

Toward a new economy of suspended rights: sex offenders and post-sentence confinement and control

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Abstract

Giorgio Agamben has recently described the state of exception as a new ‘paradigm of government’ while Judith Butler writes of ‘the new war prison’ in which terror suspects and other ‘detainees’ face an indefinite detention suspended beyond or outside law. Less remarked upon has been the recent entry into Australian politics of a new penal form: schemes that provide for the post-sentence detention (continued imprisonment) of sex offenders who have completed a finite sentence of imprisonment and who would otherwise be returned to society as free citizens. First introduced in 2003 in Queensland, where such detention may be indefinite, three Australian states now have extended supervision and detention arrangements, while Victoria is currently drafting legislation to add continued detention to its current extended supervision provisions. This paper examines these measures that aim to excise, quarantine or exclude certain categories or groups of people from society through the lens of liberty rights. Particularly significant within the structure of justification for these measures, it will be suggested, is the status of justice rights. The focus of the paper is upon one recent case, *Director of Public Prosecutions (WA) v GTR* [2008], wherein key movements occurred in an emerging jurisprudence of security and architecture of control.

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On 14 November 2001 a sex offender by the name of Joseph Belcher was released from prison in New Zealand. He proceeded on to a two-year period of parole, which was completed successfully and by the end of the year 2003 had resumed his status as a free citizen of New Zealand. Yet on 22 April 2005 – almost three and a half years after his release into the community – Belcher was placed on a 10 year Extended Supervision Order under retrospective provisions of New Zealand's recently amended Parole Act. Belcher's case is part of a new politics of security and control emerging in slightly different but clearly recognisable forms throughout the western world. It forms part of a new logic and strategy that dovetails neatly with a whole series of new restrictions and pre-emptive risk containment measures directed at suspect characters, most notably including terrorists and illegal migrants, and it materialises a number of formerly inchoate tendencies to extend punitive practices into the realm of civil threat or disorder.

This began in Australia when in June 2003 Queensland's *Dangerous Prisoners (Sexual Offenders) Act* came into force. There now exists a small literature on the Act (see for example, Gray 2005), and the case of *Fardon v Attorney General for the State of Queensland* [2004], in which the constitutionality of Robert Fardon's indefinite preventive confinement under the Act was upheld by the High Court. In 2006 both Western Australia and New South Wales responded, promulgating legislation that provided for post-sentence detention and/or extended supervision orders under the

Crimes (Serious Sexual Offenders) Act (NSW) 2006 and the *Dangerous Sexual Offenders Act* (WA) 2006. In 2008 Victoria is well under way to toward its own post-sentence confinement scheme, which is likely also to be targeted toward sexual offenders generally. Each of these schemes provides for long periods of post-sentence confinement – ranging from indefinite detention in Queensland and Western Australia to five-year (extendable) detentions in New South Wales and the mooted Victorian scheme. These confinement schemes may also be buttressed by arrangements for the long-term supervision and monitoring of offenders in the community. New Zealand and Victoria both have quite draconian versions of such schemes.

Analytically, one way to understand these developments is to situate them within the rapidly expanding field of security in the post-9/11 world. Lucia Zedner, whose work is concerned with the tension security invokes between different conceptions of rights, is one person who has done much to develop this sort of analysis (Zedner, 2003a, 2003b, 2005, 2007, 2008). On the one hand, she suggests, there is the widely held assumption that the key justification and purpose of security is the protection of freedom, yet the means by which this often ill defined notion of freedom is achieved often works to undermine those very liberty rights that constitute political freedom. She cites Michael Ignatieff's observation that, in this respect, such undermining reflects what he terms a 'moral temptation' in our society to see liberty itself as divisible, such that the liberty of some may be secured by extinguishing or significantly constraining the liberty rights of others (Zedner, 2005: 524). Part of what makes such a strategy so tempting is that the costs of public safety achieved in this way tend to fall on just a small minority who are felt to be, as it were, dispensable, not only in the utilitarian sense of their small number but also through their being what

Nils Christie and Loic Waquant have termed in the penal context ‘suitable enemies’ (Christie, 1986; Waquant, 1999). The danger associated with this sort of approach to securing social goods forms a conceptual thread that runs throughout Zedner’s work. It is not intended here to reprise her arguments in detail, but rather to draw out a few key observations that will provide a springboard into the present paper, the aim of which is to consider the emerging form of one apparatus of security in Australia.

Four observations will help set the scene. First, despite its frequently paradoxical (or incoherent) effects, and despite the many difficulties with the notion of ‘balance’ that is used in its justification, the recruitment of security measures is ultimately tied to the desire to *preserve liberty and freedom* (Zedner, 2003a, 2005). The observed failure of security measures to do so, or their inherent tendency to trample the very goods they are supposed to uphold (Zedner, 2008), suggests therefore that it is quite possible to have too much security, but this still leaves unanswered the question of how security might best be measured out. Second, the failure of security mechanisms, and indeed of the demand for them, to self-regulate naturally means we should look for analogous situations that would supply principles for the *justification and distribution of security*. Zedner argues in favour of ‘harvesting ... analogous principles’ (2003a: 176) from criminal justice, where experience with the high-stakes associated with punishment would provide an approach to security that offers appropriate protections to individual rights. Thus, a principled approach based upon the procedural and structural safeguards common to criminal justice is suggested by Zedner as an appropriate corrective to rhetorical or politically flimsy arguments about the appropriate balancing of individual liberty rights with public safety. Third, as noted previously, special attention is needed to the way in which risk assessment and threat

profiling has created new classes of dangerous individuals whose behaviour is rendered, at least notionally, *scientifically predictable*. It is precisely this rational scientific measurement of risk, argues Zedner, that ‘that furnishes the ostensible moral basis for designating dangerous populations whose rights to due process are overridden solely because they belong to a particular group’ (2008: 25). Finally, it must be recognised that the discussion of liberty rights is always twofold: liberty involves both a freedom to act (typically termed positive liberty) and a *freedom from governmental restriction* (negative liberty). When security is discussed as a balance between individual rights and public safety, the individual rights in question tend to be presumed to be positive rights (eg., the right of prisoners to go free upon expiry of their sentence) and the role of state power is elided by the discussion of ‘community’ safety. Yet, the nub of the issue, as Zedner rightly I think argues, is the question of ‘[h]ow to enhance security’ against a pressing threat ‘without diminishing security against the state’: how to achieve that, she suggests, ‘*is a central problem of our times.*’ (2005: 532, emphasis added).

In a recent attempt to develop a critical criminology of offender risk (this author, 2008) I suggested that Hannah Arendt’s work on the Jewish experience in Nazi Germany had clear relevance. Arendt argued that the Jews came to be constructed as ‘superfluous people’ not by chance or happenstance but by the application of distinct processes and political techniques. These included constructing the ‘Jewish problem’ as one that may be solved by a utilitarian logic of greater goods; of priming the wider population through strategies of psychological inoculation, such as through techniques of gradualism, denatured language and belief in special categories of persons; and finally through the killing of the juridical subject, the bearer of rights.

Here Arendt concluded: ‘Jurists are so used to thinking in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than the layman to recognise that the deprivation of legality, *i.e.*, of *all* rights, no longer has a connection with specific crimes.’ (1951: 374).

The remainder of this paper will consider the way jurists have negotiated this difficult nexus, one that lies also at the heart of Australian sex offender supervision and detention schemes. This is the effacement of the historical and presumptive link between specific crimes and the regime of suspended rights that we normally associate with sentences of imprisonment. Over time, juridical responses to the *problem* of imprisonment – its moral and ethical challenges – lead to the development of the elaborate structure of principles that Zedner refers to and that we commonly understand as general principles of justice. Our concern here, therefore, will be with the response of Australian jurists to the problem of imprisonment when it is framed within the new discourse not of punishment but of security. As such, it will be worthwhile beginning this analysis with a sense of how those seeking the passage of such bills – Australian parliamentarians – have represented the sex offenders with whom they are concerned.

Quarantining Sex Offender Risk

All Australian legislation follows with minor variation the model of Queensland’s *Dangerous Prisoners (Sexual Offenders) Act* 2003. In each state, the legislation has met with little by way of sustained attention within Parliament. In the New South Wales Legislative Council, for example, where after very brief debate the *Crimes*

(Serious Sex Offenders) Bill was passed by a 19-5 vote margin, one member sought to extend the then Premier's description of criminals as 'grubs' by claiming he did 'not want to refer to these characters as persons, people or human beings' and that 'the use of the term "people" is too kind' (Hansard NSW, 2006: 21812). Against the claim of liberty rights, another member chastised those in the house 'who appear to have an unnatural and bizarre need to set themselves up as the guardians of sex offenders' (p. 21805). In the Victorian Parliament the question of rights was situated within a framework of 'exceptional' behaviour which would in turn produce exceptional risks and thus exceptional obligations upon the Parliament. 'Extraordinary crimes' argued one member 'must be subject to extraordinary measures' (Hansard Vic, 2005: 21), while the minister introducing the bill reminded members that the community had 'a special obligation to our children ... and it warrants whatever it is that might be adversely impacted upon in relation to the *supposed* rights of offenders' (p. 36, my emphasis).

Clearly this is not an encouraging start and it rather undermines claims by a number of jurists in the cases cited below to be giving effect to their parliament's carefully considered intentions in respect of the framing of certain sections. Nevertheless, if Lucia Zedner's (2003a) suggestion that the limiting principles of punishment (eg., of proportionality, parsimony, restraint, or equal impact) might be useful also for delimiting mechanisms of security, then we might expect Australia's higher courts of appeal to be the place where the first moves towards such a jurisprudence of security might emerge. The case on which I concentrate here is *Director of Public Prosecutions (WA) v GTR*, a matter heard on appeal in the Western Australia Supreme Court between June and September 2008 that was significant for its breadth of

attention to some of the key interpretive questions arising in the WA statute. However, since the drafting of legislative provisions around the country is nearly identical, the Court in *GTR* also drew upon and discussed a number of other cases of appellate review of sex offender legislation in Western Australia, Queensland, NSW and Victoria, thus providing an Australia-wide relevance. I wish to draw out three points from *GTR*, but to expand here on just the first. These are: (i) the interpretation of the Court as to the evidence necessary in order for a continued supervision or detention order to be made; (ii) the possibility of making no order should the government be unwilling or unable to make good the preventive (treatment/proper supervision) element of the order; and (iii) its decision on the admissibility of evidence of offending as a child. Together, these three factors reveal a court shifting back and forth between criminal and civil standards and precepts in order to establish an entirely new field of legality that makes possible the governmental objectives of quarantine and exclusion.

Establishing risk to community

The Western Australian legislation sets out in s 40 that proceedings under the Act 'are to be taken to be criminal proceedings for all purposes'. Further, individuals detained under the Act will be treated as prisoners, being detained 'in a prison under the *Prisons Act 1981*' (s 45). One might expect therefore, given the criminal nature of proceedings and the effective imprisonment under consideration, that a criminal standard of proof would be required in order to secure post-sentence detention or supervision of an offender against predicted future conduct. In fact, in line with other state's schemes, the WA law establishes a complex set of intersections between

standards of proof, estimates of likelihood and vague invocations of seriousness of imagined future conduct. Just how these are worked out, and in whose benefit presumptions and similar legal devices are established, will go a long way in determining the capacity of Australian jurists to take seriously the importance of individual liberty rights for ‘suspect’ populations.

Section 7 of the WA Act establishes that the court must ‘be satisfied that there is an unacceptable risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence’ and that this satisfaction must be ‘to a high degree of probability’. The WA court had previously considered this in *Williams* [2007], while the ‘high degree of probability’ element had been considered in Victoria in *TSL* [2006] and in NSW in *Tillman* [2007] and *Cornwall* [2007], both of the latter following *TSL*. The court in *TSL* prefaced its conclusions by noting that ‘[a] person subject to an extended supervision order is a prisoner in all but name’ (at 10). Nevertheless, it concluded in respect of the ‘high degree of probability’ question that ‘[t]here is no reason to think that it must be more than 50%.’ (at 11), meaning that while the court must be satisfied that a further serious offence is likely, it should not be required to be more likely than not. The Court in *GTR* followed this lead, denying that the legislation (and legislative intent) could be construed to mean that, overall, there must be a better than even chance (> 50%) that a serious sexual offence would occur if an order were not made. The language used is that the legislation conveys ‘no requirement’ for such a high standard (at 34). Thus despite the clearly criminal context and outcomes, a civil standard comes to applied as a strategic tool in conditions where no serious hope could be found for success under any measure of criminal (justice) standards.

Setting out the cascading decision structure in the WA legislation, the Court in *GTR* noted (at 34) that for an order to be made there must be (i) satisfaction to a high degree of probability; that (ii) there was an ‘unacceptable risk’; that (iii) a serious sexual offence ‘would’ occur unless a continuing detention or supervision order were made. We are thus left with a proportion (the high degree of probability), of a further proportion (the risk), of an event (the offence), which is itself conditioned by the impact of another event (treatment to be received in detention or on community supervision). Within this, offenders’ liberty rights are considered as part of a ‘balancing exercise’ (at 27). This, essentially, forms the mechanism by way of which such rights are traded away against the impacts of offenders’ imagined future behaviour, the result going to form the ‘unacceptable risk’ component above. What we find in the emerging jurisprudence of risk, therefore, is an eschewal of the very principles justice that lie at the heart of traditional criminal judgment and an acceptance of a new hybrid domain of exception, neither fully criminal nor fully civil but construed and constructed so as to give effect to parliamentary intentions for the sub-men who are regarded as barely human.

Further derogations of justice

The fundamentally punitive character of continued detention and supervision in Western Australia emerges further when the Court considers the question of whether or not, upon a finding of danger by the process above, a court may decline to make an order. In the Queensland case of *Francis* [2007] the court there used the phrase ‘executive repudiation of the preventive objects of the Act’ to describe government

refusal to provide treatment to a willing offender, thus making continued detention ‘truly punitive in character’ (at 31; emphasis added). Leaving aside the very high bar of ‘refusal’ to provide treatment, as opposed, for instance, to provision of insufficient or ineffective treatment or supervision, we face here the question of whether a government is bound to *effect* prevention (through treatment, supervision conditions, etc) or whether danger in and of itself must trigger control (via detention of supervision). In *GTR* the Court found in favour of the latter (at 51), giving enormous license to government to establish minimal, ineffective or even sham measures for the very treatment component that is held to render detention and supervision non-punitive and thus outside or beyond established principles for the limitation of punishment. This would also seem to leave ample scope for poor community supervisions structures to increase the likelihood that courts will be forced toward detention as the only reasonable option for securing public safety.

The extinguishment of long held principles of justice continued in the case of *GTR* when the Court ruled on the admissibility of childhood offending. Despite this not being a matter of appeal, the Court felt it important to clarify that the Act’s demand for all material relevant to establishing a risk of further serious sexual offending should over ride provisions of the *Young Offenders Act* (WA) 1994 that effectively expunge youthful convictions after a period of two years. That Act’s instruction in s 189(2) that, once two years have passed, ‘the conviction is not to be regarded as a conviction for any purpose’ was set off in *GTR* against the *Dangerous Sexual Offenders Act* counter claim in s 38(4) that information to establish risk should be supplied ‘despite any other law or duty of confidentiality’. Consistent with the demeaned status of offenders subject to these proceedings, the Court in *GTR* ruled

that the conflict should be settled in favour of the control legislation. This presumptive shift was not the first of its type in the judgment, but was illustrative of this movement back and forward to achieve governmental ends and to head off criminal standards and notions of justice. Earlier, for instance, the Court had give quick dispatch (at 29) to the Act's instruction that its proceeding were 'to be taken to be criminal proceedings for all purposes', citing again Parliament's intentions and the need to secure these ends.

Conclusion

This paper has considered the treatment of individual liberty rights within an emerging apparatus of security. It has focused on Australian higher courts as a site for the invocation or refusal of principles of justice and has begun tracing the first moves in an emerging jurisprudence of security in respect of sex offender risk and community safety. The focus of this paper has been the case of *Director of Public Prosecutions (WA) v GTR* [2008] wherein a number of these issues were aired. What have not been mentioned thus far have been the specific details of the case. It seems appropriate to finish this discussion with mention of these circumstances, for they place in context the scope and impact of this new form of preventive control in Australia. The respondent, GTR, was a young Aboriginal man from a remote community. In prefacing his judgement on the original application for supervision, *Director of Public Prosecutions v GTR* [2007], McKechnie J remarked that of 15 applications thus far made by the Director of Public Prosecutions, seven had concerned Indigenous respondents. Thus, he noted, though Aboriginal people made up just 3% of the WA population, they had thus far been represented in 47% of

Dangerous Sex Offender applications. Further, fully 33% of applications had been made in respect of residents of remote communities. The nature of GTR's offending is also important. Without diminishing the significance of any offending, it must be noted that his comprised just two events, the first of which, committed as a 17 year old, resulted in seven months imprisonment; the second, occurring approximately one year following his release was met with a sentence of three years, four months. Both offences were against adult women. He had undertaken treatment on his most recent sentence and it had been considered successful. McKechnie J, in the original judgement decided that although there was 'a pattern to his past offending' there was 'no evidence of a propensity to so offend' (at 132), a view supported by the appellate court. The danger with schemes such as these, particularly when constructed and interpreted in the manner described here, is that they open up what Robert Castel (1991: 289) has termed 'a vast hygienist utopia' in which the play of community anxieties quickly subsumes any supposed liberty rights of offenders and in which arguably 'run of the mill' offenders, such as GTR, may find themselves redefined as a chronic social threat. Thankfully in this case, and despite two applications from the Director of Public Prosecutions, the Western Australia Supreme Court declined to agree.

List of Cases

Attorney-General (Qld) v Francis [2006] QCA 324.

Cornwall v Attorney-General (NSW) [2007] NSWSCA 374.

Director of Public Prosecutions (WA) v GTR [2007] WASCA 318.

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Fardon v Attorney General for the State of Queensland [2004] 210 ALR 50.

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