

## A Criminal Law for Semicitizens

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**ABSTRACT** *A significant number of influential philosophical theorists of punishment argue that only those who enjoy the status of citizenship in a political community can legitimately be punished by that polity. Yet, the strength of this approach wanes when these scholars treat individuals who clearly do not respond to their idealised conception of citizenship (such as asylum seekers, disenfranchised offenders, and tourists) as if they were fully fledged citizens. This article argues that ‘citizen criminal law’ can only be theoretically feasible in today’s world if it abandons the binary position between ‘full citizens’ and ‘noncitizens’ and recognises the everlasting presence of certain types of ‘semicitizens’. Thus, citizenship should be conceived as a scalar phenomenon. Based on a typological approach to the different forms of semicitizenship, we argue that the strength of the political bond between offenders and the political community must be considered when gauging punishment severity. The weaker the bond, the more lenient the punishment should be.*

### 1. Introduction

Among contemporary criminal law scholars, it is increasingly common to assert that the criminal law of a given state is only applicable to those who have some kind of political bond with it.<sup>1</sup> More precisely, they claim that a state can legitimately impose punishment only on those who, at the time of the commission of the offence, already belong to the political community as ‘citizens’.<sup>2</sup> In other words, (criminal) law does not punish a subject *qua* moral agent or member of a global community, but only *qua* (domestic) citizen.<sup>3</sup> Seen from this perspective, whoever steals from another without being a citizen is certainly affecting the property of others, and possibly she is also committing a moral wrong, but she cannot be punished by a legal order that does not bind her.<sup>4</sup>

It is worth noting that advocates of citizenship-based punishment do not view the concept of ‘citizenship’ as a strictly formal status (legal membership in a political community, usually documented via passports or other identity documents) but rather in a more substantive or enriched fashion.<sup>5</sup> For some authors, the citizenship bond is constituted mainly by the possibility of being able to participate in lawmaking process (in a broad sense), meaning that the (criminal) law would only bind those who had the possibility to take part in the (democratic) process of its creation (deliberative model).<sup>6</sup> In Klaus Günther’s words, ‘To be a responsible agent of a legal order always means to be a responsible moral person in the role of the law’s addressee, and to be a responsible moral person as the law’s author’.<sup>7</sup> Other scholars argue that the aforementioned bond is instead based on the fact that the individual can envisage the (criminal) law as ‘her own’ in a somewhat more ambitious way, namely, as the reflection of a set of shared values that define her polity as a collectively engaged project with her fellow citizens (republican model).<sup>8</sup> According to Antony Duff, the law ‘should not be something imposed on us by a sovereign: it

should be a common law – a law that is our law, that speaks to us in our own collective voice in terms of the values by which we define ourselves as a polity; a law by which we bind ourselves'.<sup>9</sup> Finally, there are those who, like Michael Pawlik, base the notion of citizenship on a synallagmatic relationship governed by the principle of fairness (liberal or contractualist model).<sup>10</sup> As asserted by Pawlik, since the citizen makes use of the 'status of liberty' that the state guarantees through (criminal) law, she is obliged to respect that law from which she benefits and, if necessary, to tolerate the imposition of punishment in case of violation.

In our view, the introduction of the concept of citizenship (in all its different variants) into the discussion on the legitimacy of punishment has at least two important advantages. Firstly, these theoretical foundations rightly place the individual who must endure punishment at the centre of the discussion about its legitimacy. Without taking the side of any of the aforementioned variants, reflecting on how to legitimise the imposition of punishment in the eyes of the person who actually suffers the censure and the hard treatment seems to be the correct starting point for any theoretical justification attempt. Secondly, the notion of a 'citizen criminal law' provides a limiting force to the scope of the criminal law that is lacking in those theories that justify punishment based on the mere protection of interests. Insofar as the state should not punish everyone who has harmed an alleged (legal) interest of the political community that it represents, but only those who have infringed a norm of the political community of which they are a part, the range of individuals who can be punished is substantially reduced. Thus, the variants of citizen criminal law do us a great service by highlighting massive problems of legitimacy when punishing people living in social exclusion;<sup>11</sup> foreigners who commit crimes against nationals outside the territory of the state that intends to punish them;<sup>12</sup> minors who, despite being volitionally and cognitively comparable to an average citizen, are not allowed to vote;<sup>13</sup> or even corporations that have no voting rights.<sup>14</sup>

However, the most influential variants of citizen criminal law nowadays have at least two major problems that ultimately lead even their fiercest defenders into deep internal contradictions. Firstly, these conceptions operate with a binary understanding of the notion of citizenship, which apparently allows a clear line to be drawn between full citizens and noncitizens.<sup>15</sup> However, according to contemporary political theory, it is more plausible to assert that the bond between an individual and a political community is of an essentially gradient nature, meaning that a significant number of potential offenders cannot be fairly allocated into the category of either 'insiders' or 'outsiders'.<sup>16</sup> The Spanish national who studies a master's degree in Germany and can vote in the host country's municipal elections during her residence, albeit not in general elections, has a bond with the German state that is different from both that of the German national who lives in Germany and that of the Spaniard living in Spain who assaults a German in Barcelona. Thus, it is not sufficiently compelling to consider the German citizen and the Spanish student as equivalent just because they both reside in Germany or both Spaniards on the same footing just because they are not German nationals. Secondly, based on a gradient notion of citizenship, it is problematic to assume a rigid association between punishment for full insiders as opposed to simple preventive measures of coercion for all those individuals who do not fit into this pattern. While the standard case of punishment is defined as a burden intentionally imposed by a state to censure the act committed by whoever is considered responsible (culpable) for a wrong, coercive measures constitute a purely preventive instrument to be imposed on whoever is just considered a source of danger.<sup>17</sup> The notion

that the citizen should be censured through the imposition of punishment, while the outsider should be treated as a mere source of danger to the interests of a polity fails as soon as it is recognised that most potential recipients of a criminal conviction are neither completely outsiders, nor do they have a political relationship with the state in line with the idealised terms usually described by theories that justify citizenship-related punishment.<sup>18</sup>

Therefore, the binary understanding of citizenship confronts advocates of such theories with a dilemma. One way out would be to use a strict notion of citizenship and accept that a large number (if not the majority) of non-full citizens who commit offences cannot be punished.<sup>19</sup> Consistency here, however, comes at too high a cost: to set such demanding preconditions for the legitimacy of punishment would mean that a significant proportion of what we understand as criminal law would be illegitimate. Depending on what is understood by the term 'citizenship' (according to the variants mentioned above), the state could not prosecute a foreigner who attacks individual or collective interests from abroad, nor a tourist who commits a crime on its soil, nor the national who lives under a certain poverty threshold. Thus, in several cases, the state would be forced to resort to coercive measures that seek to prevent future harm (e.g. preventive detention, deportation).<sup>20</sup> However, a broad application of preventive measures on non-full-citizens not only fails to respond to contemporary judicial practice but also undermines the two advantages of citizen criminal law, inasmuch as neither the sanction against the offender (who is treated as a mere source of danger) is justified, nor does it provide any significant normative constraint on state coercion. When it comes to prevention, the more coercion, the better.

Another option in the face of the aforementioned dilemma, for which most scholars currently opt, is to try to guarantee acceptable practical consequences based on *ad hoc* adaptations of the different conceptions of citizenship. This means *de facto* punishing noncitizens just as if they were citizens. Thus, when Duff analyses how to deal with the temporary resident or the visitor (who, by definition, cannot see in the law of the given state an expression of the civic values of 'her' community), he appeals to the notion of hospitality, inherent in the guest-visitor relationship and asserts that 'a civilized polity extends to guests the same protections and expectations as its citizens share'.<sup>21</sup> However, the key factor would not be the guest status either because, for Duff, those who enter the territory of the polity without authorisation could also be punished. In the end, the only relevant factor for the legitimisation of punishment is the harm to an 'interest' of the community that intends to punish: 'criminal wrongs committed within the polity are indeed its business, and our business as its citizens, whether they are committed by a citizen or by a non-citizen'.<sup>22</sup> For his part, Gideon Yaffe, who takes a deliberative approach to the notion of citizenship, seeks to avoid the impunity of visitors and immigrants by directly modifying the source of the legal reason that binds them to the state: 'The alternative source is a commitment, essential to being a visitor, not to disavow the applicability of the law to oneself'.<sup>23</sup> We can see how in both examples the political bond gives way to a different foundation, be it the interest of society in protecting itself in the case of Duff or an idealised contractualist doctrine based on tacit consent in the case of Yaffe. Even authors who defend a less demanding notion of citizenship (liberal variant) are forced to introduce corrections to their rationale for the justification of punishment. For example, after stating that only those who enjoy the benefits of the 'state of real freedom' guaranteed by law are obliged to contribute to its maintenance, Pawlik concludes that everyone who is in the territory of the state, upon being protected by it, is obliged by the same terms and therefore

could legitimately be punished.<sup>24</sup> And Jesús-María Silva Sánchez claims that the state may even legitimately punish total outsiders for offences committed abroad insofar as these offences can be considered as ‘violent’ *mala in se* (which in turn would include not only crimes such as murder, but also coercion or bodily harm).<sup>25</sup> By going so far, Silva Sánchez conceives of the potential subject of punishment as a moral agent integrated into a universal community and bound by prepolitical duties; therefore, Silva Sánchez abandons a strictly state-centric political foundation of punishment.

Obviously, all these *ad hoc* corrections and adaptations of the notion of citizenship facilitate reaching more acceptable consequences, i.e. those that are compatible with criminal practice. But at the same time these approaches heavily undermine the compelling force that citizenship displays regarding the justification of punishment.<sup>26</sup> What is the usefulness of claiming that punishment can only be legitimately imposed on those who are socially included – i.e. those who have fair access to the material resources and welfare benefits necessary to reach a decent quality of life – if it is then argued that even the tourist who only spends a few hours in the country is to be considered a citizen from the point of view of punishment? Why link the legitimacy of punishment to the fact that the person affected by it has the possibility of democratically shaping the law if it is then asserted that someone who lacks the right to vote can also be punished, provided that she has had some opportunity to express herself politically? We can thus see that a theory of punishment based on the paradigm of citizenship is unappealing in a world that is rife with increasingly imperfect forms of citizenship.<sup>27</sup>

Assuming that the requirement of a political bond as a precondition of punishment is a promising path (inasmuch as overcoming the problems just referred to does not mean abandoning the figure of the citizen in favour of that of a prepolitical moral agent or the idea of a global political community),<sup>28</sup> the aim of this article is to show that there is a way to advocate for a citizen criminal-law conception without incurring the internal inconsistencies mentioned above. The argument in this article will unfold as follows. In Section 2, we approach the notion of citizenship from a typological approach. In particular, in Section 2.1, we shed light on why the relation of citizenship between a state and a person is eminently ‘gradient’ (i.e. it is a matter of degree). We argue that it does not make sense to construct an overly complex reality characterised by multiple and multilevel citizenship (e.g. mass tourism, exchange students, socially excluded, permanent residents, guest workers, refugees, asylum seekers, and unauthorised immigrants) from a black-and-white (citizen/noncitizen) perspective. In Section 2.2, we deal with the multiple forms of semicitizenship just referred to from a typological approach. In Section 2.3, we outline the ideal types of ‘full citizen’ and ‘minimal semicitizen’ as reference points at the extremes of a continuum of possible political relationships with varying intensities. Likewise, we explain who can be considered a ‘full outsider’, and why such individuals should be left out of this continuum. In Section 3, we discuss how a polity must respond to the offences of non-full-citizens. In Section 3.1, we explain why the strength of the political relationship must be reflected in the severity of the punishment of the semicitizen; then, in Section 3.2, we illustrate how this could be achieved. Our formulation makes the severity of the punishment a function of the intensity of the political bond between the offender and the state when all other relevant variables are held equal. Against the full outsider, however, certain coercive measures can be imposed, but, as we defend in Section 3.3, the full outsider is by no means an outlaw against whom unlimited coercion can be applied. In Section 4, we summarise the central theses of this article.

## 2. Citizenship as a Typological Concept

### 2.1. *Citizenship as a Gradient Concept*

In contemporary political philosophy, it is widely accepted that citizenship, viewed from a material prism, is not a notion with sharp boundaries and therefore cannot be starkly contrasted with 'noncitizenship'.<sup>29</sup> This is partly due to the influence of the 'rights-based' conception of citizenship, as proposed by Thomas H. Marshall in his famous work *Citizenship and Social Class*.<sup>30</sup> As claimed by Marshall, full membership in a political community comprises three elements: (i) the civil element, composed of the rights necessary for individual liberty, such as freedom of speech and thought, being able to conclude contracts, and the right to due process; (ii) the political element, namely, the right to participate in the exercise of power, which encompasses both active and passive suffrage; and (iii) the social element, including the right to a minimum of social welfare according to the existing standard in a society.<sup>31</sup> Moreover, Marshall argues that these three elements are interrelated. Thus, for example, a public education of a certain quality is a necessary precondition for the proper exercise of civil and political rights.<sup>32</sup> Nevertheless, clearly not all members of a polity enjoy full rights in each of these three dimensions. This, which is true even for the most developed states that guarantee a decent level of rights, is an important point for scholars who argue against a binary distinction between citizens and noncitizens, emphasising the character of citizenship as a 'gradient category'.

Among these scholars, Elizabeth Cohen's approach stands out.<sup>33</sup> Cohen stresses that the binary approach to citizenship collapses if material citizenship is defined on the basis of multiple elements (i.e. different kinds of rights) because distinct types of rights are not necessarily granted jointly (e.g. the guarantee of civil rights does not necessarily come with social rights) and their recognition varies from person to person.<sup>34</sup> She claims that 'accepting that citizenship rights are disaggregated in any liberal democratic state entails accepting the inevitable presence of semicitizenship'.<sup>35</sup> 'Semicitizens', as Cohen understands the term, refers to those who enjoy some – but not all – of the rights associated with citizenship (civil, political, social, and nationality rights).<sup>36</sup> She then argues that semicitizenship – understood in these broad terms – is not, as is usually assumed, an exception to be overcome, but rather the rule in a globalised world where the movement of people is increasingly fluid.<sup>37</sup> Moreover, it should be noted that these forms of semicitizenship not only arise in the absence of legal citizenship status – as in the case of the permanent resident, the guest worker, or the unauthorised immigrant – but can also emerge in relation to individuals who formally enjoy full citizenship status.<sup>38</sup> Consider the case of the national who has been deprived of the right to vote due to the commission of an offence or of a Brazilian citizen of African ancestry living in a favela, who enjoys very different social and civil rights than her compatriot living in a rich neighbourhood in Sao Paulo.

Thus, given that the bond between an individual and a political community is materialised in the rights that the latter guarantees to the former, being therefore necessarily gradient, and considering furthermore that semicitizenship is quantitatively very important in the contemporary world, it seems evident that any attempt to justify punishment should not operate with an idealised conception of full citizenship that categorially opposes the notions of insider and outsider. A criminal

law for a world of semicitizens must seriously consider the variability of the political bond that unites the potential addressee of punishment with the community that seeks to impose it.

## 2.2. *Towards a Typological Approach to the Forms of Citizenship*

Advocates of citizen criminal law frequently raise the issue of certain ‘degraded’ citizenship statuses of some nationals, particularly the socially excluded or disenfranchised.<sup>39</sup> Yet, they normally address this matter, as stated, on the basis of a rigid categorial contrast between citizenship and noncitizenship; moreover, they view these degraded statuses as if they were exceptional and negative situations, to which criminal law should provide a provisional response while waiting for them to be overcome.

The distinction drawn by the criminal doctrine between insiders and outsiders is based on a ‘classifying method’ distinctive of classical logic. This implies determining one or several characteristics that a person must necessarily have in order to be considered a citizen and, by exclusion, classifying anyone who does not present (all) these characteristics as an outsider. Nevertheless, if it turns out that the political bond of citizenship between an individual and a political community is of a gradient nature, with full citizenship in the contemporary world being a *rara avis*, it seems clear that there is no point in justifying punishment on the basis of an idealised material conception of the citizen, whatever element is taken as central (political participation, civil liberties, social security, etc.), nor is it possible to resort to the dichotomy of citizen/noncitizen.

In order for the notion of citizenship to be a theoretical contribution to the theory of punishment, it is essential to approach it from a different methodological perspective, that is, from a typological one far removed from the separational reasoning of categorial thinking.<sup>40</sup> This approach consists in understanding legal concepts as ‘ordering concepts’, which contain gradable properties that can be ascribed to different individuals to a greater or lesser degree. The most important of these ordering concepts are the ‘typological concepts’, which may consist, for example, in especially ‘pure’ concepts located at the ends of a conceptual continuum. These typological concepts allow for the remaining concepts to be ordered according to degrees (i.e. how close they are to an extreme). A typological concept, apart from having gradient elements (they can appear with more or less intensity), is not defined by any essential element. Therefore, the elements that compose it (or may compose it) are compensable: the lack of one element can be compensated by the presence of another.

In order to approach the notion of citizenship from a typological perspective, we must construct (at least) two ideal types: the full citizen and the minimal semicitizen. Both are located at the extremes of an infinite sequence of possible political ties of varying intensity. Only the complete outsider (i.e. one who lacks *any* previous bond with the state) is outside this *continuum* of political relations. Therefore, the relevant question is not only whether someone is a full citizen (let us call her ‘1’) or an outsider (noncitizen who has absolutely no rights; let us call her ‘0’), but also whether her political bond is closer or further from the ideal type of the full citizen (‘1’) or the minimal semicitizen (let us call her ‘0.1’). Although this approach implies the loss of some legal certainty, this is the only possible path to coherently introduce the essentially gradient notion of citizenship to criminal law.

### 2.3. *The Ideal Types of 'Full Citizen' and 'Minimal Semicitizen'*

Drawing the ideal types of full citizen and minimal semicitizen, and thus determining how strong the political bond between an individual and a community is, would be easy if it were possible to find a single structural element around which to shape the conceptual continuum and measure the relationship.<sup>41</sup> In fact, in a certain sense, this is how the aforementioned deliberative theories operate, i.e. by trying to define the material notion of citizenship based only upon the political status of the individual.<sup>42</sup> We share this willingness to define the notion of citizenship based on a rights-based approach,<sup>43</sup> but we disagree with a one-dimensional perspective that only considers the democratic element. Instead, in order to ascertain the two ideal types at the extremes of the typological continuum, it is first necessary to consider the four major groups of rights that constitute the notion of citizenship, that is, civil, political, and social rights, as well as the rights directly associated with nationality (formal citizenship). In addition, we must ponder the variable intensity with which these rights are recognised and guaranteed in the real world. The rights that make up each of these four groups are not formally ascribed to any person (e.g. a tourist will hardly have access to social rights in the country to which she is travelling), and the formal acknowledgement of a right is often not accompanied by its material enjoyment (i.e. the legal recognition of the right to receive a quality education obviously does not ensure effective access to it). For explanatory reasons, we will distinguish between three levels of strength within each group of rights associated with citizenship: strong, moderate, and weak.

The ideal type of full citizen, then, relates to a person who enjoys strong rights in each of the four groups. Thereby, this ideal type of citizen is embodied in someone who, in addition to being a national (right to enter and remain in the territory of the state and to receive consular assistance when abroad), enjoys extensive civil rights (fundamentally the protection of 'negative' liberty against arbitrary attacks or interferences by third parties or the state itself, besides rights already referred to such as due process or contractual freedom), along with wide possibilities not only of political participation (active and passive suffrage) but also of political influence (access to the media or social networks to disseminate opinions or the ability to finance campaigns), as well as (potential) access to rights of a social nature (education to a certain level, health care, decent minimum wage, family care rights, etc.) as required. Moreover, the ideal type of full citizenship presupposes that the rights held are not only formally recognised, but that the individual in question can actually exercise them *vis-à-vis* the political community to which she belongs. This profile is embodied, for instance, by a British university professor who lives in a wealthy and safe city in southern England, has a high disposable income, and influences political discussion by regularly authoring columns in a widely distributed newspaper.

At the other end of the conceptual continuum of 'citizenship' would be the ideal type of minimal semicitizen, incarnated by those who enjoy very weak rights. An example could be an unauthorised Venezuelan immigrant who lives in a Brazilian favela and who does not even have a temporary residence permit (lack of rights associated with nationality/residence), is excluded from access to any social benefits (i.e. her children cannot attend public school due to their immigration status), and lacks the right to vote. Although this person enjoys certain civil liberties (which are usually guaranteed to all persons in the territory, for example, the right to acquire ownership of a movable asset or the right to contract), her civil rights can only be qualified as weak, given that the Brazilian state does not even adequately guarantee the right to personal security to the inhabitants of certain favelas. The enjoyment of some rights guaranteed by the state (even if they are only weak) nevertheless

allows for the establishment of a political bond and constitutes the minimum common denominator that delineates the typological continuum of citizenship, from the full citizen (e.g. the British professor) to the minimal semicitizen (e.g. the Venezuelan immigrant).

However, there is a categorial gap between the minimal semicitizen and the full outsider (henceforth, 'outsider'). The outsider is personified by an individual who fully lacks the most elementary civic, political, and social rights in a given political community and who lacks formal citizenship as well.<sup>44</sup> This would be the case of a foreigner who carries out or participates in a terrorist attack against a state without ever having set foot on its territory, nor having had any previous contact with it. Another case that fits this profile is that of the individual who belongs to a systematically persecuted minority (e.g. the Rohingya in Myanmar), who despite living in the territory of the state has not only been deprived of its formal nationality but are also denied any political and social rights, while the state authorities allow or even promote their deportation or death.

Between the ideal types of full and minimal semicitizen exists a countless range of semicitizenship forms. On the one hand, semicitizenship can be traced back to the (normative) nonrecognition of a particular dimension of citizenship rights. This is usually the case for resident foreigners, who normally enjoy civil rights and sometimes even certain basic social rights, but they are frequently deprived of political rights (at least until they have resided in the country for a certain period of time). Of course, the 'denial' of a particular right (e.g. the right to vote) can be partial (i.e. the European citizen who has the right to vote in the country where he resides in communal but not national elections) or total (e.g. non-EU residents who absolutely lack the right to vote, or tourists who are normally only granted civil rights during their stay). On the other hand, it is also possible that the status of semicitizenship is the result of the weakness with which some rights of any of the referred elements are guaranteed in practice. An example of this would be a poor peasant of indigenous ancestry in Latin America who is formally recognised as having broad civil, political, and social rights, but whose children are *de facto* denied schooling because of the enormous distance between their place of residence and the nearest public school or because they cannot be educated in their mother tongue. Finally, semicitizenship status may be a result of a combination of the above two factors: that is, the lack of formal recognition of some rights in addition to the limited effective guarantee of other rights. This is the case of the socially excluded foreigner, who is not only formally deprived of the rights associated with nationality and political rights, but whose enjoyment of civil and social rights is limited, for example, because his right to due process is in practice reduced by constant harassment by police officers. In extreme cases, a person may, in practice, lack even the most basic rights (such as individual security), a situation that may occur in failed states (e.g. Somalia) or when an individual belongs to a *de facto* persecuted minority. Even more severe are those cases where a person is normatively excluded from all kinds of rights. Individuals who find themselves in these last two situations cannot be considered as semicitizens (even at the weakest level), but rather as outsiders (the state guarantees them '0' rights).

### 3. Towards a System of Criminal Sanctions for Semicitizens

#### 3.1. *Semicitizenship Status and Political Obligation*

So far, we have scrutinised the status of citizenship exclusively from a rights perspective. But this approach has, as an essential counterpart, the (political) obligation of the citizen



towards her polity.<sup>45</sup> By benefiting from the rights guaranteed by the state, the citizen, as Pawlik argues, is obliged to cooperate in maintaining the state of freedom ensured by the polity that makes this possible in the first place. It is from this generic political obligation to cooperate that the specific obligation to obey the law is derived. The citizen who, in violating the prohibition of murder, kills a cocitizen, is in breach of her political obligation, insofar as she is unwilling to assume her part in the common political project. In turn, as Zachary Hoskins argues, the obligation to tolerate punishment is nothing more than a novation of this primary political obligation towards the polity: 'One way to comply, then, would be to constrain one's behavior so as to avoid being liable to punishment; another way to comply would be, if one has committed a criminal offense, to accept the prescribed punishment'.<sup>46</sup> The punishment, then, confirms the indissoluble link between the enjoyment of freedom and the fulfilment of the duty to cooperate in its preservation at the expense of the offender.

Accordingly, just as the bundle of rights that someone enjoys by virtue of her citizenship varies, so too must her political obligation be gradient.<sup>47</sup> The problem is that the duty to cooperate in the maintenance of the existing legal order appears to be, at first sight, a non-gradient duty. In one sense, this is true: either the obligor<sup>48</sup> respects the law and fulfils her political obligation or she commits a crime and violates her civic obligation. But, in another regard, the political obligation does admit gradation: its strength is directly related to the rights that the obligor enjoys as a semicitizen, from which her political obligation derives in the first place. In other words, the closer an individual is to the ideal type of full citizen, the greater the intensity of her political obligation. What does this mean for the state's response to a criminal offence?

An initial way of giving effect to the gradient nature of this obligation could be to distinguish between different sets of criminal norms and to link each semicitizenship status to a particular package.<sup>49</sup> For example, we could argue that the unfairly disadvantaged are not obliged to pay taxes or that they are not required to cooperate with the state in the prosecution of crime. For the purposes of this article, however, we favour another approach, which focuses on the strength of the duties and the corresponding proportionality of punishment. Given that the duty to tolerate punishment is nothing else than a novation of the primary political obligation embodied in the criminal law (the strength of this obligation depending in turn on the rights that the polity has guaranteed to the offender), the lesser strength of the guaranteed rights must necessarily be reflected (*ceteris paribus*) in more lenient punishment. In summary: fewer (lower quality) rights guaranteed = weaker political obligation = less punishment. Let us take a closer look at how this proposal could work.

### 3.2. *Towards Proportionate Punishment Based on Semicitizenship Status*

On the assumption that, firstly, whoever holds some degree of semicitizenship, however tenuous, is already legitimately bound by the duty to cooperate in maintaining the state of freedom of the polity and, secondly, that the top of the punishment scale provided in the penal codes are those deserved by the person who commits a crime while enjoying full citizenship status, we argue that the punishment to be imposed on a semicitizen must be reduced proportionally as the citizenship status of the offender moves away from the ideal type.<sup>50</sup> In other words, the severity of punishment should be a (linear) function of the intensity of the degree of citizenship when all other relevant variables are held equal. We

argue that this is a necessary conclusion for anyone who takes seriously the notion of citizen criminal law, even for those criminal law scholars who, like Tatjana Hörnle, claim that not only the political relation between offender and state but also the victim's rights are relevant in legitimising the punishment and its degree.<sup>51</sup> In short, the penal severity should be proportional not only to the seriousness of the criminal offence (i.e. type of harm threatened or caused) as well as to the offender's amount of culpability, but also to the strength of the offender's bond with the polity that intends to punish her.<sup>52</sup> This, of course, makes it even more complex to determine the penal severity in the real world. However, it is crucial in order to treat semicitizen offenders as they deserve.

The typological method sketched above lays the foundation for a treatment of all forms of semicitizenship in harmony with the ordinal proportionality principle<sup>53</sup> and, ultimately, with the political foundation of punishment that underlies the variants of citizen criminal law. Since we do not assume a hierarchy among the different groups of rights that compose the status of citizenship, it cannot be held, for example, that the punishment to be inflicted on those who have the right to vote must necessarily be higher than that to be imposed on those who reside in a country, but lack that right. Only the overall assessment of the rights of the specific individual, taking into account the possibility of compensation, allows us to determine her position within the framework of the continuum of possible political relations – which ranges from '0.1' (weak rights) to '1' (full rights) – and then to specify the quantum of punishment she deserves. The greater or lesser degree of freely 'self-binding' to the law of the polity, then, should not be a decisive factor in determining the strength of the bond and the ensuing severity of punishment.<sup>54</sup>

As stated, in order to facilitate this assessment, we could assign to each group of rights (civil, political, social, nationality) a *prima facie* rating, with three possible levels (strong, moderate, weak), according to the strength with which these rights are guaranteed to the person and, eventually, the time during which they have been guaranteed. Now, let us see how this variant of citizen criminal law might work in practice. Five individuals affiliated with the organisation Islamic State of Iraq and Syria plan to carry out a terrorist attack on French soil from their base in Iraq, but they get arrested and are extradited to France. All five have an identical hierarchy in the terrorist organisation, their contribution to the planning of the attack was comparable, and the danger they pose to France, in terms of the possibility of future attacks, is similar.<sup>55</sup> But the semicitizenship status of the five individuals in France is very different. (A), who is a French national, comes from a wealthy family and studied at La Sorbonne. She has strong rights in all respects, except in the political element, where she has only moderate rights due to a lack of political leverage. (E) stands at the opposite end of the spectrum: she is Syrian and has never been to France or had any contact with that country before the extradition (lack of rights in all groups). In between lie the other three individuals. (B) has a permanent residence permit in France (moderate nationality rights), can vote only in local elections (weak political rights), and before leaving for Iraq, she grew up in a secure middle-class neighbourhood (strong civil rights) where she went to the local public school (strong social rights). (C) is French (strong nationality rights), but she grew up in a very poor and relatively insecure Parisian '*banlieue*' (moderate civil rights) and failed to finish her education at a secondary school marked by a high drop-out rate (weak social rights), her failure at school being the starting point of a criminal career leading to her conviction and temporary disenfranchisement (weak political rights). Finally, (D) has a very limited previous bond with France: she once travelled as a tourist to the country and recently reentered it legally as part of the preparation of the attack (moderate civil rights, lack of other rights).

Consider, for the sake of the example, that the punishment for the offence of preparation of terrorist acts as a member of a proscribed organisation – after considering parameters such as culpability, harm, and eventually dangerousness (all these factors being equal with respect to the five offenders in our example) – ranges from 20 to 30 years of imprisonment. In order to reach a sentence within this range, the judge must consider the degree of semi-citizenship of the offenders. As can be noted, all the offenders except (E) have some degree of bond with France (as France has guaranteed them rights to some extent), but their ties are vastly different. We argue that the state can legitimately punish all individuals except (E), but that the penalty to be inflicted on them should follow the logic of ordinal proportionality: (A) should clearly receive a more severe punishment (about 30 years), while (B), who has strong social and civil rights, should receive a slightly higher penalty than (C), who has only strong nationality rights, i.e. roughly 26 and 24 years, respectively. Finally (D), whose link with the French polity is extremely weak, should receive the minimum punishment available (20 years). We must remember, though, that this *prima facie* assessment of how ‘strong’ the different rights are that each person enjoys is merely a guideline; it is not a ‘closed formula’ for analysing the bond between someone and a community. Thus, the judge must undertake a joint assessment of all the rights, at which point compensation mechanisms play a role. How would this operate? Consider the case of a wealthy foreigner who has made her fortune in the country thanks to beneficial tax treatment. Despite her lack of social and political rights and her weak or moderate residence rights, the rights she has received have been so beneficial to her that her bond with the community can be considered as strong. Therefore, if this individual had been the sixth member of the group referred to above, she should receive – *ceteris paribus* – a relatively severe penalty, perhaps equivalent to that of (B).

In our view, this approach has three important virtues in comparison with the variants of citizen criminal law referred to in the introduction. Firstly, our approach allows for the punishment of *mala in se* offences committed by semicitizens without having to resort to the – controversial – notion of natural duties and therefore to an extraordinary justification of punishment.<sup>56</sup> Secondly, our approach leads to a fairer and more individualised punishment of crimes committed by semicitizens, insofar as it enables the infliction of punishment that fits the semi-citizenship status, making it possible to distinguish – unlike Duff, for example – between markedly different statuses, such as national and tourist. Thirdly, by legitimising the imposition of punishment against individuals who lack the idealised status of full citizens, we adopt a variant of citizen criminal law that suits the real world, where semicitizens are the rule. Although it may seem counterintuitive, our proposal contributes to an overall reduction of state coercion, insofar as we subject the extension of the state’s response to the culpability principle. In short, legitimate punishment could also be imposed on the socially excluded, which from a symbolic perspective means reaffirming their membership in the community<sup>57</sup> and from a practical perspective circumscribes the severity of the punishment to the strict limits imposed by the culpability principle and their semi-citizenship status. Submitting the response to offences committed by semicitizens to the realm of coercive measures would mean overextending the scope of sanctions whose main aim is to prevent dangers, which, being subject to more uncertain constraints, may potentially be more burdensome for those affected than the criminal law.<sup>58</sup>

### 3.3. Coercive Measures Against the Outsider

At this point, however, a key question remains unanswered, namely, how should the state respond to an offence committed by an individual who lacks any previous bond with it,

i.e. someone who has not been guaranteed any rights at all? Although the outsider cannot be reproved for her offence with a (proportional) punishment, the state does not have to stand idly by while the outsider poses a danger to the citizens of the political community against whose interests she has offended.<sup>59</sup> Coercive measures, unlike punishments, do not presuppose any political bond, nor are they limited by the principle of culpability as to their magnitude. This, nevertheless, does not mean that the outsider can be considered an outlaw or enemy of humankind (*hostis humani generis*), nor is it possible to respond to her with unlimited coercion.

Rather, coercive measures to be imposed on outsiders would only be legitimate to the extent that they comply with three classic limitation principles.<sup>60</sup> According to the first requirement, the necessity principle, the individual to whom the measure is to be applied must have seriously harmed or attempted to harm legally protected interests of the community. There is no room for 'precrime' measures,<sup>61</sup> nor for applying these measures in response to facts that in no way concern the political community itself. This means, for example, that Italy cannot apply a coercive measure on an English citizen who commits an armed robbery against a Pakistani national in Denmark, since the act does not concern it, as the Italian political community was not the object of the attack. Secondly, according to the subsidiarity principle, the coercive measure must be necessary to avert future dangers to vital interests that the polity is supposed to protect. The assessment of dangerousness must be based on the probability of future wrongdoing as well as the entity/nature of the harm that is to be expected if an offence is actually committed.<sup>62</sup> Thus, someone who *a priori* seems dangerous – for instance, a Bolivian drug trafficker who previously sent large shipments of cocaine to Ecuador, without even visiting the country, and has now been extradited to it – cannot be subjected to a measure by Ecuador if it is known that this individual has been out of the cocaine business for some time and has no possibility of rebuilding her commercial networks, now in the hands of former rivals. Thirdly, the measure to be applied should also be governed by proportionality in the strict sense. Thus, the measure must not be out of proportion to the danger. For example, Chile cannot place a Peruvian citizen in preventive detention for trying to sell a small amount of drugs to a Chilean citizen in a Peruvian border city, even though only prolonged detention would be the ideal mechanism for averting this risk in the future. A state can legitimately respond to an offence of a dangerous outsider only under these strict requirements. In any case, it is not a matter of punishment, but of pure (proportional) coercion.

#### 4. Conclusion

A citizen criminal law has two important potential advantages when it comes to legitimising punishment. Firstly, this view justifies punishment *vis-à-vis* the individual who suffers the hard treatment, without being satisfied with merely identifying social preventive needs. Secondly, citizen criminal law is a far more efficient remedy against an excessive expansion of the scope of the criminal law than those theories that justify punishment purely on the basis of averting threats/harms to community interests. However, the binary-categorical approach to citizenship pushes the advocates of citizen criminal law into a dilemma, which they can avoid only at the cost of incurring important internal inconsistencies. Given that the real addressee of state punishment is – as a general rule – far from fitting in with the idealised concept of citizen that a binary approach requires, supporters of this theory are forced to

treat individuals who do not live up to their ideal of citizenship in the same way as they would treat full citizens, to circumvent the undesirable (or inconvenient) conclusion that a large number of offenders (resident aliens, tourists, disenfranchised nationals, socially excluded individuals, etc.) cannot be legitimately punished.

Nevertheless, we suggest that it is possible to avoid these internal inconsistencies without having to deny the legitimacy of large swathes of contemporary criminal law. As we have shown in this article, this is achieved first by recognising that, as has long been known in political philosophy, the notion of citizenship – understood in the light of a rights-based approach – is necessarily gradient. Since citizenship is based on four different groups of rights (civic, political, social, nationality), which are recognised in a disaggregated manner and with different intensity, the forms of semicitizenship are the rule, not the exception. Thus, the only way in which citizen criminal law can justify punishment in today's world is by abandoning the binary-categorical approach in favour of a typological approach. The idealised notion of the citizen with full rights is therefore only an ideal type at one end of a continuum of possible political relationships that degrades according to the lesser strength of the citizenship bond until it reaches the other end, where the ideal type of the minimal semicitizen is located. It is only possible to appreciate a categorical gap between this minimal semicitizen and the individual to whom no rights are guaranteed at all, that is, the outsider.

Finally, we have claimed that it is legitimate to impose punishment on any individual who is not an outsider. Yet, the length of the sentence must necessarily depend on the strength of the offender's political bond with the community. The further away the perpetrator's status as a semicitizen from the ideal type of full citizen, the lesser the penalty to be imposed. The determination of the punishment, in short, requires specifying where in the typological continuum of semicitizens the offender is located. By doing so, the semicitizen offender is treated in a fairer manner. Thus, unlike the solution proposed, for instance, by Duff, the guest would have to be punished (*ceteris paribus*) with a lesser penalty than the full citizen. Moreover, by legitimising the imposition of punishment against individuals who do not fit the ideal type of full citizen, we give legitimacy to citizen criminal law in a world where forms of semicitizenship are the rule, not the exception. Conversely, the state cannot legitimately inflict punishment on an outsider, due to her lack of prior political obligation. Exceptionally – and to a limited extent – the state may respond to her offence through measures directly aimed at countering the danger she represents for the vital interests it is supposed to protect.

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## NOTES

- 1 The most influential of the English-speaking authors is Antony Duff, 'A criminal law for citizens', *Theoretical Criminology* 14,3 (2010a): 300–304; *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018a), pp. 102–145; *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), pp. 181–184. In a similar vein, e.g. Gideon Yaffe, 'Punishing noncitizens', *Criminal Law and Philosophy* 14,3 (2020): 347–364; Kenneth Gallant, 'Outsider's responsibility to answer for crime', *Ratio Juris* 32,3 (2019): 256–277; Richard Dagger, *Playing Fair: Political Obligation and the Problems of Punishment* (Oxford: Oxford University Press, 2018); Stephen Garvey, *Guilty Acts, Guilty Minds* (Oxford: Oxford University Press, 2020), pp. 46–70. Regarding the continental law scholars, see e.g. Klaus Günther, *Schuld und kommunikative Freiheit. Studien zur personalen Zurechnung strafbaren Unrechts im demokratischen Rechtsstaat* (Frankfurt am Main: Vittorio Klostermann, 2005), pp. 245–258; Jesús-María Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal* (Barcelona: Atelier, 2018), pp. 67–112; M. Pawlik, 'Die bürgerliche Mitwirkungspflicht im Strafrecht und die Stellung der Exkludierten' in E. Hilgendorf (ed.) *Brücken bauen. Festschrift für Marcelo Sancinetti* (Berlin: Duncker & Humblot, 2021); 'Norm confirmation and identity balance: On the legitimacy of punishing', *Critical Analysis of Law* 7,1 (2020): 26–34; *Das Unrecht des Bürgers. Grundlinien der Allgemeinen Verbrechenlehre* (Tübingen: Mohr Siebeck, 2012), pp. 120–127.
- 2 Antony Duff, 'Criminal law and political community', *International Journal of Constitutional Law* 16,4 (2018b): 1251–1252; 'Towards a theory of criminal law', *Proceedings of the Aristotelian Society*, LXXXIV, 1 (2010b): 1–28.
- 3 See e.g. Bill Wringer: 'Punishing noncitizens', *Journal of Applied Philosophy* (2020): 7; Pawlik 2020 op. cit., pp. 32–33; Matt Matravers, 'The victim, the State, and civil society' in A. Bottoms (ed.) *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Cullompton: Willan, 2010), pp. 6–13; and Antony Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2009), pp. 47–56.
- 4 Duff 2001 op. cit., p. 184. See also David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), p. 1; Stephen Garvey: 'Injustice, Authority, and the Criminal law' in A. Sarat (ed.) *The Punitive Imagination: Law, Justice, and Responsibility* (Tuscaloosa: University of Alabama Press, 2015), p. 51.
- 5 See e.g. Duff 2018a op. cit., p. 121.
- 6 In this sense, see Yaffe 2020 op. cit.; *The Age of Culpability: Children and the Nature of Criminal Responsibility* (Oxford: Oxford University Press, 2018), pp. 98–156; Wringer 2020 op. cit., pp. 4–7; Juan Pablo Mañalich, 'Pena y Ciudadanía', *Revista de Estudios de la Justicia*, 6 (2005): 63–78.
- 7 Klaus Günther, 'Nulla poena sine culpa and corporate personhood', *Critical Quarterly for Legislation and Law* 98,4 (2015): 371.
- 8 See Duff 2009 op. cit., pp. 46–56; 2018a op. cit., pp. 117–127; 'Relational Reasons and the Criminal Law' in L. Green (ed.) *Oxford Studies in Philosophy of Law*, vol. 2 (Oxford: Oxford University Press, 2013), pp. 175–208; Antony Duff & Sandra Marshall, 'Civic wrongs' in A. Dzur (ed.) *Democratic Theory and Mass Incarceration* (Oxford: Oxford University Press, 2016), p. 35.
- 9 See Duff 2009 op. cit., p. 50.
- 10 Pawlik 2020 op. cit., pp. 26–34; 2012 op. cit., pp. 120–127. Similarly, Silva Sánchez 2018 op. cit., pp. 67–112; Matravers 2010 op. cit., pp. 8–10; Zachary Hoskins, 'Fair Play, Political Obligation, and Punishment', *Criminal Law and Philosophy* 5,1 (2011); Dagger 2018 op. cit.
- 11 Roberto Gargarella, 'Penal Coercion in Contexts of Social Injustice', *Criminal Law and Philosophy* 5,1 (2011): 21–38; Silva Sánchez 2018 op. cit., pp. 67–112; Javier Cigüela Sola, *Crimen y castigo del excluido social* (Valencia: Tirant lo Blanch, 2019).
- 12 Michael Pawlik, 'Strafe oder Gefahrenbekämpfung? Die Prinzipien des deutschen Internationalen Strafrechts vor dem Forum der Strafrechtstheorie' in A. Hoyer (ed.) *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (Heidelberg: C. F. Müller, 2006).
- 13 Yaffe 2018 op. cit.; 2020 op. cit.

- 14 Günther 2015 op. cit., pp. 373–376; and Carlos Gómez-Jara Díez, ‘Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay Between Self-regulation, Corporate Compliance, and Corporate Citizenship’, *New Criminal Law Review* 14,1 (2011): 92–93.
- 15 In this sense (paradigmatic), Duff 2018a op. cit., pp. 117–126.
- 16 See Section 2.
- 17 For a discussion of the assumptions built into this distinction, see e.g. Douglas Husak, ‘Preventive Detention as Punishment?’ in A. Ashworth (ed.) *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013). On the different principles governing the imposition of punishment and coercive measures, see below (Section 3.3).
- 18 See Garvey 2015 op. cit., pp. 61–62, who argues that the state could exercise coercion against ‘second-class’ citizens in order to secure the goods that are essential for its existence.
- 19 See Wringe 2020 op. cit., p. 12, who criticises Duff’s justification of punishment with respect to visitors and temporary residents (who in the framework of Duff’s theory are noncitizens), pointing out that their consideration as ‘guests’ might eventually justify a theory of criminalisation (to hold offenders to account through criminal trials), but hardly a theory of punishment (namely, why the infliction of hard treatment is a proper answer to their offences).
- 20 See e.g. Garvey 2015 op. cit., pp. 44, 55, 61–62; and 2020 op. cit., pp. 260–303.
- 21 Duff 2010b op. cit., p. 6; Antony Duff, ‘Responsibility, citizenship, and criminal law’ in A. Duff (ed.) *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 141–143; ‘Relational Reasons and the Criminal Law’ in L. Green (ed.) *Oxford Studies in Philosophy of Law*, vol. 2 (Oxford: Oxford University Press, 2013), pp. 207–208.
- 22 See Duff 2018a op. cit., pp. 120–126. Using a similar argument, Duff likewise tries to legitimise the extraterritorial application of criminal law based on the passive personality principle [Duff 2018a op. cit., p. 118].
- 23 Yaffe 2018 op. cit., p. 190. Similarly, Emmanuel Melissaris, ‘Noncitizens as subjects of the criminal law’, *LSE Law, Society and Economy Working Papers*, 2 (2017): 23–27. The other strategy followed by supporters of deliberative theses is to lower their requirements, for example, by considering citizens to be those who, despite lacking the right to vote, can express themselves politically (e.g. through the right to free speech). Paradigmatic, Gómez-Jara Díez 2011 op. cit., p. 93; and Mañalich 2005 op. cit., pp. 68–69.
- 24 Pawlik 2012 op. cit., p. 122.
- 25 Silva Sánchez 2018 op. cit., pp. 68–71. Similarly, Göran Duus-Otterström & Erin Kelly, ‘Injustice and the right to punish’, *Philosophy Compass* 14,2 (2019): 3–7.
- 26 Both Alejandro Chehtman, ‘Citizenship V. Territory: Explaining the Scope of the Criminal Law’, *New Criminal Law Review* 13,2 (2010): 430–438; and Gallant 2019 op. cit., p. 260, rightly warn about this consequence.
- 27 Wringe 2020 op. cit., p. 15.
- 28 By contrast, see Markus Dubber, ‘Citizenship and Penal Law’, *New Criminal Law Review* 13,2 (2010): 193–214; Lucia Zedner, ‘Is the Criminal Law Only for Citizens?’ in J. Aas (ed.) *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013), pp. 52–54; and Gallant 2019 op. cit.
- 29 On the gradient character of citizenship, see e.g. Maarten Vink, ‘Comparing Citizenship Regimes’ in A. Shachar (ed.) *The Oxford Handbook of Citizenship* (Oxford: Oxford University Press, 2017), pp. 221–244.
- 30 Thomas Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).
- 31 Marshall 1950 op. cit., pp. 10–11.
- 32 Marshall 1950 op. cit., pp. 25–26. Certainly, Marshall’s citizenship formulation is open to many objections. For instance, a libertarian author would not readily subscribe to its egalitarian roots. Moreover, it can be argued that his classification of rights is debatable or needs to be updated (e.g. due to the progressive dissociation between the rights guaranteed by a state and the formal status of citizenship, some rights – especially civil rights – are increasingly associated with personhood rather than citizenship). Nonetheless, it is worthwhile to adopt Marshall’s theory as a framework for two reasons. Firstly, it reflects the normative aspirations of most modern liberal states, which aim to guarantee the above rights at least to some degree. Secondly, it provides a substratum upon which to apply our scalar approach to the political bond, thus allowing a glimpse into how our proposal of proportionate punishment based on semicitizenship status might be plausible in practice. We thank an anonymous reviewer of *The Journal of Applied Philosophy* for encouraging us to clarify this point.
- 33 Elizabeth Cohen, *Semicitizenship in Democratic Politics* (Cambridge: Cambridge University Press, 2009), p. 36.
- 34 In the same sense, Vink 2017 op. cit., p. 226.
- 35 Cohen 2009 op. cit., p. 206.
- 36 Cohen 2009 op. cit., p. 48.

- 37 Cohen 2009 op. cit., pp. 35–36, 74. Similarly, Linda Bosniak, *The Citizen and the Alien Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006), pp. 3, 34–35, who states that citizenship is a ‘divided concept’.
- 38 Cohen 2009 op. cit., p. 53.
- 39 On the problem of the socially excluded, see e.g. Gargarella 2011 op. cit. For a lenient treatment of those who do not have the right to vote, see Yaffe 2018 op. cit., specifically Chapters 6 and 7.
- 40 Hernán Orozco López, *Beteiligung an organisatorischen Machtapparaten* (Tübingen: Mohr Siebeck, 2018), pp. 298–314. Cohen 2009 op. cit., pp. 59–77, despite recognising the inevitable gradient nature of citizenship, still tries to operate through classificatory concepts.
- 41 Orozco López 2018 op. cit., pp. 306–307.
- 42 See e.g. Günther 2005 op. cit., pp. 245–258.
- 43 On the contrary, the unwillingness to respect a state’s legal system is not in and of itself relevant to defining the citizenship status of a person for the purposes that matter here. By contrast, see Günther Jakobs, ‘Feindstrafrecht? – Eine Untersuchung zu den Bedingungen von Rechtllichkeit’, *HRRS* 8,9 (2006). For criticism, see Tatjana Hörnle, ‘Das Ideal des Bürgerstrafrechts vor dem Hintergrund gesellschaftlicher Fragmentierung’ in J. Bublitz (ed.) *Recht – Philosophie – Literatur. Festschrift für Reinhard Merkel zum 70. Geburtstag, 1* (Berlin: Duncker & Humblot, 2020), pp. 512–522. For further discussion on punishing dissidents and recusants, see e.g. Duff 2018a op. cit., pp. 127–137.
- 44 In a similar sense, Silva Sánchez 2018 op. cit., p. 83.
- 45 Pawlik 2020 op. cit., pp. 20–26.
- 46 Hoskins 2011 op. cit., p. 60. See also, Dagger 2018 op. cit., p. 9; Pawlik 2020 op. cit., pp. 31–34; and Matravers 2010 op. cit., p. 7.
- 47 On this, see Göran Duus-Otterström, ‘Fair-play obligations and distributive injustice’, *European Journal of Political Theory* 20,2 (2018): 167–186.
- 48 By ‘obligor,’ we meant a person who is bound to another (in this case, the citizen ‘bound’ to the state to respect the law because she has been previously guaranteed rights).
- 49 Critically, Duus-Otterström 2018 op. cit., pp. 176–177.
- 50 Similarly, Dagger 2018 op. cit., p. 255; and Duus-Otterström 2018 op. cit., pp. 179–183.
- 51 See e.g. Tatjana Hörnle, ‘The Role of Victims’ Rights in Punishment Theory’ in A. du Bois-Pedain (ed.) *Penal Censure: Engagements Within and Beyond Desert Theory* (Oxford: Hart Publishing, 2019), pp. 207, 218–219, who claims that individuals whose rights have been violated have a right against the state to obtain a statement about the wrong in the form of a criminal court’s condemnatory message. There are two reasons that make Hörnle’s position compatible with ours. Firstly, the semicitizen is still subjected to the condemnatory message (penal censure); therefore, the state signals the seriousness of the crime and thereby reinforces the rights of the victim. Secondly, even if it is assumed that the victim of the crime generally has a *prima facie* right to have the perpetrator suffer the hard treatment of punishment, our approach only determines that, *ceteris paribus*, the punishment of the semicitizen must be more lenient than that of the full citizen. The citizenship bond, in short, should only be one factor in assessing penal severity. We are grateful to Tatjana Hörnle for emphasising the importance of this question.
- 52 Similarly, Silva Sánchez 2018 op. cit., pp. 84–85; and Bill Wringer, ‘Are There Expressive Constraints on Incarceration?’ in C. Surprenant (ed.) *Rethinking Punishment in the Era of Mass Incarceration* (New York: Routledge, 2017), p. 119.
- 53 Andrew Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester: Manchester University Press, 1985), pp. 40–43; *Censure and Sanctions* (Oxford: Oxford University Press, 1993), pp. 18–19. For recent discussion on proportionality in punishment, see Göran Duus-Otterström, ‘Weighing Relative and Absolute Proportionality in Punishment’ in M. Tonry (ed.) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford: Oxford University Press, 2020); Matt Matravers, ‘The Place of Proportionality in Penal Theory’ in M. Tonry (ed.) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford: Oxford University Press, 2020); Douglas Husak, ‘The Metric of Punishment Severity. A Puzzle about the Principle of Proportionality’ in M. Tonry (ed.) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford: Oxford University Press, 2020).
- 54 An important objection arises at this point (which we owe to an anonymous reviewer of *The Journal of Applied Philosophy*): It is counterintuitive, to say the least, to punish the tourist who has freely decided to enter a country less than the semicitizen who, despite having a greater bundle of rights, has no feasible option of dissociating herself from the legal system that binds her. This objection raises an alternative basis for the political bond (or at least for the determination of its force) to the one proposed here, namely, a voluntaristic or consensual



- one. In our opinion, the bundle of rights enjoyed by a subject is, in determining his punishment, a fairer criterion than the act of self-binding by the punished person. For a critique against the consent approach à la Locke, see Christoph Kletzer & Massimo Renzo, 'Authority and Legitimacy' in J. Tasioulas (ed.) *The Cambridge Companion to the Philosophy of Law* (Oxford: Oxford University Press, 2020), pp. 191–207. In our synalagmatic approach, therefore, what is decisive is which rights are effectively guaranteed to the individual by the State, not an alleged degree of self-binding. Just as the recusant who repudiates the law but enjoys citizenship rights must answer criminally for her offences in the same way as someone who does not challenge the infringed law (see fn. 43), the tourist who visits a country but enjoys only a few civil rights must be punished, *ceteris paribus*, lesser than the resident who is entitled to greater rights. This also explains the legitimacy of the expulsion of the tourist as a coercive measure complementary to punishment. The lack of legitimacy to punish the tourist as the insider implies the need to resort to a coercive measure such as expulsion. And obviously, given that the political bond is only one factor in determining punishment, it is plausible that a tourist – despite being guaranteed fewer rights by a community – is punished more severely than a socially excluded national who has been guaranteed more rights, but whose exclusion nonetheless affects her culpability.
- 55 The proposal that we put forward in this article is independent of the discussion on whether the offender's dangerousness should play a role in the punishment to be imposed. If it is considered that it does play a role, then faced with two equally dangerous offenders (and when other elements that influence the magnitude of the punishment – e.g. culpability, harm – are equivalent), the state should punish more severely the one who had stronger bonds with it before the crime was committed.
- 56 For a critique of the theory of natural duties, see e.g. Dagger 2018 op. cit., pp. 90–100.
- 57 On this, see Ivó Coca-Vila, 'Our 'Barbarians' at the Gate: On the Undercriminalized Citizenship Deprivation as a Counterterrorism Tool', *Criminal Law and Philosophy* 14,2: 156–157.
- 58 For a different view, see Garvey 2015 op. cit., pp. 61–62; and Pawlik 2021 op. cit., pp. 152–155; 2006 op. cit., pp. 381–386, who, upon realising the problems of renouncing the culpability principle, introduces it as an outer limit to his system of preventive measures (this is probably an unavoidable consequence of the broad scope of application that he grants to these measures).
- 59 See Silva Sánchez 2018 op. cit., p. 85; and Pawlik 2006 op. cit., pp. 380–386.
- 60 For further discussion, see e.g. Coca-Vila 2020 op. cit., pp. 157–158.
- 61 By these we refer to coercive measures that are applied exclusively based on likelihood of the subject committing crimes in the future, without having committed an offense up to that point. Given the uncertainty surrounding how to determine in advance who poses a risk and in what degree, waiting until the offense is committed to impose coercive measures is an indispensable restraint in any liberal legal system. For further discussion, see e.g. Lucia Zedner, 'Pre-crime and post-criminology?', *Theoretical Criminology* 11,2 (2007): 261–267.
- 62 On this, see Carol Steiker, 'Proportionality as a Limit on Preventive Justice: Promises and Pitfalls' in A. Ashworth (ed.) *Prevention and the Limits of the Criminal Law* (Oxford, Oxford University Press, 2013), p. 196.