are being treated as second class citizens. As one critic of the legislation put it, "there cannot be different grades of Britishness in the eyes of the law. You are either British or you are not" (Hensher, 2003).

But perhaps this conclusion is too hasty. Some laws in liberal democratic states shield particular social groups from certain penalties. One example is found in recent US Supreme Court rulings that protect individuals who commit crimes while juveniles from receiving the death penalty or sentences of life without parole.² This practice is typically defended, however, in terms of the young's underdeveloped mental capacity (for want of a better expression) – the belief that their immaturity makes them less accountable than adults for their crimes – and not on the level of hardship that it is justifiable to inflict upon juveniles as a group. Taking into account the varying hardships of penalties on individuals is somewhat more controversial, though not completely uncommon. In sentencing, fines for richer people are sometimes larger in order to make an impression upon them; judges often take a person's age and health into account before ordering prison sentences. In the UK a non-citizen in the UK who commits a crime that makes them eligible for “automatic” deportation will not be deported if returning them to their country of citizenship would place them at a strong risk of having their human rights violated. The legitimacy of this kind of practice stems, it might be argued, from the principle that equal justice sometimes requires unequal treatment.³

Nonetheless, the 2002 UK law still seems deeply problematical for two reasons. First, it is not obvious that the holding of a second nationality captures a relevant difference in the *hardships* of denationalisation for particular citizens. A person made stateless by denationalisation but allowed to remain in the UK might find themselves in a far more favourable position in terms of the rights and protections available to them than a dual national who was suddenly forced to rely only on their citizenship of Haiti or Iraq or some other country with few resources and little infrastructure for the protection of human rights. If unequal treatment may sometimes lead to more equal outcomes, it is unlikely always to do so in the case of denationalisation.

A second objection is that the status of citizenship, as the grounding principle of state membership, simply ought to be a status which admits of no gradations or rankings. Citizenship worth its name entails equal standing amongst the members of political community. The British government admitted as much when it abandoned making naturalised citizens uniquely vulnerable to denationalisation in 2002 to avoid “second class citizens”. Referring implicitly to historical exclusions of blacks, women and other ethnic minorities, Avishai Margalit has argued that the problem with second class citizenship is not simply that it withholds from some citizens some entitlement, privilege or right that other citizens enjoy, but that it implies “that second class citizens are not in essence whole human beings – in other words that they cannot become responsible adults” (Margalit 1996, 153). Dual nationality is not an ascribed status equivalent to gender or race.⁴ But Margalit's account of second class citizenship does illustrate the way gradations of citizenship are almost inevitably entwined with ideas of inferiority. Moreover, if stripping citizenship only from the naturalised is rejected because it is invidious, it seems inappropriate to treat dual nationals in the very same way. The government's position that dual nationals would not be made stateless by denationalisation is irrelevant. What makes the conditional nature of their

² See, US SC *Graham v. Florida*, 2010.

³ I am grateful to Kieran Oberman for pressing this point.

⁴ Though it is worth noting that dual nationality is a status that seems more likely to be held by recent immigrants to a state and thus to overlap with some of society's more marginalised and victimised groups.

citizenship objectionable is how it marks them as lower in standing relative to their fellow *citizens*; it has nothing to do with their relationship to another, different state. Because it makes their citizenship less secure than that of their compatriots, the UK's new denationalisation provisions illiberally treat dual nationals as inferior citizens.

Does it violate a right to full membership?

The British state could, of course, eliminate any discrimination against dual nationals by extending denationalisation powers to *all* citizens, irrespective of how many nationalities they possess or how they acquired their citizenship. But then the UK runs into the problem of creating statelessness. And one of the laudable features of the 2002 Act, from a liberal point of view, is that it ensures that statelessness is a bar on denationalisation.

Suppose, however, that state officials in the UK found a way out of the statelessness problem by making a deal with another state, call it X. Under the terms of the deal, X would grant citizenship to any UK national with only one citizenship who was denationalised by the UK. Now Britain could apply denationalisation power to all its citizens in way that was not invidious and did not lead to statelessness. Would there still be a liberal objection to the state having the power to denationalise its citizens? In other words, do people have a right not only not to be made stateless but also to continue living as a full member in the particular state in which they have hitherto resided, a right that is cruel or unjust not to respect?

One answer to this question, developed recently by a number of scholars of citizenship, is that it is unjust not to grant people citizenship in countries where they have made their lives. The idea of a right to access citizenship *jus domicili* has been conceptualised in different ways in by a range of political theorists including Michael Walzer (1983), Rainer Baubock (2008) and Joseph Carens (2009). But at the core of their thinking is the idea that continued residence over time in a state gives rise to a moral right to residence, and thus to membership. According to Carens, after a certain period of residence, one accumulates a moral right to membership because of the personal, social and economic connections one is likely to have formed over time. "There is", he says:

something deeply wrong in forcing people to leave a place where they have lived for a long time. Most people form their deepest human connections where they live. It becomes home. Even if someone has arrived only as an adult, it seems cruel and inhumane to uproot a person who has spent fifteen or twenty years as a contributing member of society in the name of enforcing immigration restrictions (Carens 2009).

Not to recognise such people as members, Carens argues, violates both liberal and democratic principles.

While the argument of those, like Carens, who support the right of citizenship *jus domicili* is traditionally focused on non-citizens denied admission to citizenship, it also has implications for the question of denationalisation. For if it is wrong to deny people *access* to citizenship when they have established connections in a society, is it not also wrong to *revoke* citizenship when and where such connections exist? Denationalisation laws are unjust because they ignore the fact that an individual has lived in a place for a substantial period of time (or a substantial proportion) of their lives, arguably acquiring a right to maintain citizenship.

This formulation is a strong but somewhat limited defence of against the use of denationalisation power. This is first because the *jus domicili* principle would provide a basis

for protecting against denationalisation only those citizens who had genuine and ongoing residence in the state in question. Citizens who lived in another country or had not spent sufficient time in the state could not, on the face of it, claim the protection of the principle any more than non-citizens outside the state could. This restriction might be particularly pertinent for dual nationals as the chances of them living outside the state would probably be greater.

A second limitation in the principle's application concerns those who have committed serious crimes while in the country. Carens, for example, sees time as a proxy for an individual's integration and argues that after ten years' residence even illegal migrants should be able to claim permanent residence in a state. But he also concedes the relevance of criminal behaviour in determining whether the right to regularise one's stay should apply *before* the ten-year period has passed. More expansively, he defends his ten-year rule on the grounds that those who have been present for so long have demonstrated that they are "responsible" and "contributing" members of society (Carens 2009). Other observers have been far more explicit (and exacting) in the criteria that they believe need to be met before a non-citizen has earned the right to reside or to gain citizenship, arguing that consistent and criminal behaviour should be an important consideration in determining access to citizenship, even if not always a bar (Schuck 2009, Neuman 2009).

The key point is that the *jus domicili* principle may not offer protection to *all* of a state's citizens. It may not apply to those who have not satisfied the residence requirements associated with it, especially (but not exclusively) if they had committed a serious criminal offence. Of course, the standard required for taking citizenship away should be higher than that for refusing to grant it originally. No state claims the right to denationalise common murderers or rapists (even when they claim the right to execute them or imprison them for life), despite the fact that these might be valid reasons for rejecting an application for citizenship. Loss of citizenship is reserved for crimes (proven or suspected) of a higher order, ones that threaten the public order of the state or involve treachery or national security. This higher bar is justifiable because it is more morally serious to deprive someone of a good they are currently enjoying than to prevent them from initially accessing the good, in part because individuals are likely to have already built their lives and expectations around the continuing enjoyment of the good (cf Waldron 2000).⁵ As long as the bar is set high enough (e.g., terrorist activity aimed at bringing down the state), there is no reason to believe that the *jus domicili* principle, as commonly interpreted, is inconsistent with the practice of denationalisation as long as it is operated within certain tight constraints.

⁵ Jeremy Waldron encapsulates this position in his discussion of historical injustices when he writes, "For better or worse, people build up structures of expectation around the resources that are actually under their control. If a person controls a resource over a long enough period, then she and others may organize their lives and their economic activity around the premise that that resource is 'hers,' without much regard to the distant provenance of her entitlement. Upsetting these expectations in the name of restitutive justice is bound to be costly and disruptive" (pp. 15-16). As Tiziana Torresi has pointed out to me, this position would seem to offer a basis also for seeing fraudulent or invalid applications for citizenship as unjustified reasons for the withdrawal of citizenship after a certain period of time had passed.

Is it arbitrary?

The UK legislation appears to address some of the concerns against arbitrariness that might serve as the basis of liberal critique. Most obviously, the new denationalisation rules allow for an automatic right of appeal within 28 days of any Home Secretary decision to an adjudicator (with further possibilities for appeal to higher courts), ensuring that a decision is at least potentially subject to judicial scrutiny (see footnote 6). The problem is that this still enables the state to denationalise in cases where an individual has never been convicted of a criminal offence. Moreover, the court that decides on whether the Home Secretary uses his powers lawfully may in case of national security be one in which normal rules of evidence (e.g., allowing someone facing denationalisation to see all the evidence against him or her) do not apply. Given that denationalisation deprives one of the very right to be remain a member of a society in which one may have lived one's entire life, the protections available against injustice seem inadequate, reliant too much on the judgment (or hunches) of a politically elected official.⁶ The new legislation thus does not escape the charge of being arbitrary and thus fails the test of liberal justice.

In sum, Britain's 2002 legislation should be seen as a failed attempt to fashion a denationalisation power fit for the liberal state. The power does not escape problems of invidiousness and arbitrariness that have led liberals to be hostile to denationalisation power in the period since 1945. Nor does it protect completely against its cruel use. While these illiberal features of Britain's 2002 law do not prove that it is impossible ever to construct a tightly crafted denationalisation law that passes liberal muster, the hurdles are evidently difficult to clear.

Moreover, there are other liberal concerns about denationalisation beyond the three I have listed here. One of these is that the community (or the state) will judge correctly and prudently just what constitutes a threat to its existence or treachery or crimes worthy of deprivation more generally. In practice, such matters are often subject to grave dispute. Is a US military officer who refuses to serve in Afghanistan because she believes it causes needless suffering and death being loyal or disloyal to the principles on which the US is based? How should we understand the behaviour of someone like Bradley Manning, the US army soldier who leaked classified US information ultimately published by Wikileaks? Many would dispute the judgement of US prosecutors that his behaviour amounts to "aiding the enemy", but others would think his crimes warrant denationalisation or even the death penalty. Another concern is that while any denationalisation power granted to officials might be justifiable in principle, in practice we need to take account of the fact that governments may well extend or abuse such powers over time for political or security reasons. Thus, there may be valid reasons for concern that conceding even the most limited of powers to the state to revoke citizenship will end – even if it does not begin – in illiberalism.

⁶ One can see that this concern is not simply a hypothetical one by considering the case of *L1 and the Secretary of State for the Home Office* in the UK Special Immigration Appeals Commission (18 November, 2010). The individual, going under the identifier L1, who was naturalised Briton, had his citizenship deprived by the Home Secretary while he was on a family holiday in Sudan. When he failed to appeal against the deprivation order within the 28-day period required by SIAC, he lost his right to appeal. The consequence has been that the Home Secretary's decision to take away L1's citizenship on grounds that his holding citizenship is "not conducive to the public good" will not be reviewed by the courts. L1 has now not only lost his right to UK citizenship but any right to reside in the UK.

This last concern is hardly a hypothetical one. Three years after the British government passed its 2002 reforms it introduced new legislation that significantly reduced the standard required to revoke citizenship. Discarding the requirement that an individual's behaviour be "seriously prejudicial to the vital interests of the state", UK legislation now requires only that an individual's holding citizenship be "not conducive to the public good." This is the same standard the UK state uses to decide whether a *non-citizen* should be deported from the UK (Gibney 2011). In the years since the new law passed, 8 British citizens have had their citizenship revoked (The Guardian, 27 January 2011).

Conclusion

The revocation of citizenship as a punishment or to protect the state has a long history, and it is a history that is not yet over. Indeed, as citizenship is transformed by dual nationality and concerns about terrorism ebb and flow, calls to boost the denationalisation powers of liberal states may well become stronger in the coming years. The question of how to respond to these calls raises difficult questions for liberals committed both to a view of the state as an association similar to (if not exactly the same as) the associations of civil society yet simultaneously antipathetic towards hierarchies of citizenship and the overweening state power. In the face of these conflicting values and conceptualisations, liberals have good reason to be concerned about recent proposals to develop denationalisation power.

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