

# Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien

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*Since 9/11, Western governments have redefined what it means to be a citizen. Though citizenship is often thought of as an inalienable right, the emergence of the “homegrown” terrorist has called into question whether certain citizens deserve the protection that citizenship status provides. Although international treaties preclude a country from rendering a person stateless, recent legislative and executive action in the United Kingdom and Canada has raised the issue of whether these new regimes of citizenship deprivation respect international and domestic law.*

*Throughout the article, the author displays how the contemporary exercise of citizenship revocation has revived the arcane practices of exile and banishment. To examine the growing trend of citizenship revocation, the author situates it against related historical practices as well as within the emerging field of crimmigration. She then examines how citizenship revocation is, was, or will be employed in the UK, the United States and Canada. Of particular relevance to the author is Bill C-24, the Strengthening Canadian Citizenship Act, which received Royal Assent in June 2014. She argues that the executive’s expanded power to revoke a person’s citizenship under this Act is inherently punitive and will create an unconstitutional regime that violates multiple sections of the Canadian Charter of Rights and Freedoms.*

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# **Introduction**

The securitization of migration has crossed the border into citizenship. In the immediate wake of 9/11, the spectre of the menacing foreigner occupied the Western field of vision, and immigration law was enlisted as first responder. Terrorism was a problem that deportation could solve by exporting the risk to some other jurisdiction. Eventually, the figure of the “homegrown” terrorist entered the picture, but since immigration law does not regulate citizens, it had nothing to offer. Of course, post-9/11 criminal law, amended to create a range of terrorism offences, applies indifferently to citizens and non-citizens alike. Yet, this apparent virtue of non-discrimination seems to dissatisfy those who insist that the terrorist is always and already foreign. If those deemed threats to national security are not actually alien in law, then they must be alienated by law.

In response, politicians in various states have recently pondered citizenship stripping as a way to convert the terrorist into a foreigner. This may be achieved via two-step exile: Step one, revoke the citizenship

of the undesirable citizen. Step two, deport the newly-minted alien. In earlier writing, I worried not only about demonizing actual non-citizens post-9/11, but also about producing the alien within. I had in mind profiling, discourses of fear and discrimination against Muslims, Arabs and refugees.<sup>1</sup> But citizenship revocation makes the production of the alien within entirely literal. In Canada, the recently enacted *Strengthening Canadian Citizenship Act* (Bill C-24) aims to do just that.<sup>2</sup> I argue that in twenty-first century Canada, citizen revocation for “crimes against citizenship” violates the *Canadian Charter of Rights and Freedoms*<sup>3</sup> and likely breaches Canada’s international legal obligations.

Depending on one’s perspective, citizenship revocation is either emergent or recrudescent. For students of crimmigration, denationalization extends the functionality of immigration law in advancing current penal and national security objectives through expulsion. For a historian, citizenship revocation for uncitizen-like conduct looks more like the revival of banishment. Both depictions are useful in tracing the trajectory of contemporary citizenship revocation in Canada and the United Kingdom, and both tacitly understand the practice as essentially punitive—a view to which I also subscribe.

Part I of this article situates twenty-first century citizenship revocation against related practices, including deprivation of citizenship rights, deportation of non-citizens, historical practices of banishment and exile, and the death penalty. The objective is to specify the distinctive features of revocation while identifying its familial resemblance to these related practices. Part II examines citizenship deprivation more closely. I compare the international, British, American and Canadian treatment of citizen revocation. Next, Part III focuses on citizenship reforms effected by Bill C-24, the *Strengthening Canadian Citizenship Act*. The reforms are then compared to the existing UK regime, where denationalization has recently been deployed with increasing enthusiasm. Finally, Part IV

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1. See Audrey Macklin, “Borderline Security” in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 [Macklin, “Borderline Security”].

2. *Strengthening Canadian Citizenship Act*, SC 2014, c 22 [Bill C-24]. As of the time of writing, the revocation provisions have not been declared in force. All references to specific provisions are to the *Citizenship Act*, RSC 1985, c C-29, as amended by Bill C-24.

3. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

surveys the legality of the Canadian version of citizenship revocation by considering potential challenges to Bill C-24 under sections 7, 11, 12 and 15 of the *Canadian Charter of Rights and Freedoms*.

## I. Situating Citizenship Revocation

### A. Historical Perspective

Citizenship is the highest and most secure legal status one can hold in a state, but it is not inviolate. States that prohibit dual nationality may revoke the citizenship of a person who naturalizes elsewhere. Many states also retain the power to denaturalize a citizen who obtained citizenship through fraud or misrepresentation.<sup>4</sup> Over a dozen European Union Member States provide for loss of citizenship for extended residence abroad on the basis that the citizen lacks a genuine link or, in the words of the *Nottebohm Case (Liechtenstein v Guatemala)*, the “social fact of attachment” to the country of citizenship.<sup>5</sup> This disdain for the “nominal citizen” was also deployed tactically in 2004 to resolve the case of Yaser Hamdi, an alleged al Qaeda combatant who was born in the United States but spent his life in Saudi Arabia and was captured in Afghanistan in 2001.<sup>6</sup>

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4. Denaturalization refers to the non-consensual deprivation of citizenship acquired by naturalization, while denationalization encompasses deprivation of citizenship, however acquired. The classification only matters where the rules for citizenship revocation differ as between naturalized and birthright citizens. Renunciation of citizenship refers to voluntary surrender of citizenship by the individual. The US practice of expatriation historically blurred revocation and renunciation by deeming certain conduct to amount to constructive renunciation.

5. [1955] ICJ Rep 4 at 23 [*Nottebohm Case*]. These EU Member States also provide for affirmative steps that citizens residing abroad can take to retain citizenship short of taking up or resuming residence in the country. To the extent that many individuals who reside more or less permanently in another state are dual citizens, such laws indirectly impede the exercise of multiple citizenship.

6. US law does not provide for loss of citizenship based on residence abroad, but it arrived at the same result when it agreed to release Hamdi from detention in exchange for Hamdi surrendering his US citizenship and agreeing to deportation to Saudi Arabia under strict conditions. For an interesting critical analysis of the Hamdi case, see Peter Nyers, “The Accidental Citizen: Acts of Sovereignty and (Un)making Citizenship” (2006) 35:1 *Economy & Society* 22.

Formal exile of citizens for criminality, immorality or treason is generally regarded as a relic. In Ancient Greece, exile was an alternative to execution. In late eighteenth and nineteenth century England, exiling convicts to remote Australia served imperial objectives of colonial expansion and the domestic goal of relieving pressure on overcrowded prisons. The fiction of *terra nullius*, along with the absence of border control, indulged the belief in an infinite expanse of unclaimed and unoccupied territory to which undesirables could be expelled. By the start of the twentieth century, penal colonies were no longer necessary or even useful. The growth of domestic prisons meant that states could segregate wrongdoers on state territory. The acceptance of rehabilitation as a central tenet of modern penal theory also made reintegration into the community after incarceration a central goal of punishment.<sup>7</sup> Nevertheless, denaturalization was retained and even grew as an option for purging politically suspect naturalized citizens.<sup>8</sup>

As the twentieth century progressed, exile of citizens became understood as the prerogative of tyrants, or a deplorable excess committed in “the delirium of war”.<sup>9</sup> The denationalization and deportation of Japanese Canadians from internment in Canada to Japan following World War Two remains a shameful episode in Canadian history.<sup>10</sup> However, the demise of exile was matched by the ascent of deportation (or more accurately, deportability) in the late twentieth and early twenty-first century.

As noted above, most liberal states provide for denaturalization where a citizen acquired status through fraud, misrepresentation or concealment of material facts. Some states impose a statute of limitations on exposure

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7. See Matthew J Gibney, “Should Citizenship be Conditional?: Denationalisation and Liberal Principles” (2011) Refugee Studies Centre Working Paper No 75 at 8.

8. See Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (Philadelphia: University of Pennsylvania Press, 2013).

9. Cong Globe, 40th Cong, 2d Sess, 1804 at 2317 (1868) cited in *Afroyim v Rusk*, 387 US 253 at 265 (1967).

10. See *Co-Operative Committee on Japanese Canadians v Canada (AG)*, [1946] UKPC 48 [Co-Operative Committee on Japanese Canadians]. See also Christopher G Anderson, “Review Essay: Immigration, Immigrants, and the Rights of Canadian Citizens in Historical Perspective” (2011) 43 Intl J Can Studies 207; Christopher G Anderson, “A Long-Standing Canadian Tradition: Citizenship Revocation and Second-Class Citizenship Under the Liberals, 1993–2006” (2008) 42:3 J Can Studies 80.

to denaturalization while others, like Canada, do not. This indeterminate vulnerability proved convenient for the Canadian government when, in the 1980s, it was revealed that Canadian officials permitted German and East European war criminals to immigrate in the aftermath of the Second World War. Even though Canadian officials had failed to ask prospective immigrants about their activities during World War Two, the Canadian government attempted (ultimately with limited success) to denaturalize these men on grounds of fraud or misrepresentation because they failed to divulge their wartime activities.

In addition to formal denaturalization, citizenship status may be eviscerated, leaving behind a citizenship that is hollowed of content but formally intact. The individual remains a citizen but loses some of the rights that go with it. The core citizenship rights are the franchise and the right to enter and remain. Legislated felon disenfranchisement, both temporary and permanent, is still lawfully practised in several US states. It has, however, been recognized as a *Charter* violation in Canada. The European Court of Human Rights is less categorical in its jurisprudence and has upheld permanent disenfranchisement under Italian law for offenders sentenced to more than five years' imprisonment, while finding the UK regime disproportionately harsh.<sup>11</sup>

The right to enter may also be denied to citizens, but this typically occurs through opportunistic exercise of executive discretion, rather than legislative authorization. For instance, states may deny consular assistance or withhold issuance of a passport to deprive citizens abroad of their right to enter. In effect, the government repudiates the individual qua citizen without resorting to formal denationalization. This repudiation is sometimes labelled *de facto* statelessness. Over the past decade, the Canadian government has obstructed the return of Canadian citizens Maher Arar, Abousfian Abdelrazik, Ahmad el-Maati, Muayyed Nureddin, Abdullah Almalki, Omar Khadr and Suad Mohammed, exemplifying the constructive repudiation of Canadian citizens deemed unworthy

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11. See *Scoppola v Italy (No 3)*, No 126/05, [2012] 56 EHRR 663. The European Court of Human Rights has found British disenfranchisement law disproportionate and thus in violation of the *European Convention on Human Rights*, Protocol 1, Article 3 (right to free elections). *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur TS 5 (entered into force 3 September 1953) [ECHR]. See *Hirst v UK (No 2)*, No 74025/01, [2005] IX ECHR 187; *Greens and MT v UK*, No 60041/08, [2010] VI ECHR 57; *R (Chester) v Secretary of State for Justice*, [2013] UKSC 63.

of Canada's protection. Similarly, US embassy officials in Yemen have reportedly confiscated passports of US citizens of Yemeni origin.<sup>12</sup> Most recently, United Nations Security Council Resolution 2178 encourages states to restrict exit by criminalizing travel by their nationals to foreign states for purposes directly and indirectly related to terrorism.<sup>13</sup>

A contemporary regime of citizenship revocation shares certain traits with banishment, disenfranchisement and repudiation. Like exile (and unlike disenfranchisement), the objective of the revocation is to physically expel the individual from the state's territory. By interposing denationalization as prelude to expulsion, the state can formally dub the expulsion "deportation" rather than "exile".

Like the mass denationalization of disfavoured groups, current citizenship revocation practice in the UK happens to be a phenomenon directed almost exclusively at Muslim males, although the numbers are comparatively tiny. Like felon disenfranchisement, citizenship revocation requires explicit statutory authorization. But, like the opportunistic repudiation of individual citizens abroad, a judgment deeming a citizen undeserving of the protection of citizenship is a matter of executive discretion. Notably, Britain's Secretary of State for the Home Department (Home Secretary) also favours exercising her citizenship-stripping power when the targeted citizen is abroad, and then barring him (*qua* foreigner) from entering Britain in order to appeal the decision.<sup>14</sup>

Citizenship deprivation also shares a certain affinity with the sovereign's other technique for the permanent elimination of wrongdoers: namely, the death penalty. When tethered to expulsion, citizenship revocation effects a kind of "political death". As eighteenth century Italian jurist

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12. See Ramzi Kassem, "Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases" (2014) 82:5 *Fordham L Rev* 2099.

13. UNSCOR, 7272nd Mtg, UN Doc S/Res/2178 (2014) at para 6(a). The Canadian government announced in September 2014 that it had cancelled passports of citizens whom it believed intended to travel abroad to fight for insurgent groups in Syria and Iraq, as well as those already abroad. See Stewart Bell, "Canadian Government Begins Invalidating Passports of Citizens Who Have Left to Join Extremist Groups", *The National Post* (20 September 2014), online: <[www.nationalpost.com](http://www.nationalpost.com)>. Australia has acknowledged the practice as well. See Ben Saul, "Broad Passport Powers Raise Concerns", *The Drum* (23 June 2014), online: <[www.abc.net.au/news/thedrum](http://www.abc.net.au/news/thedrum)>.

14. See Patrick Galey, "Citizenship Revoked: Lawmakers Scathing on Plan to Expand Citizen-Stripping Powers", *The Bureau of Investigative Journalism* (3 March 2014), online: <[www.thebureauinvestigates.com](http://www.thebureauinvestigates.com)>.

Cesare Beccaria declared, “banishment is the same as death in respect to the body politic”.<sup>15</sup> A citizen stripped of nationality and banished from the territory is, for all intents and purposes, dead to the state. This political death is a sibling to the historic practice known as civil death, whereby slaves and felons were denied legal personhood. The individual remains physically alive and present in the community, but is no longer recognized as an autonomous legal subject capable of contracting, suing and being sued, or otherwise participating in civic life. Killing them is not murder.

Denationalization is not only a political analogue to death; it may also be a prelude to it.<sup>16</sup> Once outside the territory, the state has neither legal claim nor legal duty to the former citizen and is relieved of any obligation to object if another state kills one of its nationals.<sup>17</sup> The British Bureau of Investigative Journalism reports that two UK nationals who were stripped of their citizenship while abroad were subsequently executed by US drone strikes. Ian Macdonald, president of the Immigration Law Practitioners Association, observed that once the UK deprives a person of citizenship, “the British government can completely wash their hands if the security services give information to the Americans who use their drones to track someone and kill them”.<sup>18</sup> Just as civil death makes the person available to be killed but not murdered—much like Agamben’s *homo sacer*<sup>19</sup>—so too can political death presage physical death.

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15. Cesare Beccaria, *On Crimes and Punishment*, 5th ed translated by Graeme R Newman & Pietro Marongiu (New Brunswick, NJ: Transaction Publishers, 2009) at 63.

16. This was the case with the Nazi extermination of German Jewry, as Hannah Arendt recounted. First, the Nazi government stripped Jews of German nationality and then, when no country would take them in, proceeded to murder them. See Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and Company, 1951).

17. Since the United States’ lethal drone strike on US citizen Anwar al Awlaki (and his son), the United States’ position is that it may lawfully execute its own citizens when they are abroad. This, of course, obviates the need for the US to strip citizenship before executing a citizen abroad. See Spencer Ackerman, “US Cited Controversial Law in Decision to Kill American Citizen by Drone”, *The Guardian* (23 June 2014), online: < [www.theguardian.com](http://www.theguardian.com) > .

18. Chris Woods & Alice K Ross, “US Covert Actions in Somalia: Former British Citizens Killed by Drone Strikes After Passports Revoked”, *The Bureau of Investigative Journalism* (27 February 2013), online: < [www.thebureauinvestigates.com](http://www.thebureauinvestigates.com) > .

19. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

So far, only the UK and Canada (among G20 nations) have revised their citizenship laws post-9/11 to facilitate citizenship revocation on national security grounds. In mid-2014, an Australian Member of Parliament introduced a private member's bill that would enable dual citizens who support terrorism to be stripped of citizenship. Legislators in the Netherlands and Austria have also signalled interest in new legislation.<sup>20</sup> In 2010, US Senator Joe Lieberman introduced the *Terrorist Expatriation Act*, which would have expanded the acts evincing intent to renounce US citizenship.<sup>21</sup> Despite the prevailing post-9/11 securitization mentality, the initiative failed to attract support, and US legal scholar Peter Spiro predicts that it will not be resurrected: "Expatriation of terrorists is unlikely to ever comprise a component of the US counterterror response."<sup>22</sup>

Whether successful or not, virtually all contemporary initiatives to revive exile are slathered with a thick layer of rhetoric about citizenship's status as a status: "Citizenship is a privilege, not a right", intoned the UK Home Office when it responded to media inquiries about the escalation in citizenship deprivation.<sup>23</sup> "Citizenship is not a right, it is a privilege", announced Canada's Citizenship and Immigration Minister Chris Alexander upon introducing Bill C-24 in Parliament.<sup>24</sup> "United States citizenship is a privilege. It is not a right", declared then-Secretary of State Hillary Clinton in support of Senator Lieberman's proposal.<sup>25</sup> Citizenship revocation provides the opportunity to assay the legal implications that flow from regarding citizenship as a privilege.

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20. See e.g. "Call to Strip Terrorists of Citizenship", *Sky News Australia* (14 July 2013), online: <www.skynews.com.au>; Katrin Bennhold, "Britain Increasingly Invokes Power to Disown Its Citizens", *The New York Times* (9 April 2014), online: <www.nytimes.com>.

21. US, Bill S 3327, *Terrorist Expatriation Act*, 111th Cong, 2010.

22. Peter J Spiro, "Expatriating Terrorists" (2014) 82:5 *Fordham L Rev* 2169 at 2170 [Spiro, "Expatriating Terrorists"].

23. See e.g. "Theresa May Strips Citizenship from 20 Britons Fighting in Syria", *The Guardian* (23 December 2013), online: <www.guardian.com>.

24. Susana Mas, "New Citizenship Rules Target Fraud, Foreign Terrorism", *CBC News* (6 February 2014), online: <www.cbc.ca> (quoting Chris Alexander).

25. Charlie Savage & Carl Hulse, "Bill Targets Citizenship of Terrorists' Allies", *The New York Times* (6 May 2010), online: <www.nytimes.com> (quoting Hillary Clinton).

## II. Citizenship Revocation Compared

### A. International Law

State power to revoke citizenship is circumscribed by international and regional legal commitments.<sup>26</sup> Article 15(1) of the *Universal Declaration of Human Rights (UDHR)* proclaims that every person has a right to nationality but fails to stipulate an addressee of the right.<sup>27</sup> Article 15(2) states that “no one shall be arbitrarily deprived of . . . nationality”, but leaves arbitrariness undefined.<sup>28</sup> Since the *UDHR* is a declaration, it may exert less legal force in positivist terms than conventions and treaties. Nevertheless, its pronouncement on nationality provides useful context for interpreting relevant provisions of other binding instruments.

Article 12(4) of the *International Covenant on Civil and Political Rights (ICCPR)* provides that “no one shall be arbitrarily deprived of the right to enter his own country”, and unlike other mobility provisions in the *ICCPR*, this right is not subject to derogation on grounds of national security or public order.<sup>29</sup> By conspicuously choosing the non-technical term “own country” rather than country of nationality, the provision seems to preclude two-step exile, at least where the deprivation of nationality precipitating the expulsion is arbitrary.<sup>30</sup> In such cases, even if a government strips a person of nationality, the state arguably remains “his own country”, and so the consequential expulsion or entry bar could still

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26. The present article surveys those instruments most apposite to citizenship revocation on grounds of misconduct. For other instruments that regulate loss of nationality, see *Convention on the Nationality of Married Women*, 20 February 1957, 309 UNTS 4468 (entered into force 11 August 1985); *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 13 UNTS 1249 (entered into force 3 September 1981).

27. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), art 15(1).

28. *Ibid.*, art 15(2).

29. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 12(4) (entered into force 23 March 1976) [*ICCPR*].

30. *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, 21 ILM 58, art 12(2) (entered into force 21 October 1986) also guarantees to every individual “the right to leave any country including his own, and to return to his country”. However, this right may be restricted “by law for the protection of national security, law and order, public health or morality”. *Ibid.* Whereas the *ICCPR* and the *African (Banjul) Charter on Human and Peoples'*

breach Article 12(4).<sup>31</sup> According to international human rights lawyer Manfred Nowak, tagging the qualifier “arbitrarily” onto the deprivation of the right of entry was intended to preserve existing practices of “lawful exile as punishment for a crime, whether this is accompanied by loss of nationality or not”.<sup>32</sup> This interpretation of arbitrariness finds support in the *travaux préparatoires* of the *ICCPR*, because at the time of drafting, a few states retained exile as potential criminal punishment and did not want to relinquish the option. However, the use of exile as criminal punishment also connotes a sentence passed by an independent judge presiding over a court of law. It seems incongruous to interpret Article 12(4) to insulate exile as criminal punishment, while simultaneously precluding any derogation from Article 12(4) on grounds of national security or public order. After all, as the Canadian example will show, the justification for punishing certain crimes with exile is very likely to be grounded in national security or public order. Indeed, the Human Rights Committee’s *General Comment 27* on Freedom of Movement concedes that

[t]he reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law . . . should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.<sup>33</sup>

In 2000, the International Law Commission (ILC) reviewed the international law governing expulsion of aliens. In addition to its research, the ILC has generated draft provisions on the subject. Article 8 of the

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*Rights* protect the right to enter one’s “own country”, Article 3 of Protocol Number 4 to the *ECHR* prohibits the expulsion of nationals from state territory, and guarantees the right of entry to nationals. *ECHR*, *supra* note 11, Protocol (No 4), art 3. Thus, the *ECHR* explicitly prohibits expulsion of nationals, though its application to two-step exile is a matter of interpretation.

31. See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Germany: NP Engel, 1993) at 220.

32. *Ibid* at 219.

33. UN, Human Rights Committee, *CCPR General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1993.

latest draft states that “[a] State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.”<sup>34</sup> The Special Rapporteur’s commentary sheds light on the meaning of arbitrariness under Article 15(2) of the *UDHR* and, by extension, Article 12(4) of the *ICCPR*, but his analysis is not unambiguous:

The Commission is of the view that such a deprivation of nationality, insofar as it has no other justification than the State’s desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights . . . It should be clarified, however, that [draft Article 8] does not purport to limit the normal operation of legislation relating to the grant or loss of nationality; consequently, it should not be interpreted as affecting a State’s right to deprive an individual of its nationality on a ground that is provided for in its legislation.<sup>35</sup>

Ambiguity arises because legislation may indeed provide for deprivation of nationality when that legislation’s sole plausible justification is to expel the individual—that is to say, constructive exile.<sup>36</sup> The most sensible reading of this passage is that the Special Rapporteur is disqualifying two-step exile, while leaving intact denaturalization for fraud or misrepresentation, or loss of citizenship on grounds of dual nationality.

The right to family and private life, enshrined in both the *ICCPR*<sup>37</sup> and the *European Convention on Human Rights (ECHR)*,<sup>38</sup> may also constrain

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34. UNGA, International Law Commission, *Expulsion of Aliens: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on Second Reading*, UN Doc A/CN.4/L.832, 20 May 2014, art 8.

35. *Report of the International Law Commission*, UNGAOR, 67th Sess, Supp No 10, UN Doc A/67/10 (2012) 9 at 32–33.

36. See Guy S Goodwin-Gill, “Mr Al-Jedda, Deprivation of Citizenship, and International Law” (Paper delivered at a Seminar at Middlesex University, 14 February 2014). My proposed reading in relation to “two-step exile” aligns with the dissenting views of Gerald Neuman and Yuji Iwasawa in *Nystrom v Australia*. UN Human Rights Committee, *Views: Communication No 1557/2007*, 102nd Sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) at 23.

37. *Supra* note 29 (“[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”, art 17(1)).

38. *Supra* note 11.

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary

a state's revocation power in the same way it limits the power to deport long-term non-citizen residents. Losing citizenship entails losing the right to enter the state where one's family lives and/or where one's life, livelihood, cultural and social attachments are located. The right to family or private life is not unconditional and is subject to a proportionality analysis that weighs it against, *inter alia*, the state's interest in migration control, national security, public safety, etc.

The 1961 *Convention on the Reduction of Statelessness* (1961 *Statelessness Convention*) speaks directly to denationalization and its consequences for mono-nationals.<sup>39</sup> It presupposes the existence of domestic laws that deprive individuals of nationality on account of marriage to a non-national, birth outside wedlock, non-residence, fraud or misrepresentation, repudiation of allegiance, or conduct "in a manner seriously prejudicial to the vital interests of the State".<sup>40</sup> Only denationalization on "racial, ethnic, religious or political grounds" is prohibited absolutely.<sup>41</sup>

Articles 5 to 8 of the 1961 *Statelessness Convention* prohibit denationalization where it would result in statelessness, although Article 8 qualifies the prohibition.<sup>42</sup> Two qualifications are salient for present purposes. First, denaturalization may create statelessness where the citizenship was obtained by fraud.<sup>43</sup> Second, denationalization for conduct "seriously prejudicial to the vital interests of the state" may leave a person stateless.<sup>44</sup> In order to take advantage of the latter exception, however, a State Party's domestic law at the time of signature, accession or ratification must already provide for citizenship revocation on "vital interest" grounds, and the State Party must express its intention to retain

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in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Ibid.*, arts 8(1)–(2).

39. *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

40. *Ibid.*

41. *Ibid.*, art 9.

42. *Ibid.*, arts 5–8.

43. *Ibid.*, art 8(2)(b).

44. *Ibid.*, art 8(3)(a)(ii).

that power.<sup>45</sup> In other words, Article 8 allows countries to grandfather laws that authorize the creation of statelessness in the name of protecting the vital interests of the state.

Article 8(4) also imposes an institutional and procedural constraint on these exceptional powers, providing that a Contracting State should not render a person stateless “except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body”.<sup>46</sup>

The *European Convention on Nationality* creates a defeasible rule against denationalization. Denationalization is generally prohibited, subject to exceptions set out in Article 7.

If it was obtained by fraud, misrepresentation or concealment of a material fact;

If the individual acquires another citizenship (thereby accommodating states that continue to prohibit dual nationality);

Upon a demonstrated “lack of a genuine link between the State Party and a national habitually residing abroad”; or

Upon engaging in “conduct seriously prejudicial to the vital interests of the State Party”.<sup>47</sup>

Article 7(3) prohibits citizenship revocation where it would render the individual stateless; the sole exception is where citizenship was acquired by fraud, misrepresentation or concealment.<sup>48</sup> This makes the ambit of permissible statelessness narrower than under the 1961 *Statelessness Convention*.

Canada and the UK are parties to the 1961 *Statelessness Convention*; the US is not. Neither Canada nor the US have acceded to the European Convention on Nationality, and the UK appears to have abandoned its stated intention to ratify it.

The current posture of international law toward citizenship is evolving: It seems reasonably clear that revocation leading to statelessness is permitted, at least for some period of time post-naturalization, where

45. *Ibid.*

46. *Ibid.*, art 8(4).

47. *European Convention on Nationality*, 6 November 1997, 37 ILM 47 at 49 (entered into force 1 March 2000).

48. *Ibid.*

citizenship was obtained by fraud, and either prohibited absolutely or presumptively in other cases. Even where citizenship revocation does not induce statelessness, arbitrary deprivation of nationality violates international law. Indicia of arbitrariness may include (but are not exhausted by) disproportionality, unreasonableness, denial of procedural fairness, lack of independent judicial engagement, discrimination and a desire to effectuate exile.

### *B. Britain*

The citizenship revocation provisions in the *British Nationality Act 1981 (BNA)* were amended in 2002, 2006 and again in 2014.<sup>49</sup> Prior to 2002, British law authorized deprivation of citizenship where it was obtained by fraud or misrepresentation; where a naturalized citizen was convicted and sentenced to at least a year's imprisonment within five years of naturalization; or where the citizen had demonstrated disloyalty, disaffection or assistance to the enemy in wartime. Citizenship deprivation was not automatic, but required the Home Secretary to certify that continuance of citizenship was "not conducive to the public good".<sup>50</sup> When acceding to the 1961 *Statelessness Convention*, the UK entered a reservation under Article 8(3) preserving its existing right under domestic law to create statelessness on the above grounds. Between 1949 and 1973, the Home Secretary deprived ten British and Colonial citizens of citizenship, and none thereafter until 2002.<sup>51</sup>

The 2002 amendments to the *BNA*, effective as of April 2003, expanded the ambit of citizenship revocation to birthright citizens and replaced existing grounds with conduct "seriously prejudicial to the vital interests"

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49. For a chronology of the changes to UK citizenship revocation since 1981, see UK, House of Commons Library, "Deprivation of British Citizenship and Withdrawal of Passport Facilities", by Melanie Gower, SN/HA/6820 (4 September 2014). For a more critical survey of the evolution between 2001 and 2013, see also Caroline Sawyer, "Civic Britannicus Sum No Longer?: Deprivation of British Nationality" (2013) 27:1 J Immigration, Asylum & Nationality L 23; Rayner Thwaites, "The Security of Citizenship?: Finnis in the Context of the United Kingdom's Citizenship Stripping Provisions" in Fiona Jenkins, Mark Nolan & Kim Rubenstein, eds, *Allegiance and Identity in a Globalised World* (Cambridge, UK: Cambridge University Press, 2014) 243.

50. See Gower, *supra* note 49 at 15.

51. UK, Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (Second Report)* (26 February 2014) at 11.

of the UK.<sup>52</sup> However, they also repealed the power to render a person stateless by citizenship revocation in all cases except where citizenship was obtained by fraud. This was consistent with the limitation contained in Article 7(3) of the *European Convention on Nationality*, which the UK had expressed a future intention to ratify.

By 2006, the aftermath of 9/11, the incendiary preaching of Muslim cleric Abu Hamza of London's Finsbury Mosque, and the revelation that at least one of the July 7, 2005 London suicide bombers was a birthright citizen, deepened alarm about "homegrown" terrorism. The proximate cause for the 2006 *BNA* amendment appears to have been David Hicks, an Australian captured by the US in Afghanistan and detained at Guantanamo Bay. While detained, Hicks succeeded in claiming UK citizenship because his mother was a Briton. The UK government immediately revoked his UK citizenship, but the British courts frustrated this gambit in 2005. So, in 2006, Parliament further diluted the standard for revocation to require only the Home Secretary's subjective belief that deprivation would be "conducive to the public good".<sup>53</sup>

The 2013 UK Supreme Court decision in *Secretary of State for the Home Department v Al-Jedda* affirmed that the prohibition on creating statelessness is violated when the Home Secretary issues an order for revocation and the individual does not, at that moment, possess another nationality.<sup>54</sup> The Home Secretary argued unsuccessfully that al-Jedda (a naturalized UK citizen) was eligible to reclaim his former Iraqi citizenship as of right and that his failure to do so made him the author of his own statelessness.<sup>55</sup> The UK Supreme Court ruled that the *BNA* addressed the consequence of the Home Secretary's order, and the impact of her order made al-Jedda stateless. The UK Supreme Court's judgment effectively reinstated al-Jedda's British citizenship, which the Home

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52. *British Nationality Act 1981* (UK), c 61 [*BNA*], as amended by *Nationality, Immigration and Asylum Act 2002* (UK), c 41, ss 40(2), 40(4).

53. For an account of the judicial decisions and parliamentary response, see Sawyer, *supra* note 49 at 30–32.

54. [2013] UKSC 62.

55. *Ibid.* The Supreme Court judgment affirmed the lengthier judgment of the Court of Appeal. [2012] EWCA Civ 358. I discuss and analyze the Court of Appeal decision in Audrey Macklin, "Sticky Citizenship" in Rhoda Howard-Hassmann & Margaret Walton-Roberts, eds, *Slippery Citizenship* (Philadelphia: University of Pennsylvania Press, forthcoming).

Secretary immediately revoked again. The judgment also prompted the British government to amend the *BNA* to restore the power to render people stateless. The 2014 reform to the *British Nationality Act 1981* now empowers the Home Secretary to render naturalized citizens stateless (beyond cases of fraud) if, *inter alia*, the person “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom” and the Secretary of State believes on reasonable grounds that the individual is able to acquire citizenship elsewhere. The new provisions are retrospective.<sup>56</sup> Whether the 2014 legislative reform complies with the UK’s obligations under the 1961 *Statelessness Convention* remains contentious.<sup>57</sup>

Since 2006, the UK has stripped at least fifty-three UK nationals of citizenship. Twenty-seven were deprived on grounds of “conducive to the public good”, and the remainder for fraud or misrepresentation in the acquisition of citizenship.<sup>58</sup> The government has declined to publicly disclose identities or circumstances of those deprived of UK citizenship.<sup>59</sup> All but one of the subjects of national security revocations were Muslim males, and in all but two known cases since 2006, the Home Secretary issued the order when the person was abroad.<sup>60</sup> The UK government

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56. *BNA*, *supra* note 52, as amended by *Immigration Act 2014* (UK), c 22, s 66.

57. See Open Society Justice Initiative, “Opinion on Clause 60 of UK Immigration Bill & Article 8 of United Nations Convention on Reducing Statelessness” *Open Society Foundations* (5 March 2014), online: <[www.opensocietyfoundations.org/sites/default/files/briefing-clause60-03112014.pdf](http://www.opensocietyfoundations.org/sites/default/files/briefing-clause60-03112014.pdf)>. The 2014 law revives a power to induce statelessness that had been repealed over a decade earlier. It also authorizes the imposition of statelessness on birthright citizens, which was not contemplated in the Article 8(3) reservation entered by the UK when it acceded to the 1961 *Statelessness Convention*. Open Society argues that the reservation authorized by Article 8(3) of the 1961 *Statelessness Convention* only permits retention of extant domestic laws, or the repeal and immediate re-enactment of substantively similar laws. Principles of international human rights law and treaty interpretation do not entitle the state to instigate new laws creating statelessness. This would, in the opinion of Open Society, be inimical to the overarching objective of the 1961 *Statelessness Convention*, which is “to continually reduce statelessness”. *Ibid* at para 38.

58. See Gower, *supra* note 49 at 4.

59. See Alice K Ross, “Citizenship Revoked: Prominent House of Lords Lawyers Oppose Theresa May’s Citizenship-Stripping Plans”, *The Bureau of Investigative Journalism* (31 March 2014), online: <[www.thebureauinvestigates.com](http://www.thebureauinvestigates.com)>.

60. See Alice K Ross & Patrick Galey, “Citizenship Revoked: Rise in Citizenship Stripping as Government Cracks Down on UK Fighters in Syria”, *The Bureau of Investigative Journalism* (23 December 2013), online: <[www.thebureauinvestigates.com](http://www.thebureauinvestigates.com)>.

has not disclosed to the UK Joint Committee on Human Rights the exact number of those who were abroad when the Home Secretary deprived them of citizenship,<sup>61</sup> citing “reasons of nationality security and operational effectiveness.”<sup>62</sup> In 2013, the Home Secretary deprived twenty UK nationals of citizenship—more than all other years since 2002 combined.<sup>63</sup> Two former UK nationals were executed by US drone strikes in 2012 after they were deprived of UK citizenship in 2010, and another was rendered to the US for trial on terrorism charges.<sup>64</sup>

Citizenship revocation in the UK does not formally seek justification by reference to past criminal conduct, though the punitive motive is virtually conceded when politicians admit that “[w]e think that deprivation is a way of expressing extreme displeasure at the way in which someone has behaved.”<sup>65</sup> Deprivation of citizenship in the UK is characterized as a technique for preventing future risks to national security, not for punishing past crimes against national security. Yet the differences can be overstated in the context of post-9/11 securitization of citizenship. First, the behaviour that furnishes evidence of future risk is clearly regarded as misconduct, even if it is not criminal, or if the state lacks evidence sufficient for criminal prosecution. Second, the distinction between punishment for past harm and prevention of future risk has been blurred and eroded by a general turn toward “preventive justice” and, more specifically, the creation of expansive “anti-terrorism” offences in criminal legislation.<sup>66</sup>

### C. United States

US law does not draw a sharp distinction between voluntary renunciation of citizenship by a national and unilateral deprivation of

61. Joint Committee on Human Rights, *supra* note 51 at 1.

62. *Ibid* at 11.

63. *Ibid*.

64. See Patrick Galey & Alice K Ross, “Citizenship Revoked Interactive: The 53 Britons Stripped of Their Nationality”, *The Bureau Of Investigative Journalism* (3 June 2014), online: <[www.thebureauinvestigates.com](http://www.thebureauinvestigates.com)> (the three Britons were Mohamed Sakr, Bilal al-Berjawi and Mahdi Hashi).

65. See UK, HC, *Parliamentary Debates*, col 54 (30 April 2002) (Angela Eagle), cited in Thwaites, *supra* note 49 at 263, n 94.

66. See Audrey Macklin, “Stuck at the Border: Ten Years After 9/11” in Craig Forcese & François Crépeau, eds, *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal:

citizenship by the state.<sup>67</sup> The concept of expatriation is unique to US law and encompasses both. Expatriation casts all citizenship loss as the product of deliberate surrender by the individual. One explanation for this approach is that the Citizenship Clause of the Fourteenth Amendment to the US Constitution appears to prohibit the unilateral revocation of citizenship by the state: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>68</sup> It does not, however, preclude voluntary renunciation of citizenship by the individual. Thus, expatriation was organized around a model of renunciation that was, over time, distended to accommodate acts that purportedly conveyed an intention to renounce citizenship.

Acts deemed to signal an intention to expatriate included swearing allegiance to a foreign sovereign or a female citizen’s marriage to a foreigner. This inference of intent from conduct was facilitated by the fact that these were common triggers for automatic loss of citizenship in many states. Eventually, the range of acts deemed to signal intent to expatriate expanded to include, *inter alia*, serving in a foreign army, voting in foreign elections, treason, employment by a foreign state and remaining abroad to avoid conscription and desertion. To the extent that the inference of intent from action grew tenuous, voluntary expatriation shaded into constructive expatriation and, eventually, into thinly-disguised revocation. In a series of US Supreme Court judgments in the 1950s and 1960s, various grounds of constructive expatriation were successfully challenged as unconstitutional. For present purposes, it is noteworthy that expatriation for desertion was found by the US Supreme Court in *Trop v Dulles* to be a punitive measure (as opposed to recognition of transferred allegiance) that violated the constitutional prohibition on cruel and unusual punishment.<sup>69</sup> The reasoning of the US Supreme Court in this line of cases is relevant to the current Canadian law’s constitutionality under the *Charter*, and will be discussed below.

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Canadian Institute for the Administration of Justice, 2012) 261 [Macklin, “Stuck at the Border”].

67. For a brief overview and restatement of US expatriation law, see US, Department of State, *Loss and Restoration of U.S. Citizenship*, 7 FAM 1214 (2013), online: <[www.state.gov/documents/organization/109065.pdf](http://www.state.gov/documents/organization/109065.pdf)>; Spiro, “Expatriating Terrorists”, *supra* note 22 at 2171–74.

68. US Const amend XIV, § 1.

69. 356 US 86 (1958).

Although US jurisprudence retains the possibility that conduct short of express, voluntary, intentional renunciation could suffice to expatriate,<sup>70</sup> the US Department of State has adopted an administrative presumption that performing an expatriating act does not denote an intention to surrender US citizenship.<sup>71</sup> The 2010 *Terrorist Expatriation Act* would have added to the list of expatriating acts “providing material support” to, or “engaging” with, foreign terrorist groups or forces engaged in hostilities against the US.<sup>72</sup> But even those acts would have been subject to the same presumption of non-intent to expatriate, and this weakness may have contributed to the bill’s swift demise. Because revocation is subsumed into expatriation, and expatriation is formally framed as emanating from the individual citizen, the requirement of intent continues to constrain its functionality. Notably, since 2001, the US has not attempted to use its existing expatriation power against US citizens accused or convicted of terrorist crimes, even against Yasir Hamdi. According to US scholar Peter Spiro, “[u]nder the current approach, it is impossible to lose one’s [US] citizenship against one’s will.”<sup>73</sup>

### III. Canadian Citizenship Revocation

#### A. History

Both the UK and the US regimes governing citizenship revocation differ from the Canadian model in significant ways. The UK and US models formally clothe citizenship revocation for misconduct in the rhetoric of risk prevention or voluntary renunciation, respectively. Under Canada’s Bill C-24, citizenship revocation is explicitly punitive and non-volitional: Apart from fraud or misrepresentation, the prerequisite for Canadian citizenship revocation is past commission of a criminal act,

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70. See *Vance v Terrazas*, 444 US 252 at 261–63 (1980).

71. Department of State, *supra* note 67. Note that this also makes it more difficult for US citizens who wish to expatriate for tax reasons to do so unilaterally without first complying with conditions imposed by the US government. I thank Amar Khoday for bringing this point to my attention.

72. *Supra* note 21.

73. Spiro, “Expatriating Terrorists”, *supra* note 22 at 2173.

and the Minister does not purport to manifest the will of the citizen when depriving him or her of citizenship.<sup>74</sup>

Canadian citizenship as legal status came into existence in 1947. Prior to that, the highest legal status an individual could obtain in law was British Subject of Canada, although it was not uncommon to casually refer to such persons as Canadian citizens. Nevertheless, the law distinguished between a British subject by birth and by naturalization. The 1868 *Aliens and Naturalization Act* provided for revocation of naturalization granted by Canadian authorities where it was obtained by fraud.<sup>75</sup> This power was carried over to the 1947 *Canadian Citizenship Act* and continues to the present.<sup>76</sup>

Chris Anderson reports that as early as 1919, at least one Member of Parliament protested that any revocation power should properly rest with the courts—not politicians—and that it was preferable to try people in criminal courts rather than strip them of status and deport them.<sup>77</sup> Nonetheless, the revocation power was used to target foreign-born labour activists for expulsion during the anti-communist crackdown in the early 1930s.<sup>78</sup>

Near the end of World War Two, the Liberal government enacted a scheme to “repatriate” (deport) to Japan thousands of Canadian citizens and non-citizens of Japanese descent, including British subjects born in Canada who had never been to Japan. This entailed, among other things, denationalizing citizens by birth and naturalization. Future Prime Minister John Diefenbaker, then a Conservative Opposition Member of Parliament, later described the plan as “iniquitous” and recalled how

the government endeavoured to get power to deport and to exclude Canadian citizens or to revoke nationality . . . Parliament pointed out that to deport Canadian citizens was the

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74. Serving in an enemy armed group does not require a criminal conviction, but for reasons discussed below, it is closely related to the crime of treason.

75. SC 1868, c 66.

76. SC 1946, c 15.

77. See Christopher G Anderson, “A Long Standing Canadian Tradition: Citizenship Revocation and Second-Class Citizenship under the Liberals, 1993–2006” (2008) 42:3 J Can Studies 80 at 85–86.

78. *Ibid* at 86.

very antithesis of the principles of democracy, one of the first of which is that minorities are entitled to protection.<sup>79</sup>

The Orders-in-Council that effectuated the denationalizations and deportations were upheld as *intra vires* by the Supreme Court of Canada and the Privy Council.<sup>80</sup>

Between the 1947 and the 1977 *Canadian Citizenship Act*,<sup>81</sup> various grounds for citizenship revocation were added and subtracted. These included acquisition of another nationality and service in an enemy army. Naturalized citizens could also be denaturalized for fraud in the acquisition of citizenship, engaging with the enemy during wartime, disloyalty, treason, residing outside Canada for more than six years or conviction of a serious criminal offence with a stipulated period after naturalization.<sup>82</sup> Treason was removed in 1967,<sup>83</sup> and the 1977 *Citizenship Act* eliminated all grounds of revocation except for naturalization obtained by fraud, which is available indefinitely, even if it induces statelessness.<sup>84</sup>

Denaturalization for fraud is distinct from other grounds of citizenship revocation because the alleged misconduct occurs prior to the acquisition of citizenship. The operative premise behind the fraud exception is that the applicant misled the state into believing that the conditions precedent to naturalization were met. Had the true facts been known, the person would not have acquired citizenship. Revocation nullifies the erroneously granted citizenship and restores the parties to the position they would have been in absent the misrepresentation or fraud. Although it is commonly assumed that only naturalized citizens are vulnerable to this type of revocation, this is not strictly correct. The same result would occur if a person obtained citizenship by falsely declaring a Canadian location of

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79. Ann Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War*, 2nd ed (Ottawa: Ann Gomer Sunahara, 2000) at 112–13; online: <[japanesecanadianhistory.ca/Politics\\_of\\_Racism.pdf](http://japanesecanadianhistory.ca/Politics_of_Racism.pdf)> (quoting John Diefenbaker).

80. See *Co-Operative Committee on Japanese Canadians*, *supra* note 10, aff'g [1946] SCR 248, [1946] 3 DLR 321.

81. SC 1974–75–76, c 108.

82. See Library of Parliament, “Legislative Summary of Bill C-24: An Act to Amend the Citizenship Act and to Make Consequential Amendments to Other Acts”, by Julie Béchar, Penny Becklumb & Sandra Elgersma (Ottawa: Library of Parliament, 8 July 2014) at 1–2 [Library of Parliament, “Bill C-24 Legislative Summary”].

83. *An Act to amend the Canadian Citizenship Act*, SC 1967–68, c 4, s 5.

84. Library of Parliament, “Bill C-24 Legislative Summary”, *supra* note 82 at 1–2.

birth, or misrepresenting a parent as a Canadian citizen. The citizenship would presumably be void *ab initio* (subject to potentially compelling equitable arguments about reliance and possibly statelessness).<sup>85</sup>

## B. Strengthening Canadian Citizenship Act (*Bill C-24*)

The amendments to Canada's *Citizenship Act* enacted by Bill C-24 expand executive power to denationalize birthright and naturalized citizens. Bill C-24 was introduced in early 2014 and revived elements of a private member's bill (Bill C-425) that died on the order paper the previous year.<sup>86</sup> It contains several provisions that make citizenship harder to obtain, but for present purposes, I focus on provisions that make citizenship easier to lose.

Substantively, the Bill expands revocability by adding new grounds. However, these provisions apply differentially to dual nationals, birthright citizens and naturalized citizens. The Bill also provides for limited procedural participation by the targeted citizen and varies the role of independent judicial oversight according to the statutory ground for revocation.

### (i) Specific Provisions

#### a. Lack of Intent to Reside Permanently (Naturalized Citizens)

The current *Citizenship Act* requires that the Minister grant citizenship to a permanent resident applicant who fulfills the residency requirement, is not under a removal order, and has an adequate knowledge of English or French, of Canada, and of the "responsibilities and privileges of citizenship".<sup>87</sup> Bill C-24 adds several additional prerequisites, including that the applicant "intends, if granted citizenship, to continue to reside

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85. This is, in effect, the government's position in relation to Deepan Budlakoti, discussed below.

86. Bill C-425, *An Act to amend the Citizenship Act (honouring the Canadian Armed Forces)*, 1st session, 41st Parl, 2012. At least three other bills proposing to amend the *Citizenship Act's* revocation provisions were introduced between 2000–2002. See Library of Parliament, "Legislative Summary of Bill C-18: The Citizenship of Canada Act", by Benjamin Dolin & Margaret Young (Ottawa: Library of Parliament, 1 November 2002).

87. *Supra* note 2, s 5(1)(e).

in Canada”.<sup>88</sup> Further, this intention “must be continuous from the date of his or her application until they have taken the oath of citizenship”.<sup>89</sup> This provision not only authorizes an officer to reject an applicant where the officer believes that the applicant lacks the requisite future intent, it also empowers the Minister to revoke citizenship on the basis of past misrepresentation of future intent. While the 1946 *Citizenship Act* explicitly made non-residence a ground for denaturalization, Bill C-24 does so indirectly: Where the Minister identifies a naturalized citizen who appears to reside outside Canada, the Minister can allege that the citizen’s post-citizenship departure evinces a pre-citizenship lack of intention to continue residing in Canada once citizenship was granted.

As noted earlier, denaturalization for misrepresentation, fraud or concealment of material facts may render the person stateless. Under Bill C-24, this would presumably apply even where the evidence supporting misrepresentation of “intent to reside” is residence in a country where the individual is not a citizen.<sup>90</sup>

Where the Minister seeks revocation for fraud or misrepresentation in the acquisition of citizenship (in relation to matters other than war crimes, crimes against humanity, terrorism and organized crime), the Minister must send a notice in writing setting out the grounds for revocation. The citizen may make submissions in writing prior to a deadline set by the Minister. The citizen is not entitled to an oral hearing, although the Minister has discretion to order one. (By way of comparison, where a permanent resident of Canada faces loss of permanent resident status for, *inter alia*, misrepresentation, section 63(3) of the *Immigration and Refugee Protection Act (IRPA)* guarantees an oral hearing before the Immigration Appeal Division, an independent quasi-judicial body.)<sup>91</sup> Following submissions, the Minister makes a decision in writing. That revocation decision is judicially reviewable by leave of the Federal Court. A judgment by the Federal Court is, in turn, only appealable to the Federal Court

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88. *Ibid.*, s 5(1)(c.1)(i).

89. *Ibid.*, s 3(2).

90. For example, a Canadian citizen may be denied the ability to sponsor a spouse under the *Immigration and Refugee Protection Act*, and choose to reside in the sponsor’s country of nationality without possessing that country’s citizenship. See *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

91. *Ibid.*, s 63(3).

of Appeal if the Federal Court judge who rendered the initial decision certifies a question of general importance.

b. Conviction for Criminal Offences In or Outside Canada (Dual Nationals by Birth or Naturalization)

Section 10(2) of the amended *Citizenship Act* lists various offences under the *Criminal Code*, the *National Defence Act* and the *Security of Information Act*, which the marginal note describes collectively as “convictions relating to national security”.<sup>92</sup> They include treason, spying, any terrorism offence defined under section 2 of the *Criminal Code* and a variety of offences by persons subject to the Canadian Forces Code of Service Discipline (which, with the exception of spying for the enemy, does not apply to civilians). For some listed offences, the minimum sentence upon conviction must be five years, and for others it is life imprisonment. In the case of terrorism offences, section 10(2)(b) provides that the conviction may be for an offence outside Canada, if it would also constitute a terrorism offence under Canadian law. The criminality provisions are retrospective, meaning that the Minister can revoke the citizenship of someone convicted of the stipulated offences prior to passage of Bill C-24.

When revoking an individual’s citizenship for crimes committed while a citizen, the process is the same as for misrepresentation, described above.

c. Fighting for an Enemy Force (Dual Nationals by Birth or Naturalization)

Section 10.1(2) of the amended *Citizenship Act* authorizes revocation of citizenship if the Minister has reasonable grounds to believe that a person, while a Canadian citizen, “served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada”.<sup>93</sup> This provision

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92. *Citizenship Act*, *supra* note 2, s 10(2).

93. *Ibid*, s 10.1(2).

is a variant on denationalization for enlistment in an enemy force.<sup>94</sup> It is also retrospective.

Revocation for serving in an enemy force or for criminal convictions are both constrained by the prohibition on the creation of statelessness. However, the amended *Citizenship Act* places the burden on the citizen to prove, on a balance of probabilities, that he or she is *not* a citizen of “any country of which the Minister has reasonable grounds to believe the person is a citizen”.<sup>95</sup> So, the law places a reverse onus on the citizen to prove a negative. The awkwardness of this legal burden is compounded by the fact that the government of Canada possesses greater resources than a private individual to actually obtain the requisite information.<sup>96</sup>

The process applicable to citizenship revocation for engaging in military service with an enemy force differs slightly from the aforementioned grounds.<sup>97</sup> The Minister refers to a Federal Court judge the question of whether the person, while a Canadian citizen, “served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada”.<sup>98</sup> A judge’s affirmative declaration has the direct effect of revoking the person’s citizenship. Despite the judicial participation, the process contemplated for this declaration falls significantly short of a full criminal trial.

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94. It appears in the laws of several European and African states. See Gerard-René de Groot & Maarten P Vink, “Loss of Citizenship: Trends and Regulations in Europe” in *EUDO Citizenship Observatory Comparative Report* (Florence: European University Institute, 2010), online: <[eudo-citizenship.eu/docs/loss\\_paper\\_updated\\_14102010.pdf](http://eudo-citizenship.eu/docs/loss_paper_updated_14102010.pdf)>.

95. *Supra* note 2, s 10.4(2).

96. Indeed, the *Citizenship Act* authorizes the Governor in Council to issue regulations “providing for the disclosure of information to verify the citizenship status or identity of any person for the purposes of administering any federal or provincial law or law of another country”. *Ibid*, s 27(k.3).

97. The same process applies where the Minister seeks to revoke citizenship on grounds of fraud, misrepresentation or concealment of material facts that would have given rise to inadmissibility for war crimes, crimes against humanity, terrorism or organized crime under *IRPA*. It is made more complicated by the fact that the judge must determine whether the person engaged in fraud, misrepresentation or concealment of a material fact or circumstance, and also whether the individual would have been inadmissible under the very loose and expansive standard of proof in *IRPA* for terrorism, war crimes, crimes against humanity and organized crime.

98. *Citizenship Act*, *supra* note 2, s 10.1(2).

## (ii) Further Procedural Barriers

Curiously, Bill C-24 confers less procedural protection on citizens facing citizenship revocation on grounds of misrepresentation than on permanent residents facing loss of status on the same grounds. Permanent residents facing loss of status receive an oral hearing before an independent, quasi-judicial tribunal, the Immigration Appeal Division of the Immigration and Refugee Board.<sup>99</sup> Citizens facing revocation get a written hearing before the Minister, who is decidedly not independent, judicial or quasi-judicial. The choice of a written hearing facilitates the initiation of revocation proceedings while the individual is abroad (as is common practice in the UK), because the individual need not be given a reasonable opportunity to return to Canada in order to participate in an oral hearing.

The Federal Court's role in citizenship revocation is limited to a declaration of fact, law, or mixed law and fact in a subset of cases,<sup>100</sup> and judicial review is subject to a leave requirement. Judicial review of decisions made under the *IRPA* is also subject to a leave requirement; it is virtually the only field of administrative law where the rule of law's requirement that the executive be subject to supervision by an independent judiciary is bent to accommodate the exigencies of docket control. Unless the government anticipates a high volume of denationalizations, this efficiency rationale for the leave requirement under *IRPA* is inapposite to citizenship revocation under the *Citizenship Act*.

The upshot is that citizenship revocation is subject to fewer procedural protections than loss of permanent resident status, and access to judicial review for citizenship revocation is subject to the same uniquely restrictive terms that apply to immigration decisions. This graphically illustrates what it means in law to characterize citizenship as a conditional status, whose rescission by the executive warrants no greater judicial attention or accountability than loss of immigration status. As immigration lawyer and president of the Canadian Bar Association Immigration Law Section

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99. *IRPA*, *supra* note 90, s 63(3).

100. *Citizenship Act*, *supra* note 2, ss 10.1(1)–(2), 10.5(5).

Mario Bellissimo remarked, a citizen will have greater access to the courts to challenge a parking ticket than the deprivation of citizenship.<sup>101</sup>

A citizen who is denationalized on national security grounds, for criminality or for engaging in armed conflict against Canada is automatically demoted to the status of foreign national.<sup>102</sup> A citizen who is denaturalized for misrepresentation or fraud reverts to permanent resident status, with one exception. If the citizen misrepresented a fact relevant to inadmissibility under the *IRPA* national security and terrorism provisions, a declaration of citizenship revocation also constitutes an automatic deportation order.<sup>103</sup> One can understand these variations in consequence as signalling the number of steps between the individual and expulsion—one in the first case, two in the second, and none in the third. But in all cases, the facts used to justify citizenship revocation will virtually always justify expulsion.

For example, a foreign national (except those from visa exempt countries) requires a visa to enter or remain in Canada. The ground of revocation will inevitably supply a basis of inadmissibility under the *IRPA*<sup>104</sup> and the Minister of Citizenship and Immigration has wide discretion to exclude a foreign national from Canada “if the Minister is of the opinion that it is justified by public policy considerations”.<sup>105</sup> Citizenship revocation segues into expulsion almost seamlessly. For this reason, it is artificial to segregate revocation from expulsion. Rather, it seems sensible to regard them as sequential stages of a single event and to apply the term exile or banishment to that event. This, in turn, raises the question of whether one or more provisions of the Canadian scheme would breach the prohibition expressed in Article 8 of the International Law Commission’s Draft Articles: “A State shall not make its national an

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101. Mario D Bellissimo, “Bill C-24: Amendments to the Canadian Citizenship Act: Citizenship To Be Redefined, Re-Positioned and Re-Evaluated” (20 February 2014), *Canadian Immigration Blog* (blog), online: <[www.bellissimolawgroup.com/2014/02/bill-c-24-amendments-to-the-canadian-citizenship-act-citizenship-to-be-redefined-re-positioned-and-re-evaluated.html](http://www.bellissimolawgroup.com/2014/02/bill-c-24-amendments-to-the-canadian-citizenship-act-citizenship-to-be-redefined-re-positioned-and-re-evaluated.html)>.

102. *Citizenship Act*, *supra* note 2, s 10.3.

103. *Ibid*, s 10.5.

104. These include misrepresentation, *IRPA*, *supra* note 90, s 40; serious criminality, *ibid*, s 36(2); or threat to national security, *ibid*, s 34.

105. *Ibid*, s 22.1(1) (the Minister’s declaration has effect for three years).

alien, by deprivation of nationality, for the sole purpose of expelling him or her.”<sup>106</sup>

Reading the UK citizenship revocation regime in tandem with the provisions of Bill C-24 illuminates certain facets of exile’s contemporary incarnation. The first is the substantive and procedural harmonization of citizenship stripping and revocation of permanent resident status. The UK criterion for citizenship deprivation—“conducive to the public good”—replicates verbatim the criterion for cancelling the UK equivalent of permanent resident status (indefinite leave to remain). Similarly, Bill C-24 utilizes criminal conduct while a citizen as grounds for deprivation, just as criminal conduct while a permanent resident is grounds for loss of permanent resident status. Both UK and Canadian law shift citizenship closer to permanent resident status on a spectrum of relative conditionality and contingency. Lawfully obtained citizenship is only relatively more secure than permanent resident status, just as permanent residence status is more secure than the status of a foreign national or a stateless person. On the continuum from absolute security to absolute precarity, no one is completely secure. Citizenship emerges as an enhanced form of conditional permanent residence, revocable through the exercise of executive discretion.

Bill C-24’s listing of criminal offences and minimum sentences as grounds for citizenship deprivation explicitly tethers citizenship revocation to criminal convictions and cements its historical link to banishment as punishment. In *Hurd v Canada (Minister of Employment and Immigration)*, the Federal Court of Appeal insisted that deportation of permanent residents on grounds of criminality was not a penal consequence for purposes of section 11 of the *Charter*, but it did so in part by comparing it to banishment of citizens:

Deportation under the *Immigration Act, 1976* is thus to be distinguished from the older criminal sanctions of banishment or transportation to a penal colony, in which a citizen was deported from his country of birth as part of his punishment, and so was just another penal consequence.<sup>107</sup>

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106. *Supra* note 34. This contention is subject to the ambiguity described in the text accompanying note 35. The UK preference for stripping citizenship while the national is abroad seems to disclose a similar purpose.

107. (1988), [1989] 2 FC 594 at 606, 90 NR 31. No great significance should attach to the

The fact that citizenship revocation (unlike loss of permanent resident status) is available only for a subset of crimes deemed “national security” offences also suggests that deprivation of citizenship is regarded as a supplementary punishment uniquely appropriate to the named offences.

So, for example, Bill C-24 would permit the Minister to revoke the Canadian citizenship of a dual citizen sentenced to five years for the *Criminal Code* offence of “providing, making available, etc., property or services for terrorist purposes”.<sup>108</sup> It would not, however, permit the Minister to revoke the citizenship of Canadian Forces Colonel Russell Williams, a dual citizen of Canada and Britain, who was sentenced to two concurrent life sentences for sexual assault, forcible confinement and murder of two women committed while an officer in the Canadian Armed Forces. One surmises that denationalization is meant to fit the crime of “gross . . . disloyalty”<sup>109</sup> to the nation in the same way proponents of capital punishment believe that the death penalty fits the crime of murder.

Distinguishing these “national security” offences from other criminal offences does not explain why citizenship revocation is an apt punishment, since these are not crimes for which citizens are uniquely liable, or where citizenship is an aggravating circumstance. Each can be committed by citizen and non-citizen alike, and even non-citizens can be prosecuted for treason.<sup>110</sup>

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term “country of birth” rather than citizenship, since banishment largely precedes mass migration, and the country of birth and country of citizenship were largely synonymous. Even today, 97% of the world’s population resides in the country of birth, meaning that naturalization is a relatively rare means of acquiring citizenship. See UN, Press Release, “232 Million International Migrants Living Abroad Worldwide: New UN Global Migration Statistics Reveal” (11 September 2013), online: UN Department of Economic and Social Affairs <esa.un.org>.

108. *Criminal Code*, RSC 1985, c C-46, s 83.03.

109. Chris Alexander, “In Defence of Ottawa’s Citizenship Shift”, *The Toronto Star* (11 February 2014), online: <www.thestar.com> [Alexander, “In Defence”].

110. There is one proviso: The *Criminal Code* extends the prescriptive jurisdiction for treason extraterritorially, making Canadian citizens (but not non-citizens) liable for treason wherever in the world they commit it. This speaks less to the idea that only citizens can owe the duty of allegiance that is betrayed by treason and more to the traditional limits on extraterritorial jurisdiction. States have jurisdiction to legislate on the basis of

## IV. Citizenship Revocation and the *Charter*

As argued earlier, it would be a contrived and artificial exercise to consider Bill C-24's citizenship revocation scheme in isolation from consequent expulsion.<sup>111</sup> There is no practical motive to denationalize other than to remove a citizen's section 6 *Charter* right to enter and remain in Canada. Citizenship revocation triggers the loss of citizen-specific section 3 and 6 rights, but it does more than that. The exercise and enjoyment of other *Charter* rights depend on territoriality—actual presence in Canada. To take losing the right to enter and remain in Canada seriously, one must project the citizen as a foreign national outside Canada's borders who cannot enter or remain in Canada. Generally, the *Charter* does not protect a foreign national who is outside Canadian territory; she has no *Charter* rights to violate.<sup>112</sup> Whether and to what extent that person may enjoy rights protection somewhere else does not alter her position

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territoriality or nationality. Canada may make laws governing anyone on Canadian soil but may also enact laws governing Canadian nationals abroad. This explains why Canadian citizens may be liable for treason under Canadian criminal law wherever they commit it, whereas non-citizens are only liable for offences committed inside Canada. Interestingly, for purposes of creating criminal liability for acts outside Canadian territory—and only for that purpose—various provisions of the *Criminal Code* dealing with terrorism define a Canadian to include both citizens and permanent residents. See *Criminal Code*, *supra* note 108, s 83.01(1).

111. Although I focus on the proposed revocation scheme contained in Bill C-24, I intend the survey of potential *Charter* violations offered below to be generally applicable to citizenship revocation as such. Craig Forcese has recently conducted an incisive *Charter* analysis of Bill C-24 that arrives at similar conclusions on several issues. Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists'", (2014) 39:2 *Queen's LJ* 551 [Forcese, "A Tale of Two Citizenships"].

112. In the context of crime, national security and armed conflict, Canadian courts have not resolved the question of whether and to what extent Canadian officials violate the *Charter* when they treat non-citizens abroad in a manner that would violate the *Charter* if it occurred in Canada. In other matters, it seems indisputable that a foreign national outside Canadian territory has no access to the other rights and freedoms guaranteed under the *Charter*, nor any right to enter and remain in Canada where such rights and freedoms might be exercised.

under Canadian law.<sup>113</sup> The paramount question, therefore, is whether the infliction of rightlessness within the Canadian legal order is itself a rights violation. To pose the question is to reformulate Hannah Arendt's depiction of citizenship as the "right to have rights" into a legal inquiry.<sup>114</sup>

*A. Does Sauv e Answer the Question?*

Security and equality are axiomatic of citizenship in the liberal state. When citizenship becomes precarious, or subject to discrimination in the allocation of rights and privileges as between citizens, the integrity of the status travelling under rubric of citizenship is cast into doubt.

The United States Constitution confers *jus soli* citizenship as of right, says nothing of *jus sanguinis* citizenship, and declares all naturalized persons to be citizens.<sup>115</sup> The extent to which US citizenship is constitutionally entrenched thus depends on how the individual acquired citizenship. Nevertheless, since at least *Afroyim v Rusk*,<sup>116</sup> all US citizens enjoy the same right to retain citizenship.<sup>117</sup>

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113. Alexander T Aleinikoff, "Theories of Loss of Citizenship" (1986) 84:7 Mich L Rev 1471. Aleinikoff's article precedes the events of 9/11 by fifteen years. He disputes the characterization of citizenship as the right to have rights, or the loss of citizenship as rightlessness when it does not also create statelessness. Aleinikoff notes that in the US (and the same would be true in Canada), many rights attach to residence in the US, not US citizenship. But this suppresses the virtual inevitability of expulsion that follows denationalization—exiles will no longer be present on the territory. He correctly observes that denationalized Americans will enjoy the "right to have rights" in another country of citizenship. But the pattern thus far in the UK is to deprive citizens of UK nationality where their other citizenship is in a decidedly undemocratic, if not failed, state. *Ibid.*

114. Arendt, *supra* note 16 at 294. The phrase was picked up by US Supreme Court Justice Warren in *Perez v Brownell*, 356 US 44 at 64 (1958), and again in *Trop v Dulles*, *supra* note 69 at 102.

115. US Const amend XIV, ("[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside", §1).

116. *Supra* note 9. For a discussion of the residual space in the US for expatriation and denaturalization post-*Afroyim v Rusk*, see Charles Hooker, "The Past as Prologue: *Schneiderman v. United States* and Contemporary Questions of Citizenship and Denationalization" (2005) 19:1 Emory Intl L Rev 305.

117. For a brief discussion of the distinction in US jurisprudence between the right to citizenship, the rights of citizenship and the privileges of citizenship, see Markus D Dubber, "Citizenship and Penal Law" (2010) 13:2 New Criminal L Rev 190 at 194–95.

The Canadian Constitution is silent on rights to citizenship by birth or by naturalization. However, section 7 of the *Charter* does guarantee to everyone the right to “life, liberty and security of the person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice”.<sup>118</sup> Deprivation of citizenship seems a paradigmatic deprivation of interests protected under section 7. Even if the state does not move to expel the denationalized Canadian immediately, the *right* to remain (like the right to vote) is extinguished at the moment citizenship is revoked. It is difficult to resist the conclusion that extinguishing *Charter* rights—not merely limiting, or impairing, or restricting—breaches liberty and security of the person. As the Ontario Superior Court stated in *Oberlander*, “[t]here can be no question that the revocation of citizenship . . . triggers s. 7 of the *Charter*. A revocation of citizenship engages both liberty interests and security of the person.”<sup>119</sup>

The main task is to determine whether loss of citizenship on grounds enumerated in Bill C-24 can comport with principles of fundamental justice. To the extent that citizenship revocation is inseparable from the ultimate motive of expulsion, a more tendentious version of the question is whether the creation of rightlessness via exile can ever accord with principles of fundamental justice.

In *Sauvé v Canada (Chief Electoral Officer)*, the Supreme Court of Canada struck down temporary disenfranchisement of prison inmates serving sentences of more than two years.<sup>120</sup> A five-four majority decided that the denial of voting rights to prisoners for the duration of their incarceration violated section 3 and could not be justified under section 1 of the *Charter*. The infringement of citizens’ right to vote was not disputed, so the government defended the measure as a proportionate limitation on the franchise. Similar arguments could be invoked under section 7 to show that citizenship revocation accords with fundamental justice.

One could argue against extending *Sauvé* to revocation by claiming that the right to vote is a positive right enshrined in section 3 of the *Charter*, while citizenship is not. But the absurd implication of this gambit

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118. *Supra* note 3, s 7.

119. *Oberlander v Canada (Attorney General)* (2004), 69 OR (3d) 187 at para 45, 114 CRR (2d) 345 (Sup Ct J).

120. 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*].

is that disenfranchising inmates would violate the *Charter*, but divesting inmates of citizenship (and, along with it, the franchise) would not. To state the proposition is to refute it. Much of the *Sauvé* majority's critique of disenfranchisement under section 1 can be transposed to the assessment of whether denationalization comports with fundamental justice.

The Court in *Sauvé* began its section 1 analysis by asking what pressing and substantial objective disenfranchisement serves, given that imprisonment already punishes inmates for their crimes. The government advanced two objectives for disenfranchisement: enhancing respect for the rule of law and the general purpose of the criminal sanction. The majority rejected both as pressing and substantial, noting that vague, abstract and symbolic objectives render judicial review “vacuously constrained or reduce[d] to a contest of ‘our symbols are better than your symbols’”. Neither outcome was compatible with the vigorous justification analysis required by the *Charter*.<sup>121</sup> The Court then addressed each objective individually:

The rhetorical nature of the government objectives advanced in this case renders them suspect. The first objective, enhancing civic responsibility and respect for the law, could be asserted of virtually every criminal law and many non-criminal measures. Respect for law is undeniably important. But the simple statement of this value lacks the context necessary to assist us in determining whether the infringement at issue is demonstrably justifiable in a free and democratic society. To establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a Charter right. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.

The second objective—to impose additional punishment on people serving penitentiary sentences—is less vague than the first. Still, problems with vagueness remain. The record does not disclose precisely why Parliament felt that more punishment was required for this particular class of prisoner, or what additional objectives Parliament hoped to achieve by this punishment that were not accomplished by the sentences already imposed. This makes it difficult to assess whether the objective is important enough to justify an additional rights infringement.<sup>122</sup>

Later in the judgment, the majority dissected and disposed of the proposition that disenfranchisement is a legitimate supplement to conventional punishment. They drew a historical connection between

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121. *Ibid* at para 23.

122. *Ibid* at paras 24–25.

disenfranchisement and the disgraced practice of civil death—whereby convicted felons forfeited all civil rights because of their moral unworthiness—and concluded that denial of the franchise “on the basis of moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*”.<sup>123</sup>

The Court emphasized that constitutionally valid punishment “must not be arbitrary and must serve a valid criminal law purpose”.<sup>124</sup> Disenfranchisement failed on both counts: It was arbitrary because it was not tailored to the offender’s particular crime, and nothing supported the claim that it contributed to deterrence or rehabilitation.<sup>125</sup> It was an illegitimate mode of retribution or denunciation because it did not “closely reflect the moral culpability of the offender and his or her circumstances”.<sup>126</sup>

The Court added that disenfranchisement sends the negative and unacceptable message that serious criminals are “no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy”.<sup>127</sup> In the majority’s view, the government’s justification for disenfranchisement, once stripped of rhetoric, amounted to the assertion that:

[C]riminals are people who have broken society’s norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet the right to punish . . . cannot be used to write entire rights out of the Constitution.<sup>128</sup>

Ultimately, the Court ruled that Parliament is not free to “add a new tool to its arsenal of punitive implements—denial of constitutional rights”.<sup>129</sup> While liberty and mobility obviously are infringed by incarceration, those limitations were justified by their instrumental value in advancing the valid goals of punishment. The Court distinguished these from the punitive deprivation of rights as an end in itself:

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123. *Ibid* at para 44.

124. *Ibid* at para 48.

125. *Ibid* at para 49.

126. *Ibid* at para 50.

127. *Ibid* at para 40.

128. *Ibid* at para 52.

129. *Ibid* at para 46.

But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the *Charter* . . . Could Parliament justifiably pass a law removing the right of all penitentiary prisoners to be protected from cruel and unusual punishment? I think not. What of freedom of expression or religion? Why, one asks, is the right to vote different?<sup>130</sup>

Much of the reasoning in *Sauvé* is transposable to the new grounds of denationalization under Bill C-24: The benefits of citizenship revocation (apart from the putative security gain achieved through expulsion) are largely symbolic—directed at the nebulous and abstract goals of strengthening, reinforcing and protecting the value of Canadian citizenship.<sup>131</sup>

Like disenfranchisement, revocation for “gross acts of disloyalty” is predicated on the moral unworthiness of certain individuals to retain the status of citizen, an unworthiness that is only accentuated by depicting citizenship as a privilege (of which one must be deserving), rather than a right (to which one is entitled). Citizenship revocation as punishment can claim no unique or plausible deterrent value, over and above the prison sentences that those targeted by it already face. And, as the US Supreme Court observed about expatriation in the 1958 case of *Trop v Dulles*, “[i]t is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast”.<sup>132</sup>

Those subject to citizenship revocation are stripped of that aspect of human dignity that affirms the capacity and potential for autonomy, self-reflection and change. It is pure and permanent retribution. There is no re-entry into the Canadian community, no life after political death. Rather than making serious criminals temporary outcasts, citizenship revocation makes them permanent outcasts. If the Court considers it

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130. *Ibid.*

131. See e.g. Chris Alexander, “Strengthening the Value of Canadian Citizenship” to the Canadian Club of Vancouver (Keynote Address delivered at the Canadian Club of Vancouver, 18 February 2014), online: <[news.gc.ca/web/article-en.do?nid=831819&\\_ga=1.181015911.1713352821.1374540577](http://news.gc.ca/web/article-en.do?nid=831819&_ga=1.181015911.1713352821.1374540577)> [Alexander, “Strengthening Canadian Citizenship”]; Citizenship and Immigration Canada, News Release (6 February 2014), online: <[news.gc.ca/web/article-en.do?nid=814119](http://news.gc.ca/web/article-en.do?nid=814119)>.

132. *Trop v Dulles*, *supra* note 69 at 111.

problematic that a class of people should completely lose a constitutional right temporarily, how much worse is it to deprive a class of people of all constitutional rights forever?

The Court regards disenfranchisement as arbitrary because the penalty is not linked to the character of the offender's particular crime, but only to the length of the sentence of imprisonment. The same cannot be said of citizenship revocation for criminality however, since it is triggered by conviction for stipulated offences as well as length of sentence. The government's claim would almost certainly be that the designated offences evince a disloyalty or repudiation of the state's legitimacy that makes exile a non-arbitrary "political punishment for a political crime, tit for tat".<sup>133</sup>

Even if this argument is attractive, citizenship revocation under Bill C-24 remains arbitrary in other respects.<sup>134</sup> First, if the principle of non-arbitrariness requires a nexus between the offence and the punishment, the fact that citizenship revocation applies only to dual citizens and not mono-citizens ruptures the link. That an individual may be a citizen of another country is extrinsic to the character of the offence. In other words, the crime of treason is no graver when committed by a dual rather than a mono-citizen, so allocating the punishment according to that criterion is arbitrary.

Secondly, the notion that the criminal offences designated under Bill C-24 are uniquely and distinctively characterized as offences against the state fails to take proper account of the fact that *all* crime is regarded as an affront to the state's maintenance of public order (the "King's Peace") and its monopoly on the legitimate use of violence. It is this public dimension of criminal law that differentiates it from private law and confers on the

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133. Shai Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach" (2011) 61:4 UTLJ 783 at 806 [Lavi, "Citizenship Revocation"].

134. Matthew Gibney references a third basis for concluding that citizenship revocation is arbitrary, namely that its actual, concrete impact on individuals can be inconsistent, unpredictable and vary from devastating to merely inconvenient. Gibney, *supra* note 7 at 15. I doubt this contention is apposite in the context of constitutional rights, as opposed to a more general normative argument. The characterization of citizenship deprivation as rights violation cannot depend upon proof of consequential harm on a case-by-case basis. The remarks of the majority in *Sauvé* regarding the franchise apply equally to citizenship deprivation: "The government's plea of no demonstrated harm to penitentiary inmates rings hollow when what is at stake is the denial of the fundamental right of every citizen to vote. When basic political rights are denied, proof of additional harm is not required." *Sauvé*, *supra* note 120 at para 59.

state the authority to investigate and prosecute wrongdoers, in addition to and apart from any private remedy that an individual victim might seek in tort, contract or property. The public interest in prosecuting offences is not identical to the private interest of crime victims, and the existence of so-called victimless crimes affirms that the domain of criminal law is not coterminous with harms to person or property. So, the coherence and distinctiveness of the crimes designated under Bill C-24 may be overstated.<sup>135</sup>

In addition to the analogies to denationalization that the majority decision *Sauvé* invites, it is noteworthy that the Court actually makes passing reference to exile:

The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. *Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order.* Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact.<sup>136</sup>

A fair reading of this passage suggests that the Court did not imply that a democratic government could lawfully choose to renege on continued membership in the social order and revert to exile as punishment.<sup>137</sup> Rather, the Court traded on (what it assumes to be) a shared repugnance toward exile as punishment. It affirmed that the state cannot deploy the metaphor of the social contract to relegate the bad citizen to the non-citizen via the fiction of fundamental breach.<sup>138</sup>

If the reasoning in *Sauvé* discredits citizenship revocation as fundamentally unjust, that could be the end of the story for citizenship revocation as a formal supplement to existing penalties for criminality. One might suppose that the analysis leaves open the constitutionality

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135. See Lavi, "Citizenship Revocation", *supra* note 133 at 798, 806–07.

136. *Sauvé*, *supra* note 120 at para 47 [emphasis added].

137. Section 2(a) of the *Canadian Bill of Rights* prohibits "arbitrary detention, imprisonment or exile". *Quaere* whether this leaves open the hypothetical possibility of non-arbitrary exile post-*Charter*. SC 1960, c 44, s 2(a), reprinted in RSC 1985, Appendix III.

138. Shai Lavi offers a renewed defence of citizenship revocation as punishment. Lavi, "Citizenship Revocation", *supra* note 133. Lavi replaces breach of the social contract or

of citizenship stripping for engaging in armed conflict against Canada, because it is not predicated on a criminal conviction. Yet, the armed conflict provision in Bill C-24 closely mimics an element of the *Criminal Code* offence of high treason, with one variation.

Section 10.1(2) of the amended *Citizenship Act* authorizes the Minister to revoke citizenship after a Federal Court judge declares that the citizen served as a member of an armed force or an organized armed group and that country or group was engaged in an armed conflict with Canada.<sup>139</sup> Section 46(1) of the *Criminal Code*, when read together with section 46(3), makes culpable for high treason: any citizen who, inside or outside Canada, levies war against Canada or does any act preparatory thereto; or assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.<sup>140</sup> The salient difference between treason and section 10.1(2) of the amended *Citizenship Act* is that the latter applies to service in an armed force as well as an “organized armed group”, thereby capturing non-state militia such as al Qaeda or the Taliban.

The government could have simply amended the *Criminal Code* definition of treason to add “organized armed group” to section 46(1)(c).

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compact with fundamental breach of the “constitutional bond”, which unites the citizenry in a shared commitment to self-government and public deliberation. Here, the terrorist replaces the traitor as the paradigmatic menace. The ordinary criminal differs from the terrorist because the former accepts public rule but claims an exception to it, whereas the latter rejects public rule as such. That is why the terrorist “cannot be punished by being placed back under the public rule. He, unlike the ordinary criminal, must be banned from the community altogether. For the latter, the punishment is not the first stage in a journey back into the community but rather the final stage on the way out of the community.” *Ibid* at 807. Lavi, in effect, elegantly rearticulates the legal fiction that underwrote US expatriation law before the US Supreme Court demolished it: Through his acts, the citizen severs the constitutional bond, and so revocation only formalizes that which has already been signified through the citizen’s actions. A full response to Lavi’s argument lies beyond the scope of this article. However, suffice it to note that his sophisticated and nuanced analysis proceeds from: (i) an austere (and contestable) retributivist model of penal law; (ii) depends on the stability of a discernible line between criminal conduct that does and does not fundamentally breach the constitutional bond; (iii) slides from a particular qualitative distinction between types of offences to a radical distinction between forms of punishment; (iv) and fails to attend to the normative significance of exile for the conception of the legal subject. *Ibid* at 786, 805.

139. *Supra* note 2, s 10.1(2).

140. *Supra* note 108, ss 46(1), 46(3).

It opted instead to add a free-standing provision in Bill C-24 enabling revocation for substantially the same conduct as high treason, but without the prerequisite of conviction or sentence. This choice of legal instrument cannot disguise the essentially punitive character of citizenship revocation for conduct that also constitutes the crime of treason. Therefore, it seems reasonable to suggest that the constitutionality of section 10.2(1) ought to stand or fall with citizenship revocation on grounds of criminality.

## B. Other Charter Issues

### (i) Cruel and Unusual Treatment or Punishment

Section 12 of the *Charter* guarantees the right to be free from cruel and unusual treatment or punishment.<sup>141</sup> Jurisprudence is sparse and confined mainly to the penal context. One might debate whether citizenship stripping for acts of gross disloyalty constitutes punishment, since it is not formally a penal sanction. However, its intent and function is clearly punitive and supplementary to the imprisonment imposed for stipulated criminal convictions. The offender is sentenced first by a judge, to imprisonment, and again by the Minister, to denationalization.

The recent decision by the Federal Court in *Canadian Doctors for Refugee Care v Canada (AG)* considered the application of section 12 to the reduction or withdrawal of access to publicly insured health care for various classes of refugees and refugee claimants.<sup>142</sup> The objective of the policy was to deter alleged abuse of the refugee process by claimants from “safe” countries and to prod refused refugee claimants into leaving Canada promptly. In the course of her decision, MacTavish J summarized the indicia of “cruel and unusual” as part of a “cost/benefit analysis”, and included factors such as whether the treatment “goes beyond what is necessary to achieve a legitimate aim, whether there are adequate alternatives, whether the treatment is arbitrary and whether it has a value or social purpose”.<sup>143</sup>

If the practical aim of citizenship revocation is to deter terrorism, there is certainly no evidence that stripping citizenship will deter a potential terrorist any more or better than the prospect of a criminal conviction and

141. *Charter*, *supra* note 3, s 12.

142. 2014 FC 651, [2014] FCJ No 679 (QL).

143. *Ibid* at para 614.

lengthy imprisonment or, for that matter, the prospect of blowing oneself up, being detained indefinitely, tortured or killed. This undermines the ingenuousness of asserting deterrence as an objective. To the extent that citizenship revocation is subsumed into exile, and exile makes Canada more secure by removing dangerous people, the justification knows no bounds: It is not obvious why Canadians would not also be made safer by exiling all violent offenders. I have argued elsewhere that expelling terrorists is an oddly parochial response that displaces rather than resolves risk. Depending on the destination country, deportation may actually make it easier for the individual to engage in activities that pose a threat to global security.<sup>144</sup>

As noted earlier in the discussion of *Sauvé*, revocation for offences committed by dual nationals but not mono-nationals is arbitrary insofar as it sanctions different punishments for the same misconduct based on a criterion unrelated to the nature of the offence or the offender's culpability. Drawing the International Law Commission's draft articles on expulsion of aliens, it may also be arbitrary and abusive if it "has no other justification than the State's desire to expel the individual".<sup>145</sup> In terms of its social purpose and impact on human dignity, exile negates rehabilitation as a goal of modern punishment, thereby repudiating the capacity of human beings denominated as terrorists to reflect upon their beliefs and their conduct, and to change.

In the United States, expatriation provisions have been subject to scrutiny on various constitutional grounds. *Trop v Dulles* applied the US prohibition on cruel and inhuman punishment (the Eighth Amendment) to expatriation for desertion.<sup>146</sup> In 1944, Trop was expatriated for deserting the US Army. The judgment was rendered during an era where dual citizenship was rare, and so passages of the majority judgment pre-suppose that denationalization inevitably results in statelessness. But the majority's conclusion that citizenship stripping constitutes cruel and unusual punishment does not depend entirely on consequential

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144. See Macklin, "Borderline Security", *supra* note 1; Macklin, "Stuck at the Border", *supra* note 66.

145. International Law Commission, *supra* note 34 at 32.

146. *Supra* note 69.

statelessness. The judgment is pertinent beyond the statelessness context because it affirms the punitive character of citizenship revocation for misconduct, and it affirms that citizenship, once conferred by the state, belongs to the citizen:

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? . . . But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed.<sup>147</sup>

The majority acknowledges that statelessness exacerbates the impact of expatriation, but does not confine the harm of expatriation to statelessness:

[T]he impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.<sup>148</sup>

The same or similar arguments would be apposite to a section 12 *Charter* challenge to the Bill C-24 provisions that revoke citizenship based on conviction for enumerated offences.

The foregoing analysis proceeds from the assumption that citizenship will not be revoked where it would leave the person stateless, since that would (at a minimum) breach Canada's international obligations under the 1961 *Statelessness Convention*. However, the reverse onus provision, discussed below, creates that possibility.

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147. *Ibid* at 92–93.

148. *Ibid* at 110–11.

## (ii) Procedural Dimensions

The section 7 analysis above addressed whether citizenship revocation itself is inconsistent with the principles of fundamental justice.<sup>149</sup> However, the procedures for citizenship revocation under Bill C-24 also raise related concerns. Bill C-24 contemplates a written process (unless the Minister chooses otherwise) with minimal or no judicial involvement. Because the Minister possesses broad and subjective discretion to revoke citizenship, existing administrative law jurisprudence on the standard of review suggests that the Minister would argue that his decision merits a high degree of deference. Of course, if leave to seek judicial review is denied, then revocation may ensue with no independent judicial scrutiny.

Once one acknowledges the punitive character of citizenship revocation, the procedural deficiencies emerge starkly. To return to Mr. Bellissimo's comparison to traffic offences, a citizen facing a fine for speeding is entitled to a public trial before an independent judge who decides both guilt and punishment.<sup>150</sup>

Where a citizen faces banishment (on top of imprisonment) as punishment for "gross acts of disloyalty",<sup>151</sup> a government minister acts as prosecutor, judge and executioner. That an elected official and member of the executive should arrogate powers constitutionally reserved to an independent judiciary disregards a basic tenet of the rule of law. The same objection applies to the retrospectivity of provisions regarding criminality and service in a foreign armed group, as well as the reverse onus in relation to statelessness. One may reach this same conclusion from a different

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149. Craig Forcese has recently conducted an incisive *Charter* analysis of Bill C-24 that arrives at similar conclusions on several issues. See Forcese, "A Tale of Two Citizenships", *supra* note 111.

150. The incentive for the UK government to strip citizenship while the person is abroad may derive in part from the absolute prohibition under the *ECHR* Article 3 on expelling people to face a substantial risk of torture, which has diminished the feasibility of deportation for persons labelled as terrorists. *Supra* note 11, art 3. This impediment is evaded if the target of revocation is conveniently already outside the UK. In Canada, the decision of the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)* leaves open the possibility of deportation to torture and so, in principle, does not create the same incentive. 2002 SCC 1, [2002] 1 SCR 3.

151. Alexander, "In Defence", *supra* note 109 (Minister Chris Alexander used this phrase to describe the grounds of citizenship revocation).

route.<sup>152</sup> Section 11 of the *Charter* sets out a menu of procedural rights owed to any person “charged with an offence”.<sup>153</sup> In *R v Wigglesworth*, the Supreme Court of Canada defined the ambit of “offence” for the purposes of section 11.<sup>154</sup> Writing for the majority, Wilson J reasoned that section 11 applies to offences that are “criminal in nature”, or proceedings which may lead to “a true penal consequence”.<sup>155</sup> An example of the former is a relatively minor traffic offence which, though it may trigger only a modest fine, constitutes a *Criminal Code* offence or a quasi-criminal offence under provincial law. She then proceeded to define a “true penal consequence” as follows:

In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.<sup>156</sup>

While the Court in *Wigglesworth* did not name banishment or exile as penal consequences for wrongful conduct committed as a citizen, it is understandable insofar as these penalties did not then exist in Canadian law. However, the magnitude and public purpose of citizenship revocation for gross acts of disloyalty appear to fit comfortably within the Court’s definition of a true penal consequence. If that is the case, then the procedural rights owed to an individual facing citizenship revocation for criminality or for service in an enemy armed group should be governed by section 11 of the *Charter*. Section 11 guarantees, *inter alia*, the following procedures—each of which is violated by Bill C-24: the presumption of innocence, the right to an open and fair trial before an independent and impartial tribunal, the prohibition on retroactive laws and the right not be punished twice (first by a court, then by the Minister) for the same offence.<sup>157</sup>

The reverse onus provision in Bill C-24 creates the possibility that a person may be stripped of citizenship and rendered stateless. Section 10.4(1) of the amended *Citizenship Act* makes the existence of another

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152. See Forcese, “A Tale of Two Citizenships”, *supra* note 111.

153. *Charter*, *supra* note 3, s 11.

154. *R v Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235 [cited to SCR].

155. *Ibid* at 559, 561.

156. *Ibid* at 561.

157. *Charter*, *supra* note 3, ss 11(d), (g)–(h).

nationality a matter of the Minister's reasonable belief rather than a question of objective fact and places the burden on the citizen to persuade the Minister on a balance of probabilities that the Minister's reasonable belief is wrong.<sup>158</sup> This means that if the Minister erroneously believes a person possesses another citizenship, and that person is unable to dislodge the Minister's belief on a balance of probabilities, revocation of her Canadian citizenship will render her stateless.

Two examples shed light on what government ministers regard as reasonable grounds for belief that a person is a citizen of another country. In 2000, Iraqi-born Hilal al-Jedda naturalized as a UK citizen. The Home Secretary deprived al-Jedda of his British citizenship in 2007 while he was outside the UK in the apparent belief that he was also an Iraqi citizen. In fact, al-Jedda was not an Iraqi national because Iraqi law under Saddam Hussein prohibited dual citizenship, so al-Jedda relinquished Iraqi citizenship when he became a UK national. However, the 2006 Iraqi Constitution enabled those who had lost Iraqi citizenship under the Saddam Hussein regime to reclaim it. The UK government argued that the 2006 amendments automatically and retroactively restored al-Jedda's Iraqi citizenship even though al-Jedda had not applied for it and did not want it. In the alternative, the UK government argued that if al-Jedda was indeed stateless, it was through his own failure to apply for Iraqi citizenship. As discussed earlier, the UK Supreme Court rejected the government's arguments as a matter of statutory interpretation. Al-Jedda was not automatically Iraqi under Iraqi law at the moment the UK deprived him of UK citizenship, and the fact that he could potentially reclaim Iraqi citizenship did not alter the fact that the Home Secretary's decision rendered him stateless. The UK Home Secretary responded by issuing a new order revoking al-Jedda's UK citizenship and then introducing an amendment to the UK legislation that authorizes the creation of statelessness among naturalized citizens.<sup>159</sup>

In Canada, a recent and unusual case concerned the revocation of birthright citizenship. Deepan Budlakoti was born in Ottawa in October 1989, possessed a Canadian birth certificate and was issued

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158. *Supra* note 2, s 10.4(1).

159. See Alice K Ross & Olivia Rudgard, "Al Jedda: The Man Mentioned 11 Times by Home Office as It Tried to Change Immigration Bill", *The Bureau of Investigative Journalism* (11 July 2014), online: <[www.thebureauinvestigates.com](http://www.thebureauinvestigates.com)>.

two Canadian passports. Apparently he believed in good faith, and the Canadian government agreed, that he was a citizen. While serving a three year sentence for a weapons offence under the *Criminal Code*, a guard commenced an inquiry into Budlakoti's citizenship status. He concluded that Budlakoti was not genuinely a Canadian citizen because he was born to employees of the Indian High Commissioner in Ottawa and therefore, under section 3(2)(c) of the *Citizenship Act*, was not entitled to Canadian citizenship. His parents insisted that they had left the employ of the High Commission before his birth. The Canadian government has been attempting to deport Budlakoti qua foreign national to India since 2010 on grounds of criminality. Budlakoti grew up in Canada, his naturalized Canadian parents also live in Canada, and he has never been to India. The Indian government has confirmed that it does not regard Deepan Budlakoti as a citizen of India, which means that, without Canadian citizenship, Budlakoti is stateless. The case is the subject of protracted and, to date, unsuccessful litigation by Budlakoti.<sup>160</sup>

In both instances, the UK Home Secretary and the Canadian Minister of Citizenship and Immigration respectively continue to insist that the individual is a citizen of another country, in the face of dispositive evidence to the contrary in *al-Jedda*, and over twenty years of citizenship recognition by the state in the case of *Budlakoti*.<sup>161</sup>

### (iii) Mobility Rights

Section 6 of the *Charter* guarantees every citizen "the right to enter, remain in and leave Canada".<sup>162</sup> Section 3 of Bill C-24 makes it a condition of citizenship that the person, if granted citizenship, intends "to continue to reside in Canada".<sup>163</sup> This means that the Minister (or her delegate) can refuse to grant citizenship where she is satisfied that the applicant lacks

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160. *Budlakoti v Canada (Citizenship and Immigration)*, 2014 FC 855, [2014] FCJ No 912 (QL).

161. Under the current (albeit inconstant) state of Canadian administrative law, courts have demonstrated an inclination to defer to determinations of fact and even law by government ministers. See e.g. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

162. *Supra* note 3, s 6.

163. *Supra* note 2, s 3(1).

the requisite intention.<sup>164</sup> The Minister is also empowered under section 10(1) of the amended *Citizenship Act* to revoke citizenship on grounds of misrepresentation, fraud or concealing of material facts in the application for citizenship. So, if the Minister subsequently forms the opinion that a naturalized citizen misrepresented an intention to continue residing in Canada, the Minister may initiate revocation proceedings against that citizen.

Denaturalization for misrepresentation in the citizenship application does not raise the same *Charter* concerns as revocation for misconduct as a citizen. But even a cursory examination of this provision affirms that it is simply a device for regulating conduct post-citizenship. More specifically, the government has frequently derided naturalized citizens who depart Canada, accusing them of regarding Canadian citizenship as “simply a passport of convenience”.<sup>165</sup>

One anticipates that leaving Canada post-naturalization could supply the evidence of prior misrepresentation of intent to reside. Imposing a condition on citizenship applicants to intend to reside in Canada after becoming a citizen is a substitute for explicitly compelling a naturalized citizen to reside in Canada. Such an obligation, of course, would violate the mobility rights contained in section 6 of the *Charter*. The prospect of revocation for past misrepresentation of future intent to reside does not mean that every naturalized citizen who leaves Canada will face revocation proceedings. But the breadth of the Minister’s discretion, its temporal indeterminacy, the vagueness of the term “reside” and the inherently conjectural nature of inferring intent will generate anxiety. The Minister’s discretion extends to whom the Minister will target for denaturalization, when the Minister might act (possibly while a citizen is abroad), and whether the citizen will be forced into a protracted, uncertain, expensive and harrowing process to preclude or challenge the revocation. How long after obtaining citizenship can a citizen depart Canada without arousing the Minister’s suspicion? How long can a citizen remain outside Canada before the Minister deems her to be residing outside Canada? Naturalized citizens must live with the risk of losing citizenship for residing outside Canada, even if they are mono-citizens of

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164. This is, in a sense, a mirror image of the power to deny a temporary visa where the visa officer disbelieves that the foreign national intends to depart Canada when required.

165. See e.g. Alexander, “Strengthening Canadian Citizenship”, *supra* note 131.

Canada. Denaturalization for misrepresentation, fraud and concealment of material facts is available to the Minister even if it causes statelessness.

Making the intention to continue residing in Canada a condition of citizenship will produce a chilling effect on naturalized citizens' freedom to exercise their mobility rights. Naturalized citizens become accountable to the Minister for their post-citizenship mobility and face denaturalization if the Minister is unsatisfied with their account of whether or when they formed an intention to reside outside Canada. It is difficult to resist the inference that disciplining naturalized citizens' exercise of their section 6 mobility rights is the goal the government seeks by making intent to reside a condition of citizenship. This impairment of mobility rights violates section 6 as clearly, if not as directly, as a prohibition on residing outside Canada.

#### (iv) Discrimination

Describing a group of people as "second class citizens" is universally understood to describe an injustice. Section 15 of the *Charter* guarantees equality protection and benefit of the law, free from discrimination on the basis of, *inter alia*, national origin.<sup>166</sup> The intent to reside provision obviously discriminates against naturalized citizens. Birthright citizens are free to come and go from Canada, unencumbered by the risk of citizenship revocation for residing abroad. Naturalized citizens, whose national origins lie outside Canada, do not enjoy equal benefit or protection of citizenship, since their mobility rights qua citizen are compromised.

Fifty years ago, the US Supreme Court struck down a law that stripped citizenship from naturalized citizens who resided continuously in their country of origin for at least three years after obtaining US citizenship. In *Schneider v Rusk*, the majority ruled that the law violated the Equal Protection Clause of the US Constitution:

A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class

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166. *Charter, supra* note 3 ("[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", s 15(1)).

citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.<sup>167</sup>

The same reasoning applies in the Canadian context.

The other major distinction drawn by Bill C-24 is between mono- and dual (or multiple) citizens of Canada. Dual or multiple citizens will, but mono-citizens will not, face citizenship revocation for criminality or for serving in an enemy armed force or armed group. Arguably, the distinction is not discriminatory for purposes of section 15 because mono-citizens would, but dual or multiple citizens would not, be rendered stateless as a consequence of citizenship revocation. To borrow from the idiom of formal equality, mono-citizens and dual (or multiple) citizens are not “similarly situated” with respect to the burden of statelessness.<sup>168</sup>

The strength of this response depends on how one characterizes the impact of citizenship revocation. From an international-statist perspective, the function of nationality is to catalogue the world’s population and to file each person under at least one state. This ensures that some state has a legal obligation under international law to admit the person. Nationality thus provides states with a mailing address to affix on deportable non-citizens, and partly explains why statelessness is a problematic and undesirable anomaly for states. But just as all sovereign states are formally equal under international law, so too are all citizenships. Within this framework, citizenship becomes fungible. Statelessness is the problem, and nationality its solution. So, it may not actually matter what nationality a person possesses, as long as he or she possesses at least one. All nationalities are equal for the purpose of averting statelessness.<sup>169</sup> This formal equality of nationality may partly explain international law’s ambiguity about the conditions under which citizenship deprivation that does not induce statelessness is nevertheless arbitrary and contrary to international law.<sup>170</sup>

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167. 377 US 163 at 168–69 (1964).

168. For an illuminating discussion about equality in the context of UK citizenship deprivation, see Thwaites, *supra* note 49.

169. One could even imagine how a creative government wedded to this view might venture that protecting mono-citizens from statelessness is really an affirmative action initiative under section 15(2) of the *Charter*. *Supra* note 3, s 15(2).

170. See Peter Spiro, “A New International Law of Citizenship” (2011) 105:4 Am J Int Law 694 at 711–12.

From an internal perspective, citizenship is not fungible.<sup>171</sup> The revocation of citizenship severs a unique relationship between the individual and a specific state. It is unique in two respects. First, the formal equality of nationality suppresses the substantive inequality of citizenship. The bundle of social, political, economic, cultural and legal opportunities and entitlements to which citizenship provides access varies radically between countries. The “heft” of Canadian or Brazilian citizenship is dramatically and indisputably more robust than that of present-day North Korea or Somalia.

Secondly, the lived experience of that legal bond, what the International Court of Justice in the *Nottebohm Case* calls “the social fact of attachment” is as infinitely diverse as the people who make up the citizenry.<sup>172</sup> It may range from the “nominal citizen” whose social attachment is highly attenuated, to the individual who is fully a product of his country. It is neither feasible nor appropriate to devise a metric capable of measuring the quantitative, qualitative, subjective, experiential, emotional, personal, familial, cultural, social, financial, linguistic and political impact of exile. Citizenship as legal status obviates both the need and the legitimacy of an ongoing or comparative evaluation by state authorities of how much or how well a citizen performs.<sup>173</sup> The right to family and private life under the *ICCPR* and the *ECHR* operates as a crucial brake on the state’s capacity to deport non-citizens. Yet, to the extent that the right is always balanced against the state’s sovereign power to control entry and residence of non-citizens, this cannot rescue citizenship revocation. The right to enter and remain is foundational, if not definitive, of citizenship. The revocation of a particular citizenship constitutes the forcible destruction of the individual’s status in that polity and renders them rightless in respect of that state. The loss of the right to enter and remain actualizes this abjection through exile. The violence of rupture is not negated by the existence of status in another polity, if one conceives of the relationship (whatever its intensity, quality, etc.) between a state and a citizen as singular and unique. On this view, citizenship revocation inflicts an

171. Thwaites makes a similar argument. Thwaites, *supra* note 49 at 263.

172. *Nottebohm Case*, *supra* note 5 at 23.

173. This does not preclude an argument that the depth and duration of a resident non-citizen’s relationship to a state could and should generate an entitlement to remain and to be put on a path to citizenship. See e.g. Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013).

intrinsically grave harm that is separate from (though exacerbated by) the harm of statelessness.<sup>174</sup> Within a human rights framework, subjecting multiple but not mono-citizenship holders to revocation emerges as discriminatory under section 15 of the *Charter*.

## Conclusion

The traitor was once the iconic embodiment of disloyalty and riskiness; today it is the terrorist. The traitor betrays his country by transferring allegiance from his state to an enemy state. But the post-9/11 terrorist has been configured as the modern pirate—*hostis humani generis*—a common enemy of all humankind. He is loyal to no state and a menace to all.<sup>175</sup> He is thus conceived of less as a human being than as an embodiment of risk.

Criminal law theorist Günther Jakobs uses this figure of the terrorist to dichotomize his field of study into citizen criminal law and enemy criminal law. According to Jakobs, the citizen is “a person who acts according to loyalty to law”,<sup>176</sup> whereas the enemy lacks both “loyalty to law and the will to act in accordance with it”.<sup>177</sup> As Markus Dubber explains, Jakobs’ binary simply substitutes citizen/enemy for person/non-person and provides cover for a penal system that would exempt the state from treating those suspected or convicted of certain terrorist offences as rights-bearing subjects. The purported distinction between citizen and enemy does not refer to the citizen in the legal sense, but that probably matters less than the purported alignment between the enemy and the terrorist. Positing distinct normative frameworks within criminal law for the enemy and the citizen respectively neatly dovetails with the use of citizenship revocation as punishment for those consigned to the domain of enemy criminal law (read: terrorist). The incongruity of the citizen/enemy binary in criminal law is resolved by citizenship law’s conversion of the enemy into the non-citizen. The logics of

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174. For a similar argument, see Thwaites, *supra* note 49.

175. See generally Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Brooklyn: Zone Books, 2009).

176. Günther Jakobs, “Bürgerstrafrecht und Feindstrafrecht” (2004) 5 HRR-Strafrecht 88 at 91, cited in Dubber, *supra* note 117 at 202.

177. *Ibid* at 203.

crimmigration and securitization converge to reconfigure the citizen terrorist as a certain type of criminal—first, as enemy, and finally, as alien.

Since exile is the endgame of citizenship revocation, one cannot avoid the irrationality of banishment in a world where all habitable territory is subject to some state's sovereign authority. This is not a new observation. In the eighteenth century, the drafters of the US Constitution, international jurists and commentators queried the morality and the logic of exile. Matthew Gibney's insightful survey of historical attitudes toward banishment included the following blunt comment by an early twentieth century international jurist, "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 a practice is inadmissible."<sup>178</sup>

When the traitor was the paradigmatic object of exile, there was a certain rationality to transferring the person to his or her country of allegiance. But where the terrorist is constructed as a global enemy, the logic falters. Whatever conduct makes him unworthy of Canadian citizenship would presumably make him equally unworthy of citizenship anywhere else. Indeed, the amended *Citizenship Act* trades on this notion of the terrorist as global outlaw: Section 10(2)(b) makes conviction for a terrorism offence in a foreign country sufficient reason to revoke Canadian citizenship.<sup>179</sup> An enemy of one state is an enemy of all. If that is so, the logic of denationalization leads to the conclusion that the terrorist is—or ought to be—nobody's citizen.

Consider the absurd scenario where all states behave as the UK and Canada: A dual UK-Canadian citizen is convicted of a terrorism offence in the UK. A conviction in the UK is enough to strip him of UK and Canadian citizenship under the laws of the two states. Both the UK and Canada are also constrained in their power to inflict statelessness. So, now it becomes a race to see which country can strip citizenship first. To the loser goes the citizen.

Modern exile, as imagined under UK and Canadian law, is built upon unsustainable and incoherent propositions about the nature of legal citizenship. If citizenship is irrevocable only where it causes statelessness, then citizenship is a right for mono-citizens but a privilege for dual citizens.

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178. Sir John Fischer Williams, "Denationalization" (1927) 8 Brit YB Intl L 45 at 57, cited in Gibney, *supra* note 7 at 7. See generally Gibney, *supra* note 7 at 5–8.

179. *Supra* note 2, s 10(2)(b).

Legal citizenship is performative and substantive for exiling states, who can revoke it because the individual's misconduct exposes him as a bad citizen. But the exiling state must simultaneously insist that citizenship is formal and static for destination states, because the exiling state depends on compelling the destination state to admit the exile qua citizen, whether good or bad. One state's authority to deem the bad citizen a non-citizen presupposes another state lacking that same authority.

This power of a state to demote the bad citizen to the non-citizen does not turn on any principled argument about the nature of citizenship or the legitimate scope of state sovereignty, but on extrinsic and contingent facts about multiple nationalities, the citizenship regimes of other states, and inter-state games of "hot potato" played with the bodies of undesirable citizens.

The final irony of these emerging citizenship revocation regimes is that the securitization of citizenship makes actual citizens less secure. Dual citizenship will diminish rather than enhance security wherever the prospect of denationalization exists. This will be the case where one of the citizenships is practically difficult or impossible to shed (which is the case for many Middle East states). It will also exacerbate precarity where exiling states aggressively seek to impute another citizenship to individuals against their will and even contrary to the will of the other state (as in al-Jedda and Budlakoti).

People often express the view that citizenship is a privilege. They usually mean something like this: "I feel privileged to be a citizen of my great country, and I take my civic responsibility seriously by being an active, loyal and committed member of my political community." That is a laudable sentiment, and states legitimately wish to instill and promote that sense of commitment. But it is a grave error to confuse the invocation of privilege as sentiment with privilege in the legal sense. A privilege in law belongs not to the recipient, but to the patron who bestows it. A right belongs to the one who bears it. When members of the executive declare that citizenship is a privilege and not a right, what they are asserting is their own power to take it away. When the US Supreme Court in *Afroyim v Rusk* ruled that the government lacked the power to revoke citizenship, it declared that it did "no more than to give to this citizen that which is his own, a constitutional *right* to remain a citizen

in a free country unlesshe voluntarily relinquishes that citizenship”.<sup>180</sup> When Paul Martin Sr. introduced Canada’s first *Citizenship Act* in 1946, he described citizenship as “the *right* to full partnership in the fortunes and in the future of the nation”.<sup>181</sup> Reducing Canadian citizenship to a revocable privilege would be a legally and politically transformative act; the one thing it would not be is a “Strengthening Canadian Citizenship Act”.

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180. *Afroyim v Rusk*, *supra* note 9 at 268 [emphasis added].

181. *House of Commons Debates*, 20th Parl, 2nd Sess, No 1 (2 April 1946) at 510 (Paul Martin) [emphasis added].