BEHIND BARS

A critical analysis of limitations on prisoners' rights under the NZBORA

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Table of Contents

I. Introduction

In the last decade, many prisoners have brought cases regarding their rights under the New Zealand Bill of Rights Act 1990 (NZBORA). These cases have been responsible for significant developments in NZBORA jurisprudence. The most well-known example is the successful *Taylor v Attorney-General* litigation on the right to vote.[1] But the reality is that most breaches of prisoners' rights do not reach the courtroom. For everycase that succeeds, many other potential cases fail to make it to a full hearing,[2] which is an unsurprising result given the restrictions on access to legal materials and computers in prisons.[3] The number of prisoners in New Zealand has almost doubled since 2000.[4] With that increase, the pressures on prison resources make it difficult for Corrections to meet their obligations in terms of prisoners' rights.[5]

Those pressures create an environment where prisoners' rights are often limited. But whether they are lawfully limited depends on s 5 of the NBZORA, which requires that any limitation on rights be demonstrably justifiable in a free and democratic society. The justifiability of limitations is determined by the two-stage proportionality test from *R v Oakes*, adopted by the New Zealand Supreme Court in *R v Hansen*.[6] First, there must be a "pressing and substantial objective" for the rights limitation.[7] Second, the means used to achieve that objective must pass a three-step balancing test.[8] The rights limitation must have a rational connection to the objective; it must minimally impair the right; and it must be proportionate to the objective. Applying that test, this dissertation takes a critical approach to cases on prisoners' rights.

The question that this dissertation aims to answer is: which limitations on prisoners' rights can be justified? The answer is, on one level, obvious. Prison is intended to remove liberty.[9] But beyond those liberty rights which are intentionally limited as part

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[1] *Attorney-General v Taylor* [2018] NZSC 104.
[2] See, for example, *Genge v Chief Executive of the Department of Corrections* [2018] NZHC 1827 and *Smith v Attorney-General* [2017] NZHC 1647.
[3] *Greer v Department of Corrections* [2018] NZHC 1240 at [30].
[4] Institute for Crime & Justice Policy Research "New Zealand" (30 June 2020) World Prison Brief <www.prisonstudies.org/country/new-zealand>.
[5] Bronwyn Naylor "Human Rights and Respect in Prisons" 31 Law in Context 84 at 86.
[6] *R v Oakes* [1986] 1 SCR 103 at [69] and *R v Hansen* [2007] NZSC 7 at [103].
[7] *Oakes,* above n 6, at [69].
[8] At [70].
[9] Naylor, above n 5, at 84.

of imprisonment, the answer is less clear. It is obvious, to prisoners, that their rights are limited beyond the deprivation of liberty.[10] Corrections are tasked with running the prison, and concerns about security and good order often conflict with prisoners' rights. In determining whether the operations of the prison can justify limits on prisoners' rights, the courts have to assess whether Corrections have limited the right for an important reason, and in a proportionate manner. That assessment leads to two categories of justified limitations on prisoners' rights. First, some rights are justifiably limited as an inherent part of imprisonment. Second, further rights can be justifiably limited because of concerns about prison management and security put forward by Corrections. Based on these two justifications, I argue that prisoners are subject to a range of rights limitations beyond the deprivation of their liberty.

I will analyse cases on three substantive rights under the NZBORA to make this point: the right to vote, the right to freedom of expression, and the right to be free from unreasonable search and seizure. The cases are intended to provide an illustration of the courts' reasoning. I have chosen to analyse decisions from the High Court as well as their appeals, because the appellate courts tend to give reasoning on narrow issues rather than the full picture of prisoners' rights and the justifications for rights limitations. In analysing the cases, I will identify when the rights are limited as an inherent part of imprisonment and which are limited because of the prison environment.

The dissertation is split into six chapters. This is Chapter One, the introduction. In Chapter Two, I will analyse what limitations on rights are justified in punishment theory. This involves exploration of the reasons for punishment, the social contract which legitimises punishment by the state, and the specific carceral bargain which legitimises imprisonment. In the last part of the chapter, I analyse the tension between penal law, which upholds the rights of prisoners, and penal regulation, which focuses on the management of the prison.

Chapters Three, Four, and Five respectively analyse cases on the right to vote, the right to freedom of expression, and the right to be free from unreasonable search and

[10] At 94.

seizure. I will analyse how these rights have been upheld or limited in New Zealand courts. My focus, in analysing these cases, is on which reasons are accepted as justified limitations on rights.

Finally, in Chapter Six, I will unpack four conclusions on how New Zealand courts approach the question of rights limitations in prison. I find that the decisions on prisoners' rights need to be more transparent, both in the application of the *Hansen* test and in explaining the theoretical basis for rights limitations. However, on a positive note, decisions on prisoners' rights in New Zealand do not show the trend of deference to Corrections that is present in the overseas authorities. Overall, it is concerning that Corrections do not view prisoners' rights as a stopping point for their regulatory powers.

II. Rights limitations in punishment theory

In this chapter I address one of the central questions about punishment:[11] how does punishment justify treatment, like limiting rights, that would usually be illegitimate? First, I will consider the theoretical goals of the prison, as a punishment. I will then consider how social contract theory gives an account of why prisoners' rights must be respected. Finally, I will analyse how, in reality, the regulation of the prison requires rights restrictions beyond those contemplated in punishment theory.

A. Prison as punishment

Limiting prisoners' rights is the very nature of their punishment. But, equally, prisoners retain their human rights except for the loss of liberty and those rights that are taken away as a necessary result of the loss of their liberty.[12] This is referred to as "the residuum principle"; prisoners have all the rights that are not taken away by virtue of their imprisonment.[13]

The prison is used to intentionally remove prisoners' liberty for an offence against the law, so it is a punishment.[14] But giving a full account of the reasons for criminal punishment is complicated. Canton states "there is no such thing as a purpose of punishment [because] punishment does not have a purpose over and above the purpose that people may set for it."[15] However, he does describe two justifications for punishment, the utilitarian and retributive justifications, as "the most familiar and politically resonant stories of punishment".[16] I will adopt those two common justifications for my analysis. Lisa Kerr outlines these reasons as follows: [17]

[11] Zachary Hoskins "Punishment" (2017) 77 Analysis Reviews 619 at 619.
[12] Naylor, above n 5, at 84; Julie Debeljak "The Rights of Prisoners under the Victorian Charter" (2015) 38 UNSWLJ 1332 at 1337.
[13] At 1337 citing *Raymond v Honey* [1983] 1 AC 1 at 10.
[14] HLA Hart "Prolegomenon to the Principles of Punishment" (1959) 60 Proceedings of the Aristotelian Society 1 at 4.
[15] Rob Canton *Why Punish?* (Palgrave, London, 2017) at 40.
[16] At 44.
[17] Lisa Kerr "How the prison is a black box in punishment theory" (2019) 69 UTLJ 85 at 91.

> At its core, punishment theory and practice continues to contain two impulses: that we should punish behaviour because it is wrong and the offender is responsible (retribution) or that we should punish behaviour because it is socially useful to do so (utilitarianism).

The Sentencing Act 2002 confirms that the purposes of sentencing relate to these justifications for punishment. In terms of retribution, the Act states that sentencing (whether to prison or otherwise) should hold the offender accountable, promote in them a sense of responsibility for offending, and denounce their conduct.[18] Utilitarian justifications are also present, as the Act states that deterring the offender from committing the same offence, protecting the community from the offender, and assisting in the offender's rehabilitation are also purposes a court may use in sentencing.[19] The purposes of sentencing are evenly weighted between those two broad justifications for punishment.

The retributive reason for punishment is backwards-looking.[20] It asserts that we should punish crimes to hold offenders accountable, either for moral or symbolic reasons. Feinberg argues that punishment has an expressive dimension of "social disapproval and its appropriate expression that should fit the crime and not hard treatment (pain) as such."[21] Because a retributive view of punishment focuses on making the punishment fit the crime, punishment must take into account the gravity of the offending and the culpability of the offender.[22] As society is morally condemning the crime, there must be a spectrum of punishments ranging from least serious to most serious so that the moral condemnation is tailored to the offence. The Sentencing Act 2002 deals with this issue of appropriate "fit" in the principles of s 8, which taken together require the judge to place a particular offence on a spectrum of similar offences when sentencing.[23] Retributive punishment is inherently limited because "retribution sets an internal limit to the amount of punishment that is thought to be

[18] Section 7(1)(a).
[19] Section 7(1)(f), (g), and (h).
[20] Hoskins, above n 1, at 620.
[21] Joel Feinberg "The Expressive Function of Punishment" (1965) 49 The Monist 397 at 423; see s 7(1)(e) of the Sentencing Act 2002 which states that one sentencing purpose is "to denounce the [offending] conduct".
[22] Canton, above n 15, at 67.
[23] Sentencing Act 2002, s 8.

proportionate to the seriousness of the crime".[24] Keeping the punishment in proportion to the offence is central to retribution.

On the other hand, the utilitarian reasons for punishment are forwards-looking. They do not take into account the crime the offender has committed, except to the extent that it demonstrates the offender may have a propensity for future offending. The aim of utilitarian punishment is to prevent future crimes. The traditional utilitarian view of punishment is set out by Bentham as: [25]

> With respect to a given individual, the recurrence of an offence may be provided against in three ways:
> By taking from him the physical power of offending.
> By taking away the desire of offending.
> By making him afraid of offending.

Respectively, those reasons equate to the modern equivalents of incapacitation, rehabilitation, and deterrence.[26] They provide the three main utilitarian justifications for punishment.[27] Incapacitation aims to make it impossible for offenders to offend against the community by putting them in prison. Rehabilitation aims to change prisoners so that they no longer want to offend. Deterrence aims to make prisoners afraid of offending again due to their experience in prison or the length of their sentence. Those utilitarian reasons for imprisonment focus less on the offence committed and more on the possibility of preventing future offending.

Retribution and utilitarianism can both justify limitations on prisoners' rights. If justified by these principles, rights limitations are regarded as inherent in a sentence of imprisonment. For example, the right to freedom of movement is limited to achieve both retribution and utilitarianism, by symbolically excluding the prisoner from society and keeping them from offending against the community. As such, limitations on freedom of movement in the prison are justified as an inherent part of imprisonment and an intended consequence of that sentence. In assessing whether a limitation on prisoners' rights is demonstrably justified, the courts consider whether or not the limitation is inherent in imprisonment.

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[24] Roger Hopkins Burke *Criminal Justice Theory* (Routledge, Oxford, 2012) at 188.
[25] The Works of Jeremy Bentham (1843) as cited in Canton, above n 15, at 46.
[26] Rob Canton and Nicola Padfield "Why Punish?" (2019) 58 The Howard Journal 535 at 538.
[27] Canton, above n 15, at 46.

B. Prisoners' rights within the social contract

Even though prisoners' rights can be limited in prison, there is a stopping point to those limitations. The power to impose punishment, including imprisonment, derives from the social contract. But social contract theory also demands respect for prisoners' rights.

General social contract theory means that "[l]aws can legitimately be used to ensure compliance if they have been properly approved by citizens who are party to the social contract."[28] Burke states that this is because citizens have consented to government and to punishment as part of that consent. "Compliance [with the law] can be enforced by the fear of punishment, but only if entry into the contract and the promise to comply with it has been freely willed, given and subsequently broken."[29] Like retribution, social contract theory requires that punishment should be based on the harm caused to the social contract.[30] Therefore the punishment should fit the crime committed, not the person committing it.

Some views of the social contract can justify any punishment that the government administers as proportionate to the harm. Citizens have, on Rousseau's theory of the social contract, given tacit consent to all acts of the government that fall within the social contract, such as imprisoning offenders. Rousseau said, on the death penalty, that "it is in order not to be the victim of a murderer that a person consents to die if he becomes one."[31] The idea is that by consenting to a certain law, through a democratic mandate to the government, criminals have consented to the punishment that will be inflicted upon them as a result of their breaking that law. They are bound by "the general will" which is administered by "a citizen body, acting as a whole, and freely choosing to adopt laws that will apply equally to all citizens".[32] On Rousseau's account, therefore, the criminal who faces the death penalty consents to their death because they have accepted the general will through the passing of the law.

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[28] Burke, above n 25, at 18.
[29] At 169.
[30] Burke, above n 25, at 170.
[31] Jean-Jacques Rousseau *On the Social Contract* (Penguin, London, 2004) at 64.
[32] Burke, above n 15, at 16.

However, Brettschneider presents a re-reading of Rousseau's social contract that requires respect for prisoners' rights. He argues that the general will "aims to protect and preserve each individuals' interest within the social contract".[33] That is because each individual, placed in the hypothetical situation of the prisoner, would not want their own rights to be limited as punishment beyond the deprivation of their liberty. The general will (which is society's consent to the social contract) limits legitimate punishment by reference to prisoners' rights. Rousseau, in reframing punishment as a question of state legitimacy, "gives an account not only of limits on state action, but also of the rights of criminals that stem from their membership in the social contract."[34] It is fundamental to this theory that "the common good cannot replace or counterbalance the most basic interests and rights of the individual".[35] As such, criminals are not excluded from the social contract. They are citizens within it who have consented to their imprisonment through the social contact. The state's power to punish prisoners' extends to the deprivation of their liberty, but beyond that, the power is limited by prisoners' rights.[36]

On this basis, the social contract requires respect for the rights of prisoners. Building on that requirement, Dolovich's idea of the "carceral bargain" reframes social contract theory in terms of the prison as an institution. The idea is that, because society gets the utilitarian benefit of being able to put offenders in prison and the retributive benefit of denouncing their crimes, society takes on the burden of ensuring that prisoners' rights are respected in prison. Because society gains from imprisonment, society pays for those gains by respecting prisoners' rights. Dolovich writes of the carceral bargain as "the price that society pays for the decision to incarcerate offenders".[37] The government assumes "an ongoing affirmative obligation to meet the basic human needs of the people exiled in this way."[38] Prison is, in a rights context, somewhat unusual. The government, in the 'total institution' of the prison, is at an

[33] Corey Brettschneider "Rights within the Social Contract: Rousseau on Punishment" in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds) *Law as punishment / law as regulation* (Stanford Law Books, Stanford, 2011) 57 at 62.
[34] At 57.
[35] At 62.
[36] At 57.
[37] Sharon Dolovich "Cruelty, Prison Conditions, and the Eighth Amendment" (2009) 84 NYULR 881 at 892.
[38] At 892.

increased risk of breaching the negative rights of its citizens.[39] But at the same time, the government has taken on the obligation to provide for positive rights which it owes to no other citizens. Imprisonment's inherent limitations on personal liberty are, therefore, only legitimate if the state respects the other rights of the prisoner.

C. Penal regulation and prisoners' rights

Beyond punishment theory, prisons have regulatory pressures to deal with. Their central regulatory purpose is to maintain the "security and good order" of the prison. This falls outside the principles that justify punishment. These concerns are about penal regulation, which focuses on the management of the prison and its resources rather than legal principles.[40] Principles of punishment and penal regulation coexist in the prison, but they pull in different directions when it comes to prisoners' rights. While punishment theory justifies the rights limitations that are inherent in imprisonment, penal regulation goes further because it recognises that prisons are institutions, with limitations on their resources, that must be managed. This brings into effect another justification for rights limitations based on the regulation of the prison.

As Sarat, Douglas, and Umphrey note, penal law and penal regulation are distinct because:[41]

> Penal law allows the state to punish but simultaneously treats the object of punishment as an autonomous individual due rights and respect. Penal regulation differs from penal law drastically in that it does not treat criminals as autonomous individuals but instead as resources that must be managed.

Punishment and penal regulation therefore view prisoners' rights in different ways. Dubber identifies the many regulatory aspects of the prison system. He states that

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[39] Naylor, above n x, at 86.
[40] Marcus Dubber "Regulatory and Legal Aspects of Penality" in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds) *Law as punishment / law as regulation* (Stanford Law Books, Stanford, 2011) 27 at 49.
[41] Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey "On the blurred boundary between regulation and punishment" in Austin Sarat, Lawrence Douglas, and Martha Umphrey (eds) *Law as punishment / law as regulation* (Stanford Law Books, Stanford, 2011) 9 at 17.

these "include not only legislatively generated offences but also penal regulations promulgated by executive agencies, the imposition of penal discipline in administrative tribunals … and the infliction of penal control".[42] A broad range of the rights restrictions in prison stem from penal regulation rather than penal law.

Penal regulation is not taken into account in punishment theory, but the rights limitations that result from regulatory decisions are nonetheless experienced as punishment. Although limitations for reasons of regulation are "meant to carry no moral opprobrium and [are] controlled by norms that give administrative or executive agencies great discretion and flexibility", [43] these limitations meet the definition of punishment.[44] Canton describes these limitations as "collateral effects" of punishment and notes that they are problematic in terms of punishment theory.[45] Because these limitations are unrelated to either utilitarian or retributive justifications for punishment, they are collateral and unjustified in terms of punishment theory. That is because these limitations are not considered (and cannot be considered) when a sentence of imprisonment is imposed. They depend on factors within the prison, so they are imposed after a sentence. In some cases, it is not clear whether a particular rights limitation is justified because of regulation or punishment; the boundary between the two is blurred by these rights restrictions in prison.[46]

In overseas jurisdictions, the courts are willing to limit prisoners' rights in order to uphold these regulatory concerns about the safety of the prison. Parkes, analysing prisoner litigation under the Canadian Charter of Rights and Freedoms, noted that the courts characterise rights restrictions that are justified through prison regulation as administrative decisions. Rather than being treated "as analogous to classic criminal ones that require more cogent justification for state limits on rights due to the imbalance of power between individual citizens and the state, prison officials are often accorded deference by courts, particularly when it is alleged that "safety" or "security" is at stake."[47] These decisions, which relate to the management of the prison as an

[42] Dubber, above n 40, at 49.
[43] Sarat, Douglas, and Umphrey above n 41, at 9.
[44] Hart, above n 14, at 4.
[45] Canton, above n 15, at 74.
[46] Sarat, Douglas, and Umphrey above n 41, at 18.
[47] Debra Parkes "A Prisoners' Charter: Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms" (2007) 40 UBCLRev 629 at 670.

institution with resources to manage and the safety of inmates and staff to protect, are about penal regulation. These rights limitations are justified on grounds of regulation rather than punishment theory. Debeljak, writing about litigation on prisoners' rights under the Victorian Charter of Rights, makes a similar finding. She notes that these regulatory considerations create "a security-focused environment, where a significant power imbalance exists between prisoners and those in their charge, and which creates a 'total institution'."[48] Prisoners are therefore vulnerable to abuses of rights. Because of external pressures on the prison from overcrowding and budgeting, she finds that the "residuum principle" – that is, the principle that prisoners lose their liberty but keep the rest of their rights – is undermined by the modern prison structure.[49]

Security is the most common regulatory concern that presents a justified limitation on the rights of prisoners. Zinger raises specific concerns with the issue of security in prisons. "Security is, of course, a core concern of correctional administrators, but corrections is also about administering sentences and increasing the chances of releasing law-abiding citizens."[50] He notes that in the United States, there is "frequent deference of judges towards correctional decisions".[51] Stanley makes a similar finding. "Even if a case gets to court, the rights of incarcerated people are regularly read down as judges defer to state arguments that violations are necessary for reasons of security, order, safety or crime prevention," she writes.[52] When accepted by courts, these regulatory justifications can have a significant impact on prisoners' rights. That is because the regulatory concerns about the prison respond to pressures on Corrections, so where prisoners' rights can be lawfully limited for these reasons, it is likely that they will be limited.

Questions about penal regulation and how it affects the legitimacy of punishment have not been resolved in terms of penology. Canton notes that although collateral effects (rights limitations outside of punishment theory) certainly exist, there is little

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[48] Julie Debeljak "The Rights of Prisoners under the Victorian Charter: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention" (2015) 38 UNSWLJ 1332 at 1336.
[49] At 1337.
[50] Ivan Zinger "Human rights and federal corrections" (2016) 58 Canadian Journal of Criminology and Criminal Justice 609 at 620.
[51] At 622.
[52] Elizabeth Stanley *Human Rights and Incarceration* (Palgrave Macmillan, Wellington, 2018) at 10.

attention to the true effects of a given punishment. It is unclear whether the reality of prison accords with its theoretical justifications. He writes that this is because "law and research privilege the intentions of the punisher rather than the perspectives of the punished."[53] Similarly, Kerr argues that lawyers, judges, and prison theorists largely ignore the prison and the conditions within it, in favour of quantifying sentences as a measure of years which are deemed to be proportionate whatever conditions the prisoner is subjected to within those years.[54] Penal regulation is not concerned with proportionality or the utilitarian gains that prison can give society. The reality of prison, as a regulatory environment, justifies rights limitations beyond those inherent in the loss of liberty.

D. Conclusion on punishment theory

I have established that in punishment theory, prisoners lose their personal liberty for a combination of utilitarian and retributive reasons. Beyond that loss of liberty, social contract theory requires respect for prisoners' rights as the state must continue to meet its carceral burden. However, in the final part of the chapter I have argued that in reality, further limitations on prisoners' rights are imposed in order to regulate the prison environment. Those limitations are problematic. They are unintended "collateral effects" of imprisonment which are not supported by the goals of prison or the constraints of the social contract.

These theories set up an important problem to consider in the next part of the dissertation, where I analyse the limitations on certain rights within New Zealand cases. If courts accept that penal regulation is a justifiable reason to limit rights, that creates problems with proportionate sentences. Those limitations on rights are a punishment that was not taken into account at the sentencing date of the offender. In other jurisdictions, this has caused prison and punishment theorists to consider the extent to which these collateral effects should be taken into account at the date of sentencing or in assessing parole.[55] That is because collateral effects alter the

[53] Canton, above n 15, at 74.
[54] Lisa Kerr "How the prison is a black box in punishment theory" (2019) 69 UTLJ 85 at 86.
[55] Canton, above n 15, at 74.

punishment imposed by imprisonment. If regulatory limitations are accepted, then prisoners do lose more rights than those encompassed within the loss of liberty.[56]

[56] Julie Debeljak "The Rights of Prisoners under the Victorian Charter" (2015) 38 UNSWLJ 1332 at 1337.

III. The right to vote

Section 12 of the NZBORA states: "Every New Zealand citizen who is of or over the age of 18 years … has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot". The Electoral (Disqualification of Sentenced Prisoners) Act 2010 unjustifiably limited that right by disenfranchising all sentenced prisoners.

The prisoner voting ban imposed by that legislation was challenged in two lines of cases. Initially, both cases were brought by "high-profile criminal" and "jailhouse lawyer" Arthur Taylor.[57] First was a line of cases seeking a declaration that the prisoner voting ban was inconsistent with the right to vote; second, a line of cases seeking an interpretation of the Electoral Act that would mean the disqualification provision was not validly enacted because it failed to comply with the manner and form requirements of the Electoral Act. The two lines of cases reached the Supreme Court in the same year.

A. Declaration of inconsistency cases

These cases were about the Court's power to issue a formal declaration that legislation is inconsistent with the NZBORA.

1. Taylor v Attorney-General [2015] NZHC 1706

In this decision, Heath J issued a declaration that the prisoner voting ban is inconsistent with NZBORA. The decision outlines a range of arguments on why the ban may be justified or not justified.

First, the decision gives the history of prisoner disenfranchisement, tracing its origins from the Ancient Greek concept of 'civil death' to the mark of 'infamy' that New Zealand's settlers brought from Britain. Throughout these time periods, "the

[57] Michael Neilson "High-profile prisoner Arthur Taylor walks free after nearly 40 years inside" *The New Zealand Herald* (online ed, Auckland, 11 February 2019).

underlying idea was that disenfranchisement of some classes of prisoners was a necessary part of the punishment to be imposed."[58] Often, the level of disenfranchisement was linked to the seriousness of the crime committed. The history of the prisoner voting ban suggests that it could be inherent in a sentence of imprisonment for serious offenders.

The decision goes on to describe modern theories that could justify the prisoner voting ban. Social contract theory suggests that those who have committed a crime should not be entitled to vote.[59] On the other hand, "a sentence of imprisonment should not deprive a person of civil rights, beyond those inherent in the sentence, namely freedom of movement and association."[60] The Court recognised that prisoners' rights represent a limit on the appropriate punishment. This is similar to the idea of the carceral bargain.[61]

In light of the voting ban's objective—"that a person convicted for *serious crimes* against the community should forfeit the right to vote as part of their punishment"—the Court agreed with the Attorney-General's concession that the ban was not justified under s 5.[62] The arbitrary nature of the ban, which could apply equally to those in prison for weeks and those in prison for years, made it unjustifiable.[63] Heath J added to the Attorney-General's s 7 reasoning with another factor based on the punitive objective of the ban. That factor was the arbitrary distinction between prisoners on home detention and those in prison, which depended on socio-economic factors other than "just the seriousness of the crime committed".[64] Because the objective of disenfranchisement was punishment, concerns about proportionality and applying like treatment to like offenders were central to the finding that the ban was not demonstrably justified. These concerns demonstrate that the ban on voting was considered, under the s 5 test, on the basis that it was a retributive punishment for offenders.

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[58] *Taylor v Attorney-General* [2015] NZHC 1706 [*Taylor declaration* (HC)] at [17].
[59] At [25].
[60] At [25].
[61] Dolovich, above n 38, at 892.
[62] Christopher Finlayson Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (17 March 2010) at [11] cited in *Taylor declaration* (HC), above n 58, at [29].
[63] *Attorney-General v Taylor* [2017] NZCA 215 [*Taylor declaration* (CA)] at [34].
[64] At [34].

The decision was not about the original s 80(1)(d), which disenfranchised prisoners serving sentences of three years or more. Heath J noted the "powerful arguments" that the original ban was demonstrably justifiable, but he does not analyse those arguments.[65] The arguments for the original ban, on prisoners sentenced to three years imprisonment or more, are stronger because they relate to the sentence the offender is serving. By linking the ban to a serious sentence, it could be argued that the ban forms part of a proportionate, non-arbitrary punishment.. The distinction between the blanket ban and the ban for serious offenders accords with a retributive view of the voting ban as punishment. However, Heath J did not conclude on this point

2. *Attorney-General v Taylor* [2017] NZCA 215

The Court of Appeal upheld the High Court's declaration. The judgment emphasised that the Attorney-General did not advance a justification for the voting ban and that "[i]t would not be appropriate, then, to assume in this proceeding that there exists no social policy justification for them, or that the courts are necessarily better placed than the legislature to evaluate such justification."[66] In the same paragraph, the Court cited *R (Chester) v Secretary of State for Justice* when recognising that prisoner voting bans exist in many societies and some forms of them have been found to be justified on social policy grounds.[67] This approach again uses history to suggest that voting bans are, in some form, an inherent part of imprisonment.

The Court of Appeal also noted that the Attorney-General's report on the blanket ban included "an explicit assumption that temporarily disenfranchising serious offenders as part of their punishment would be a significant and important objective."[68] That comment expresses some doubt that removing prisoners' voting rights to hold them to account for their crimes meets the s 5 requirement of a "pressing and substantial objective", probably because the Court recognised that prisoners' rights should be upheld unless they were removed as a necessary part of punishment.[69]

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[65] At [78].
[66] At [179].
[67] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 at [9] and [14].
[68] *Taylor declaration* (CA), above n 63, at [182].
[69] See *Taunoa v Attorney-General* [2007] NZSC 70 at [97] per Elias CJ.

Importantly, the Court of Appeal's conclusion was that "the legislation imposes so egregious and unjustifiable a limitation upon a fundamental right that the Court should see it as its duty to make a DoI in vindication."[70] The decision to issue the Declaration was "inseparable from the broader question whether prisoner voting prohibitions are per se unjustifiable".[71] So, the Court has acknowledged that making of a Declaration of Inconsistency demonstrates just how unjustifiable the prisoner voting ban was.

The Court also linked their decision to uphold that Declaration of Inconsistency to the importance of the right to vote as a "core prerogative of citizenship in a free and democratic society".[72] Further, the Attorney-General's lack of argument made the Declaration hard to resist. The Court concluded by stating that "[t]he undiscriminating limitation imposed by the 2010 Act on so central a right demanded justification. None was forthcoming."[73] The Court found that the right to vote was a central right for all citizens in a democratic society, including prisoners. But the undiscriminating nature of the blanket ban ruled out retributive punishment as a justification because retribution required proportionality. The Declaration was therefore valid.

The Court of Appeal's judgment was careful to avoid the question of when a prisoner voting ban would be justified (e.g. if it was limited to prisoners serving sentences of three years or more). However, the Court was prepared to provide a remedy for the blanket ban, given its arbitrary application. The reasoning was similar to Heath J's judgment because it centred on concerns about the arbitrary application of the ban. That made the blanket removal of voting rights an inappropriate way to punish prisoners given the stated objective of targeting "serious offenders". The blanket ban could not serve a retributive purpose because it ignored concerns about proportionality and arbitrariness, both of which are central to retributive punishment.

3. Attorney-General v Taylor [2018] NZSC 104

[70] *Taylor declaration* (CA), above n 63, at [184].
[71] At [184].
[72] At [185].
[73] At [185].

Ellen France and Glazebrook JJ adopted Heath J's history of prisoner voting bans and its justifications.[74] This implies limitations on the right to vote may be an inherent part of imprisonment for serious offenders. The rest of the Supreme Court judgment is unhelpful for my purposes — it upholds the High Court's ability to issue a declaration of inconsistency but does not analyse whether one should have been granted in this case, because all parties agreed that if the remedy was available, it should be granted.

B. Electoral Act cases

These cases focus on whether it is possible to read the Electoral Act consistently with the right to vote under the direction in s 6 of the NZBORA or as a matter of general statutory interpretation. Taylor argued that the right of every citizen or permanent resident to vote was found in an entrenched provision, s 74 of the Electoral Act. The voting ban on prisoners, he argued, had effectively amended that entrenched provision. The ban was therefore unlawfully enacted and of no effect, because the provisions entrenched by s 268 could only be amended by a 75% majority in Parliament.

All of the decisions in this line of cases, barring the dissenting judgment of Elias CJ in the Supreme Court, found that it was impossible to read the section in the way that Taylor contended. The judgments do not directly address the justification for the voting ban, but they do indicate the Court's approach to the right to vote in the context of imprisonment.

1. *Taylor v Attorney-General* [2014] NZHC 2225

Taylor and a group of prisoner applicants sought an interim order preserving prisoners' rights to vote so that they could enrol to vote in the upcoming 2014 election. Ellis J's judgment took a broad view of the disenfranchising provisions and the reason that they were not justified. Ellis J noted that the purpose of the Bill is that "a person convicted for "serious crimes against the community" should forfeit the right to vote

[74] *Attorney-General v Taylor* [2018] NZSC 104 [*Taylor declaration* (SC)] at [6].

as part of their punishment."[75] The concerns about the ban's arbitrary nature take a similar form to Heath J's concerns that the ban applies arbitrarily between prisoners convicted of the same crimes. These concerns centre on whether the ban is a fair way to impose retributive punishment.

The decision also notes a separate rights-based criticism. "[U]nlike restrictions on freedom of movement and freedom from unreasonable search and seizure, which are necessary incidents of imprisonment, the right to vote is unrelated to the fact of incarceration."[76] That is an acknowledgement that some rights are limited by virtue of imprisonment, but the right to vote is not one of them. This comment calls into question whether even serious offenders should have their voting rights limited as a result of their imprisonment.

Ellis J also outlined the reasons that comparable jurisdictions have found blanket prisoner voting bans to be unjustified. The Supreme Court of Canada based their conclusion on social contract theory, directly acknowledging the state's carceral burden and the obligation to protect prisoners' rights. They found that the prisoner voting ban was not justified because "the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities".[77]

Alternatively, the High Court of Australia decided on the basis of retributive punishment. They stated that the ban "does not reflect any assessment of any degree of culpability other than that which can be attributed to prisoners in general", which reflects a view that losing the right to vote is a punishment which should reflect the level of culpability of the offender.[78] Ellis J did not conclude on which philosophy should apply in New Zealand, instead referring to the cases to confirm that the ban is unjustifiable.

The judgment goes on to dismiss Taylor's argument that s 80(1)(d) could be read consistently with the NZBORA. There was no other available interpretation of that

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[75] *Taylor v Attorney General* [2014] NZHC 2225 [*Taylor injunction*] at [7].
[76] At [11].
[77] At [14], citing *Sauvé v Canada (No 2)* 2002 SCC 68 at [45].
[78] At [15], citing *Roach v Electoral Commissioner* [2007] HCA 43 at [93].

provision, and s 268 did not preserve it as an entrenched provision.[79] The ban was therefore validly enacted and operated to prevent the applicants from voting.

2. *Taylor v Attorney-General* [2016] NZHC 335

After Heath J issued a declaration of inconsistency in relation to s 80(1)(d), Taylor brought the interpretive question back to the High Court, but not as an application for injunction. The question here was whether the voting ban was validly enacted at all.[80] Taylor argued that it was not, because s 74 of the Electoral Act, which qualified everyone over the age of 18 to vote, was entrenched by s 268 and amendment of that provision would require a 75% majority in Parliament.

The judgment notes that "from the earliest constitutional history of New Zealand there was a restriction on voting rights against persons who had committed serious crimes."[81] Again this historic reasoning implies that a restriction on the right to vote may be an inherent part of a sentence of imprisonment. Moreover, the judgment suggests that given the history of removing voting rights from some prisoners, there is "room for reasonable differences of opinion within the range of political views" and the rights-focused analysis of the provision must take that into account.[82] The Court will defer, to some extent, to Parliament's intentions where a ban on prisoner voting is involved. The blanket ban did not meet its stated purpose, but another ban might.

The decision specifically notes that Heath J's declaration was limited to the blanket ban rather than exclusion of the vote per se. "It allows for the removal of the right to vote for prisoners serving long sentences," Fogarty J concluded.[83] This judgment takes the view that for more serious crimes, the removal of the right to vote can be justified as retributive punishment.

3. *Ngaronoa v Attorney-General* [2017] NZCA 351

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[79] At [79].
[80] *Taylor v Attorney-General* [2016] NZHC 335 [*Taylor Electoral Act*] at [10].
[81] At [61].
[82] At [118].
[83] At [119].

The Court of Appeal also rejected the argument that the voting ban is invalid on a NZBORA-consistent interpretation. The judgment avoids the question of the justifiability of the ban, but does note that the inconsistency with the right to vote in Heath J's declaration was based on the "blanket" exclusion of the right to vote "rather than the exclusion per se".[84] So, again, the Court held open the possibility that some form of a prisoner voting ban might be justifiable.

4. Ngaronoa v Attorney-General [2018] NZSC 123

The majority in the Supreme Court considered arguments about the justifiability of the limitation but avoided deciding because, again, the Crown conceded that the limit could not be justified. The appellants had relied on *Hirst* and *Sauvé* to argue that excluding a class of voters was a serious infringement on the right to vote, but the Court did not address this reasoning.[85] Those cases would only apply "in the context of considering whether the limiting provision is nonetheless justified" and not on the interpretive question of which provisions were entrenched by s 268(1)(e) of the Electoral Act.[86]

Elias CJ's dissent took a different approach and engaged more deeply with the justifications for a prisoner voting ban. She analysed the Royal Commission Report on the Electoral System and appeared to endorse the reasons that the Royal Commission recommended a ban on prisoners serving sentences of three years or more, rather than a blanket ban.[87] The Commission's view was that removing the right to vote was a punishment, and as such, it could not be justified unless it was linked to the seriousness of the offence.[88] The Report viewed the ban as a retributive punishment. The Electoral Act 1993, on this recommendation, disenfranchised only those prisoners serving sentences of three years or more. Based on that report, Elias CJ saw the right to vote as protected by the entrenched provisions in the Electoral Act rather than just

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[84] *Ngaronoa v Attorney-General* [2017] NZCA 351 at [19].
[85] At [41]-[43] citing *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR) and *Sauvé v Attorney-General of Canada* [2002] SCC 68.
[86] *Ngaronoa v Attorney-General* [2018] NZSC 123 at [43].
[87] At [90]-[98].
[88] At [96].

in the NZBORA.[89] The dissenting judgment would have adopted the interpretation that the qualification of electors, including prisoners, was entrenched.

C. Discussion of the right to vote

The right to vote should not be removed from all prisoners as part of their punishment. That much is clear from these judgments. But the judgments on the right to vote all leave open the question of whether voting rights can be taken away from serious offenders.

The courts found that the right to vote was not justifiably removed because the blanket ban would make sentences arbitrary. That goes against the fundamental idea in penology that sentences must be proportionate to the crime. At an election, someone serving a current one month prison sentence would lose the right to vote while a prisoner just released from a two year sentence would be able to vote. Sentences of imprisonment cannot be proportionate sanctions if prisoners lose rights at random based on their sentencing date.

However, it is equally clear from the judgments that some limitation on the right to vote can be justified in a free and democratic society per s 5. Elias CJ considered that Parliament could limit the right to vote if it was linked to the three year electoral cycle, as recommended by the Royal Commission. That limitation would make the loss of the right an inherent part of imprisonment for over three years.

As such, these cases also demonstrate that Parliament has the ability to change which rights can be limited as an inherent part of a prison sentence. If a prisoner voting ban was linked to the length of an offender's sentence, it appears that the Court would accept that it forms part of a proportionate punishment and could be justified. By enacting a prisoner voting ban, Parliament adds to the loss of rights that is bundled within the restrictions on prisoners' liberty. With the enactment of the Electoral

[89] At [105].

(Registration of Sentenced Prisoners) Act 2020,[90] limits on the right to vote for serious offenders are now arguably an inherent part of a sentence of imprisonment.

Nevertheless, there are problems with depriving even some prisoners of the right to vote. Firstly, that limitation calls into question statements about the centrality of the right to vote as a "core prerogative of citizenship". [91] There is also the commonly cited proposition from *Raymond v Honey* that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication".[92] As Heath J noted, the right to vote is not necessarily linked to the sentence in the same way that freedom of movement and freedom of association are.[93]

Punishment theory therefore suggests that New Zealand courts should not accept that prisoners can be deprived of the right to vote as an inherent part of their imprisonment. Historic trends of removing the right to vote are unconvincing in a modern free and democratic society, where the courts have recognised that the right to vote is a core prerogative of citizenship.[94] Limiting the right to vote, even for serious offenders, signals that they are not equal citizens of the country. Further, as incarceration depends on the carceral bargain for its legitimacy, the courts should be slow to accept limitations on rights that are totally unrelated to imprisonment.

[90] This Act returned the voting ban to its original form of disenfranchising offenders serving prison sentences of three years or more.
[91] At [185].
[92] *Raymond v Honey* [1983] 1 AC 1 at 10.
[93] *Taylor declaration* (HC), above n 58, at [25].
[94] See *Taylor declaration* (CA), above n 63, at [179] and [185].

IV. Freedom of expression

Section 14 of the NZBORA states: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

Freedom of expression is one of the more frequently litigated NZBORA rights in the prison context, probably because it is also one of the more frequently limited rights. This analysis focuses on two lines of freedom of expression cases: first, cases about access to the media, involving the right to impart information and opinions; and second, cases about access to information.

A. Access to media cases

1. TVNZ v Attorney-General [2004] 8 HRNZ 45 (CA)

Ahmed Zaoui was not detained as punishment. He was instead imprisoned because he was deemed a threat to national security. TVNZ's request for an interview was refused by the Chief Executive of the Department of Corrections. TVNZ applied for judicial review of the regulations that prohibited the interview with Zaoui, asserting that they breached the right to freedom of expression in NZBORA. The High Court rejected the application, so the matter was appealed to the Court of Appeal.

The Court of Appeal, firstly, accepted that the regulations themselves were lawful because there were "a number of sound policy reasons justifying limitation on news media interviews", including concerns about the order and security of the prison.[95] That preliminary limitation on s 14 was justified by regulatory concerns about the prison.

However, the Chief Executive's discretion to approve or reject media interviews was constrained by an NZBORA test involving "a balancing of that right against conflicting

[95] *TVNZ v Attorney-General* [2004] 8 HRNZ 45 (CA) at [13].

values."[96] A relevant factor in that balancing test was that "part of the effect of imprisonment as a punishment is curtailment of some freedoms including that of free speech."[97] The decision reflects that imprisonment, as a punishment, inherently limit s 14 to some extent. The Court did not restrict that to high-value freedom of expression, just to cases where an inmate is fully informed about what the interview will involve and "desires to be interviewed".[98]

This case was unique as there was "no element of punishment in [Zaoui's] detention."[99] Where punishment was concerned, there would be further considerations such as the interests of victims. With Zaoui and his prospective, risk-based detention, the only balancing factor was a potential risk to the public's confidence in the Immigration Act's secret process. That factor was not enough to decline the request for interview, because the Court did not consider that a TVNZ interview would appear to influence the Inspector-General, who was responsible for the secret process. The decision to refuse the interview was unreasonable and therefore unlawful.

Zaoui, as someone who was detained in prison but not sentenced to imprisonment, could not have his right to freedom of expression limited for reasons of punishment. Corrections would have had to show a different conflicting value, such as a risk to safety or the administration of the prison, in order to outweigh his right. No justification was put forward on that basis.

2. *Taylor v Chief Executive of the Department of Corrections* [2013] NZHC 2953

This was another case about a proposed interview by TVNZ. They wished to interview Arthur Taylor, who in 2013 was successfully challenging Corrections' smoke free prisons policy through judicial review. Unlike *TVNZ*, this judicial review was brought by the prisoner rather than the media.[100] The Court said that this was important because: "The issue has been framed as one involving prisoners' rights, as opposed to

[96] At [16].
[97] At [16].
[98] At [16].
[99] At [17].
[100] *TVNZ,* above n 94.

those of the media. That is the context in which the tension between policies underlying freedom of expression and prison security must be considered."[101] The Court thus was squarely confronting the issue of prisoners and how far their rights could be limited by Corrections' concerns about the regulation of the prison.

Heath J relied in part on *ex parte Simms,* a House of Lords decision about prisoners' access to the media.[102] In that case, Lord Steyn emphasised that "[n]ot all types of speech have an equal value" and limited his decision to the facts before him where prisoners sought to access interviews with media in order to challenge the soundness of their convictions.[103] That was high-value expression and the prison would struggle to outweigh it with concerns about efficiency.

The Court applied a balancing test. But the added consideration of the value of the expression, which was not present in *TVNZ*, meant that Corrections could more easily outweigh the right with regulatory justifications. Corrections put forward a regulatory concern about a possible violent protest. The factual basis for the protest was disputed by Taylor, but the Court assumed it was correct and found that "freedom of expression, in the form of an interview for a television programme about the smoke-free policy litigation, could [not] outweigh concerns about the good order and security of the prison environment."[104] The High Court here gave a hypothetical concern about the prison's security a heavy weight in comparison with what the Court viewed as political speech.

Taylor's political speech was given low weight because the Court found that "[t]he addition of Mr Taylor's voice to the debate would have added little", as the matter had already been litigated.[105] Based on Lord Steyn's judgment in *ex parte Simms*, prisoners were not "ordinarily" entitled to join debate on issues of wider interest.[106] Their right to engage in that kind of political speech was inherently limited by imprisonment and the deprivation of their liberty that goes with it. Because political speech was

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[101] *Taylor v Chief Executive of the Department of Corrections* [2013] NZHC 2953 [*Taylor expression* (HC)] at [32].
[102] *R v Secretary of State for the Home Department, ex parte Simms* [1999] 7 BHRC 411 (HL).
[103] At 419.
[104] *Taylor expression* (HC), above n 100, at [53].
[105] At [53].
[106] At [45].

inherently limited, the Court found that security concerns prevailed as a reason to limit Taylor's s 14 right.

This decision was reversed on appeal, but not before it was used as the basis for the following case.

3. *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227 (*Watson (No 1)*)

Scott Watson, convicted of two murders, had protested his innocence for his whole sentence and had exhausted his appeal rights. Mike White, a journalist, requested to interview him. Corrections refused because an interview would be detrimental to the interests of the victims of Watson's offending. They suggested that this was not a disproportionate limitation on the right to freedom of expression because the interview could be conducted by mail or by five minute telephone calls.

Dunningham J found, based on *TVNZ* and *Taylor*, that "a prisoner's right to freedom of expression is necessarily limited, both because that is inherent in the punishment imposed, and for reasons related to the effective administration of the prison."[107] However, preventing miscarriages of justice from being aired in public would go against the administration of justice, so it cannot form part of a proportionate punishment.[108] Any limitation on Watson's freedom of expression would have to be for regulatory reasons.

The Court applied the *Hansen* test and found that the rights limitation here, which restricted the method of communication between Watson and the journalist, was not rationally connected to protecting the interests of victims.[109] In obiter, the Court stated that prison security held the most weight as a regulatory justification for limiting s 14, even against allegations of a miscarriage of justice. "Where no concerns of prison security are raised, and where the communication is to a reputable journalist, then [an allegation of miscarriage of justice] is a circumstance where the rights in s 14 of

[107] *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227 [*Watson (No 1)*] at [48].
[108] At [50].
[109] At [67].

NZBORA should almost always prevail," the Court stated.[110] It is not clear, though, how intense or readily apparent the security concerns in the prison would have to be to prevent someone like Watson from exercising their s 14 right.

Importantly, this decision undertakes a *Hansen* analysis of the limitation, rather than the less rigorous balancing analysis used in *TVNZ*. That is probably because the Court is unprepared to be deferential to Corrections' justifications where they involve victims' rights and allegations of a miscarriage of justice, rather than concerns about prison administration.[111] The *Hansen* test meant that, rather than assessing victims' rights in the round as a value equivalent to freedom of expression, the Court looked to the relationship between the limitation on Watson's expression and the limitation on rights. This lead to clear reasoning around why Watson's right could not be justifiably limited by Corrections. The same clarity is not apparent in other freedom of expression cases where the balancing test is used.

4. Taylor v Chief Executive of Department of Corrections [2015] NZCA 477 (*Taylor expression* (CA))

The facts here were the same as in *Taylor expression* (HC) above. Taylor appealed the decision that rejecting TVNZ's application to interview him was lawful. The Court of Appeal overturned the High Court, finding that Heath J had given inadequate weight to Taylor's right to freedom of expression.

In the two years before the appeal was heard, all requests to interview Taylor were declined by the Chief Executive. The Court of Appeal held that this was not relevant to the case, but the pattern of declining interview requests shows the immediate impact of decisions on prisoners' rights have. If there is a lawful justification for limiting a right, it appears that Corrections *will* limit it. This is particularly so where, as is the case for interviews with prisoners, upholding the right is inconvenient for Corrections.

The Court of Appeal held that it was "unnecessary for us to determine whether the approach to administrative decision-making under the Bill of Rights should always

[110] At [68].
[111] See [49].

embrace a full proportionality analysis of the type adopted in Hansen."[112] Instead, the Court decided to use the balancing test set out in *TVNZ v Attorney-General*.

The Court of Appeal was not prepared to be deferential to Corrections' concerns about security and good order of the prison; "Where human rights are involved, authorities tend to be supervised intensively because they do not have special expertise or authority on rights and there are important individual interests at stake."[113] The Court looked at the basis for Corrections' claim that Taylor was a risk to security and found several errors in their assessment. To minimise the impairment of the s 14 right, the decision-maker must consider whether "an interview [could be granted] in a format that sufficiently addresses and mitigates the identified risks to safety and good order."[114] This consideration of minimal impairment makes the balancing test more rigorous. It is unclear why the Court added this element, from *Hansen*, to the balancing test rather than adopting full s 5 analysis.

Contrary to the High Court, the Court of Appeal considered that Taylor was an "advocate for prisoners' rights'" and his thoughts on the smoking ban litigation would be in the public interest. This was partly because Corrections had previously allowed prisoners who supported the smoking ban to appear on TV; "That would be consistent with one of the rationales for the right to freedom of expression … by advancing public debate on matters of interest to the community or a section of it."[115] Taylor's speech, therefore, was of a high value. It was not outweighed by the hypothetical concern about security, so the decision was reversed and Taylor could give an interview.

5. *Watson v Chief Executive of the Department of Corrections (No 2)* [2016] NZHC 1996

Following *Watson (No 1)*, Mike White was allowed to interview Watson. Subsequently, White wanted to interview Watson along with Gerard Hope, the father of one of the victims of Watson's offending. Corrections decided that White could attend the

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[112] *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477 [*Taylor expression* (CA)] at [84].
[113] At [89].
[114] At [85].
[115] At [106].

meeting, but not in his capacity as a journalist. Their decision also prevented him from recording the meeting. Watson sought judicial review of the decision.

The starting point was that a "prisoner's rights in respect of some types of speech will be outweighed by the deprivation of their liberty from a sentence of imprisonment," the Court stated.[116] Low value expression is inherently limited by imprisonment.

However, because Watson's speech was of a high value, it could not be limited unless it was outweighed by Corrections' concerns. Mallon J balanced Watson's right to freedom of expression against regulatory concerns raised by Corrections.[117] Those concerns were that because this was a tense and unpredictable meeting, an "incident" was likely to arise which could be damaging to Corrections.[118] However, as White was already going to be present at the meeting, the Court found that it was unreasonable for Corrections not to allow him to record it. Applying the balancing test again, Mallon J stated that "Corrections has not demonstrated that the practical considerations which it relied on outweighed that right".[119]

In applying the balancing test, the Court did undertake an in-depth analysis of whether or not Corrections' justification is rationally connected to the limitation on Watson's s 14 right.[120] Because Corrections acknowledged that Watson could express what happened at the interview at a later date, there was no rational connection between their objective of protecting their public image and the decision to prevent White from recording the meeting. The decision, in substance, applies the *Hansen* approach even though the Court concludes on the basis of unreasonableness and the *TVNZ* balancing test.

6. Smith v Chief Executive of the Department of Corrections [2019] NZHC 2472

A journalist wanted to interview Smith, who had recently been returned from his escape to South America, about the conditions of his detention in the high security

[116] *Watson v Chief Executive of the Department of Corrections (No 2)* [2016] NZHC 1996 at [40].
[117] At [51].
[118] At [46].
[119] At [51].
[120] At [43].

wing of the prison. Smith alleged that his human rights were being breached by those conditions. The Chief Executive declined the request, based on victim's rights and concerns for Smith's personal safety. Smith sought judicial review.

The Court again endorsed the idea that some lower-value forms of expression are limited inherently by imprisonment.[121] Smith's speech was of a high value where it related to human rights, because "[t]here is undoubtedly public interest in knowing how prisoners are managed and treated, particularly because the vast majority of prisoners will eventually be reintegrated into the community".[122] As in *Watson*, the Court undertook some *Hansen*-type analysis while overtly applying the balancing test; Doogue J found that refusing a TV interview would not prevent the publicity that Corrections was concerned about (i.e. the limitation was not rationally connected to the objective).[123]

Some of the other proposed topics for discussion held no public interest. These examples of low-value expression from a prisoner, which could be limited, were: his past offending, his escape to South America, his current circumstances, and his plans for the future.[124] The interview could not be totally refused, but it could be limited to those topics in which public interest exists. As such, the decision emphasises that the value of the prisoner's expression is the central factor in determining whether Corrections should allow them to be interviewed.

B. Access to information cases

1. Hudson v Attorney-General [2017] NZHC 1441

Hudson was a convicted murderer who, like Watson, wanted to speak to a journalist about his claim that a miscarriage of justice had occurred. He wanted to access all of the legal papers from his trial so that he could pass them on to a journalist. Rule 4.5a of the Authorised Property Rules prohibited access to legal papers except where

[121] *Smith v Chief Executive of the Department of Corrections* [2019] NZHC 2472 at [47].
[122] At [53].
[123] At [40].
[124] At [54]-[55].

prisoners had current legal proceedings. Hudson did not have current legal proceedings, as he had exhausted his appeal rights.

The starting point for Ellis J's analysis was that allegations of miscarriages of justice involved high-value expression.[125] That expression was of even higher value given that Hudson wanted to talk to a journalist about the material, because of "the desirability of ventilating alleged miscarriages of justice in public".[126]

To justify the blanket prohibition on access to non-current legal materials, Corrections submitted that there were regulatory concerns about access. These concerns were: other prisoners might gain access to confidential material; the large amount of paper was a fire risk and could conceal contraband; it would be difficult for the prisoner to move cells with the materials; and prisoners should not be preoccupied with their previous legal proceedings.[127] Ellis J found that these concerns could not justify the restriction that the rule posed on "a high value manifestation of the s 14 right".[128] There was no legal basis for imposing a rule that could have such serious impacts on high value expression.

In reaching this conclusion, the Court did not undertake a balancing test. Instead the Court applied the approach from *Drew v Attorney-General*, finding that the rule was ultra vires its empowering provision because of the serious breach of s 14.[129] That reasoning on the rule's lawfulness directly recognises that prisoners' NZBORA rights limit Corrections' power to regulate the prison environment.

2. *Nuku v Chief Executive of the Department of Corrections* [2018] NZHC 2549

Nuku wanted access to his trial audio files, which were stored on 93 separate CDs. Corrections was prepared to let him access the CDs, but he could only have twelve at a time and he could only swap CDs during working days. The authorised property rules

[125] *Hudson v Attorney-General* [2017] NZHC 1441 at [35].
[126] At [36].
[127] At [44].
[128] At [47].
[129] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68]

allowed only twelve CDs but (since *Hudson*[130]) allowed almost unlimited access to legal papers. The question was whether the CDs, bearing in mind Nuku's right to freedom of expression, were "legal papers" or "CDs" for the purposes of those rules.

Hinton J held that the CDs were legal papers. However, citing *Hudson*, he stated that "no prisoner has any absolute right of access to any item of property."[131] The judgment notes that "a CD could be converted to a weapon and used to injure the prisoner, another prisoner, or anyone else" and further that if Nuku had to share his cell in the future, "Corrections would have clear obligations to ensure the safety of both prisoners."[132] So Corrections could legitimately limit Nuku's right to access the CDs if concerns about prison safety arose, such as if he had to share a cell. Without those concerns, Nuku was entitled to keep all of the CDs in his cell "subject to any relevant change in circumstances".[133]

Nuku also argued that s 14 of NZBORA meant he should be able to access all the CDs at all times. Corrections argued that removing the CDs or limiting access to them, if safety concerns did arise, would be a demonstrably justified limit on Nuku's right. The Court agreed with Corrections, because if concerns about prison safety did actually arise, limiting Nuku's access to his CDs would be a proportionate limitation on his right.[134]

This decision provides some clarity around how prison safety might outweigh the s 14 right. Even in a case of high-value expression relating to a miscarriage of justice, Corrections' concerns about CDs being converted into weapons could limit Nuku's right, but not absolutely. The decision does demonstrate that the concerns about safety must be immediately apparent, rather than apparent, in order to be accepted as a justification for limiting rights.

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[130] *Hudson*, above n 124.
[131] *Nuku v Chief Executive of the Department of Corrections* [2018] NZHC 2549 at [25], citing *Hudson,* above n 124, at [42].
[132] At [32].
[133] At [33].
[134] At [43].

C. Discussion of freedom of expression

The right to freedom of expression is limited for prisoners, but it is unclear to what extent the right is limited. The line between low-value expression and high-value expression, and limitations which form an inherent part of the sentence and those which must be justified by some other reason, is not apparent. However, three points from these authorities do help to clarify the approach in terms of why freedom of expression is limited for prisoners.

Firstly, low value expression is limited as an inherent part of a prison sentence. It is part of the liberty that is removed as punishment. Most of the New Zealand authorities rely on *ex parte Simms* for the statement that low value expression "is outweighed by deprivation of liberty by the sentence of a court".[135] The cases therefore assess the value of the speech involved before considering the justification for the limitation on rights.

However, removing liberty from prisoners does not extend to limiting high value expression. High value expression can only be limited in the face of pressing regulatory concerns raised by Corrections. Many of the cases on this issue involve allegations of miscarriages of justice, which is expression of the highest value. *Taylor expression* (CA) and *Smith* demonstrate that topics related to the treatment of prisoners are also in the public interest, and therefore have a high value.[136] Corrections are required to accommodate prisoners' high-value expression unless there is a serious concern about the security of the prison that outweighs the right.

Finally, the test applied to regulatory limits on high value expression is unsatisfactory. The High Court is still bound to apply the balancing test from *TVNZ*, because the Court of Appeal in *Taylor* did not adopt the proportionality analysis from *Hansen*.[137] However, in applying the balancing test, it is clear that the High Court considered factors other than the value of the right and the importance of the limitation. The Court considered alternatives that could reduce the impairment of the right, as well as

[135] *Ex parte Simms,* above n 101, at 419 per Lord Steyn.
[136] *Taylor expression* (CA), above n 111, at [106] and *Smith,* above n 121, at [53].
[137] *Taylor expression* (CA), above n 111, at [84].

whether there is a rational connection between the limitation and the objective. That is proportionality analysis, but the judgments do not make that explicit. The *Hansen* test would more appropriate in this setting because high value expression is involved. Corrections' justifications should be subject to rigorous and transparent analysis by the Court.

V. Unreasonable search and seizure

Section 21 of NZBORA states: "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

A. Strip searches

The right of prisoners to be free from unreasonable search and seizure is already limited by 17 provisions authorising searches in the Corrections Act. This line of cases on unreasonable search and seizure relate to the power to strip-search prisoners, set out in s 98. The strip search is the most invasive search that Corrections can undertake.

1. Forrest v Attorney-General [2012] NZCA 125

Forrest was strip-searched on his return from "the sally port", which was a room in the prison that inmates had to walk through to travel between two different blocks. Corrections argued that the strip-search was lawful and reasonable because the sally port was an unsupervised area of the prison, which gave them grounds to strip search Forrest. Forrest did not agree and claimed that it was a breach of his s 21 right.

After finding that the sally port was supervised and that the strip search was therefore unlawful, the Court moved on to consider whether the strip search was unreasonable or not. That involves consideration of s 98 of the Corrections Act. That section sets out the lawful reasons to require a strip search, but fundamentally, the power can only be exercised if a strip search is reasonably necessary to detect an unauthorised item.[138] The Court stated that whether the search is reasonably necessary is "a very fact-specific inquiry" depending on the other options available to Corrections, the prisoner's location (e.g. returning from the kitchen), and the prisoner's history of concealing unauthorised items on their body. [139] The decision emphasises that the officers must assess the risk posed by the particular prisoner, not just the general situation or

[138] Section 98(5), see [13]-[14].
[139] *Forrest v Attorney-General* [2012] NZCA 125 at [14].

danger. However, the Court stated that "[w]e should not be prescriptive about when strip searches are or are not appropriate in subs (6) situations", but what is inarguably required is that the officers "must turn their minds to the circumstances and the options available to them".[140]

The officers in this case did not turn their minds to considerations about unlawful items and they could not justify the search without meeting that legal requirement.[141] The Corrections officers involved in the strip searches nonetheless gave evidence about why the searches were justified. Their first justification was that there had been a recent threat to staff in the interview room attached to the sally port. The second justification was that their practice was to always strip search inmates entering J Block.[142] Both of those justifications were regulatory by either targeting a particular security risk or developing a practice to mitigate general security risks. They were rejected because the officers "appear not to have considered at all whether this was an occasion in which a strip search was lawful."[143]

The Court also noted that Forrest resisted the strip searched and was restrained. The unlawfulness of the strip search made the restraint an unlawful assault by the officers.[144] Whether or not there were good reason for the strip search each time that Forrest was strip searched did not matter, because the officers had not followed the legal requirements of the Corrections Act. Forrest's individual right to be free from unreasonable search and seizure was given greater weight than the importance of mitigating security risks within the prison.

The Court made general comments about the right when considering whether to award Forrest damages for the breach of s 21. After noting that "the liberties protected by the right against unreasonable search are very important", the Court stated that "there must be an air of reality about life in prison" where strip searches are common.[145] Further, the Court found there was a need to deter Corrections from unlawful strip searches, because "the evidence in this case suggests other prisoners have been strip

[140] At [15].
[141] At [16].
[142] At [16].
[143] At [34].
[144] At [36].
[145] At [37].

searched on occasions where such searches may not have been lawful."[146] The Court awarded Forrest $600 in compensation for the strip search.

The Court is unequivocal that the recent threat of violence, a regulatory concern, is not a valid reason to limit Forrest's s 21 right. However, the comment that there must be an "air of reality" about prison conditions suggests that some regulatory limitations on s 21 could be justified in other cases. Aside from that comment, the Court clearly prioritises the state's responsibility of upholding the carceral burden and protecting prisoners' individual rights over regulatory concerns about the safety of the prison.

2. *Reekie v Attorney-General* [2012] NZHC 1867

Reekie was serving a long sentence of preventative detention. He had been placed in the High Care and Special Needs units at various points during his sentence due to his risk of self-harm. In that unit, he had been subject to routine strip searches every time he entered his cell. Corrections did not dispute this, but maintained that the searches were reasonable because they were necessary to protect Reekie from his risk of self-harm. Like *Forrest*, the case was about a blanket, regulatory decision by Corrections to strip search all prisoners in a particular unit.

Wylie J noted that "it seems that strip searches were the norm and that no individual consideration was given to each particular search."[147] Given the risk of self-harm among the prisoners in Special Needs, the decision acknowledges that "it may well have been necessary for the inmates to be strip searched on many occasions when they returned to their cell".[148] But that could not justify a policy of routine strip searching; Corrections had to consider each individual case.

The Court's conclusion was that the right in s 23(5) of the NZBORA, to treat those who are arrested or detained with "humanity and with respect for the inherent dignity of the person" was breached.[149] The right in s 21 was also breached by the unlawful searches, but the ongoing and numerous searches elevated that into a breach of the

[146] At [38].
[147] *Reekie v Attorney-General* [2012] NZHC 1867 at [262].
[148] At [265].
[149] NZBORA s 23(5), *Reekie* at [290].

more fundamental right in s 23(5). *Taylor v Attorney-General* treated this decision as relevant to unlawful search and seizure claims, but noted that where searches are conducted routinely rather than as a one-off, a claim under s 23(5) will probably be appropriate due to the effect on prisoners' dignity.[150]

This decision demonstrates that the right in s 21 is a fundamental limit on the power of Corrections to regulate the prison. The right to be free from unreasonable search and seizure is so fundamental in the prison context that repeated breaches affect the "inherent dignity of the person". Strip searches are exactly the kind of coercive power that makes prisoners more vulnerable to breaches of rights than other citizens, so the Court is reluctant to allow limits on the right beyond those set out by the Corrections Act.

3. Mitchell v Attorney-General [2017] NZHC 2089

A prison guard decided to strip search all inmates within the Fergusson Wing of the prison after hearing that there was cannabis in the wing (though the informant did not identify who specifically had cannabis). Mitchell resisted the attempts to strip search her, and was subject to a rub down search instead, but the fifteen other prisoners in Fergusson were strip searched.

The judgment noted that "the Act provides for a range of less intrusive measures than a strip search" and the prison officers needed to consider those options, particularly given the vague information they had received.[151] The strip search was therefore not necessary under the Corrections Act. But Thomas J stated that a strip search could be unlawful and not unreasonable under the NZBORA. The question depended on the circumstances.[152] Here, there was no doubt that the searches were unreasonable.

Another issue in the proceedings was whether Mitchell had standing to bring this claim. The High Court found that she did due to the importance of upholding the s 21 right in the prison context, and Mitchell's legitimate fear of the unlawful strip search

[150] *Taylor v Attorney-General* [2018] NZHC 2557 at [51]-[52].
[151] *Mitchell v Attorney-General* [2017] NZHC 2089 at [15].
[152] At [20].

which she avoided "only by adamant and persistent passive resistance."[153] Thomas J noted the "obvious power imbalance", that "prisoners are among the most marginalised members of society", and the public interest in holding Corrections to account for breaches of rights.[154] The decision to strip search was meant that the women "underwent an invasive and degrading procedure" and the judgment notes that they may not even be aware that their rights were breached.[155] The High Court issued a declaration that the strip search of the other 15 prisoners was unlawful and unreasonable, but declined to grant a declaration that the "attempted" strip search of Mitchell was unreasonable.[156]

Again in this case, the Court emphasises the importance of s 21 in the prison context. With the explicit recognition of the "power imbalance" between prison staff and prisoners, the Court recognises that Corrections have to consider individual rights when they use coercive powers like strip searching. General regulatory concerns about drugs are not enough to limit individual rights when it comes to bodily integrity.

It is questionable whether a strip search that is unlawful under the Corrections Act could be a justified limit on prisoners' rights. Thomas J leaves a grey area between unlawful and unreasonable that does not seem appropriate in the prison context, particularly given the extensive search provisions in the Corrections Act.[157] It would have been much clearer, in terms of providing NZBORA guidance to Corrections, to find that all unlawful searches in the prison would be unreasonable. The distinction between unlawful and unreasonable makes it possible that Corrections could justify unlawful searches for regulatory reasons.

4. *Taylor v Attorney-General* [2018] NZHC 2557

Prison officers were attacked by prisoners who had shanks. They suspected some of the prisoners involved were drunk. The prison manager made the decision to strip search every prisoner in the East Division of the prison (209 people in total) as a result.

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[153] At [60].
[154] At [51]-[52] and [64].
[155] At [65].
[156] At [66].
[157] See ss 89-103 of the Corrections Act.

He said in evidence that he wanted to completely eliminate the risks that weapons and alcohol posed to the prison, and a mass strip search was the best way to do that. He acknowledged that he had not considered any of the prisoners' individual circumstances, such as a history of having weapons.

The main argument for Corrections was that due to the recent attack, the mass strip search was necessary under s 98 of the Corrections Act and it was a reasonable search as a result. Corrections argued that the shanks were a "health and safety issue for prisoners and staff alike".[158] Peters J rejected this. Referring to *Mitchell*, he found that a strip search of a prisoner would only be lawful and reasonable if the prisoner's individual circumstances, such as the history of them having drugs or weapons or alcohol, made it necessary to conduct a strip search. A blanket decision, even in a wing of the prison where contraband had been detected, would never be lawful under the Corrections Act. Peters J stated that "there is no power to conduct a mass search."[159]

The Attorney-General conceded that if the strip search was unlawful, it would also be unreasonable in this case.[160] So s 21 was, again, breached by a mass strip search of prisoners. The Court awarded $1000 to both of the plaintiffs for the unlawful strip search. This increase on the sum in *Forrest* was intended to "bring home to the Department the importance of compliance with the legislation".[161]

This case again highlights the importance of the need for circumstances relating to each prisoner in order to carry out a lawful search. It does not resolve the question of whether a search can be unlawful but not unreasonable, because the search here was clearly both.

B. Discussion of unreasonable search and seizure

The courts are unwilling to allow limitations on the right to be free from unreasonable search and seizure. That is because the test for justification is built into the right. If a search is reasonable, it has been justified. If a search is unreasonable, it cannot be

[158] *Taylor,* above n 149, at [38].
[159] At [47].
[160] At [60].
[161] At [93].

justified. Because of that inbuilt limit, it is not accurate to say that a limitation on s 21 is an inherent part of imprisonment. But the right does apply differently in the security-focused prison environment, where Corrections have an extensive list of possible searches set out in the Corrections Act.[162]

The Corrections Act justifications for strip searches, in s 98, are regulatory in nature. They involve detecting unauthorised items in the prison, which are generally weapons or drugs. The courts in these NZBORA cases have interpreted that section to require consideration of each prisoner's individual circumstances. Because of the s 21 right, the section cannot authorise a mass search of a block or a policy of searching prisoners in particular locations. Each decision to strip search requires consideration of the prisoner's background. The decisions uphold individual rights over regulatory pressures to make the prison a safer environment.

The authorities on strip search decisions do not confirm that the Corrections Act is an exhaustive list of the reasonable searches available in the prison. It is not clear how an unlawful search which failed to meet the requirements of the Act could represent a justified limit on the s 21 right, as it would not be "prescribed by law". Aside from that problem, which is unresolved as it has not arisen on the facts of the strip search authorities, the Court will not limit the right.

All of the cases on strip searches involve unlawful searches, where Corrections has failed to consider the individual circumstances of the prisoners searched. The courts do not allow this, repeatedly emphasising that Corrections need to consider the circumstances of each prisoner in order to justify a search. The pattern of awarding damages for breaches of the right shows that the courts take breaches seriously and wish to deter Corrections from breaching the right. Further, the fact that repeated breaches of the right amount to a breach of s 23(5), the right to be treated with dignity and humanity, demonstrates that the right is a significant limit on Corrections' regulatory powers. The strip search cases are a good example of the courts using prisoners' rights as a hard limit on the power to regulate the prison. However, repeated

[162] Sections 89-103 of the Corrections Act; Parkes, above n 47, at 652.

breaches of s 21 demonstrate that Corrections does not view prisoners' rights in the same way.

VI. Conclusions on the approach to prisoners' rights

I have reviewed significant cases on the right to vote, freedom of expression, and freedom from unreasonable search and seizure in the prison. Based on those cases, I draw four conclusions about limitations on prisoners' rights. First, there is no cohesive theory of punishment underpinning the decisions about prisoners' rights. Secondly, the reasoning on justifications for rights limitations is not transparent in decisions about prisoners' rights. In particular, the full *Hansen* analysis of demonstrable justification is largely avoided. On a more positive note, New Zealand courts are relatively loathe to defer to the concerns of Corrections in comparison with other jurisdictions. Finally, prisoners bring these cases in the absence of a culture within Corrections that protects their rights. Overall, the protection of prisoners' rights in these cases is a success for the NZBORA but a failure for Corrections in terms of upholding prisoners' rights.

A. Mixed theory of rights and punishment

Decisions on prisoners' rights do not justify limitations on a markedly retributive or utilitarian basis. This is in contrast to the Canadian approach where, as Manfredi notes, "the theory of criminal punishment underlying the various decisions nullifying prisoner disenfranchisement in Canada is decidedly utilitarian."[163] The New Zealand cases on the right to vote rely on classic retributive concerns about proportionality, where the court is very concerned to avoid arbitrariness in sentences, even if that means closely evaluating the justifications for an Act of Parliament. On the other hand, the cases about freedom of expression focus on the right's rehabilitative value to prisoners in engaging with political issues or current events. That takes a utilitarian view of the prison's function.

However, it is clear that the court is willing to hold Corrections to its obligation to respect prisoners' rights. The strip search cases demonstrate that the court is willing to reject regulatory justifications put forward by Corrections around the security of the

[163] Christopher Manfredi "In Defense of Criminal Disenfranchisement" in Alex C Ewald and Brandon Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press, Cambridge, 2009) 259 at 268.

prison. That may be because the Corrections Act, with its 19 dedicated sections on searches, gives an almost exhaustive list of the situations in which it is "reasonable" to conduct a search in the prison context.[164] Where the law is less prescriptive regarding Corrections' options, as in the freedom of expression cases, justifications of security are given a greater weight. But the court still requires Corrections to justify limiting high-value expression in each individual case.

In these cases, Corrections attempt to justify limitations on rights with the need for penal regulation rather than as an inherent part of imprisonment. Those regulatory justifications are generally based on security (the risk of violence) or drugs (the risk of contraband). Those limitations might be accepted by the court if that risk outweighs the importance of the right involved, because the s 5 test depends on context. However, rights limitations based on the context of particular prisons are changeable and will vary between prisoners. For example, two prisoners serving the same sentence might be subject to different limitations on their rights due to the risk posed by other prisoners in their block. The reasoning on these rights limitations does not take into account the importance of proportionality in a sentence of imprisonment. By focusing solely on the risks within the prison and not the purpose of the prison as a whole, Corrections can justify limitations that can undermine the proportionality of imprisonment by subjecting prisoners to different limitations on rights.

In Canada, proposals for judicial oversight and possible reduction of sentences for breaches of rights have been developed as a result of these collateral rights limitations in prisons. Justice Arbour, in particular, has been an advocate for increased judicial power to provide a reduction of sentence as a remedy where prisoners' sentences have been made disproportionate as a result of rights breaches.[165] If collateral rights limitations go too far, they alter the nature of imprisonment. To avoid the situation where the prison is treated like a "black box" without legal actors considering what happens inside it,[166] it is important to assess the judicial attitude to what happens inside the prison.

[164] The Corrections Act ss 89-103.
[165] Parkes, above n 47, at 674.
[166] Kerr, above n 56, at 86.

B. Unwilling to defer to Corrections

There is a wealth of academic writing about judicial deference to the concerns of prison management in other jurisdictions. My analysis of these three rights, however, demonstrates that New Zealand courts are relatively unwilling to defer to Corrections' concerns. Parkes describes the deferential approach in Canada as follows: "Instead of understanding these decisions as analogous to classic criminal ones that require more cogent justification for state limits on rights due to the imbalance of power between individual citizens and the state, prison officials are often accorded deference by courts, particularly when it is alleged that "safety" or "security" is at stake."[167] New Zealand courts, by contrast, have explicitly recognised the imbalance of power between prison officials and prisoners in cases about security.[168]

The approach of the New Zealand courts is best illustrated by the appeal on the *Taylor (Freedom of Expression)* case. The Court of Appeal rejected the factual basis for the concerns that Corrections put forward, where they had effectively alleged that Taylor's television interview could start a riot in the prison.[169] The Court was prepared to accept the prisoner's evidence that a riot was highly unlikely as a result of Taylor's interview. *Nuku* illustrates a similar point, where the Court rejected that hypothetical concerns about the danger of having CDs in a cell could limit Nuku's right. Unless those concerns *did in fact* eventuate, Corrections did not have a justifiable reason to limit Nuku's right.[170]

While the non-deferential approach is promising, it is not consistent. Other decisions indicate that there is some level of deference towards Corrections. In *Forrest*, the Court of Appeal stated that "there must be an air of reality about life in prison" when considering the s 21 right.[171] These comments imply that there is some level of deference to the prison management which is taken into account when assessing whether a limitation on rights is justified. Those comments do not sit easily with the courts' recognition of the power imbalance between prisoners and prison officials.[172]

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[167] Parkes, above n 47, at 670.
[168] *Mitchell,* above n 140, at [51]-[52].
[169] *Taylor expression* (CA), above n 111, at [23].
[170] *Nuku,* above n 130.
[171] *Forrest,* above n 128, at [37].
[172] *Mitchell,* above n 140, at [51]-[52].

A deferential approach to Corrections is problematic. It would place prisoners' rights on a different, lower level to other citizens' rights. It also risks leading to the problems seen in overseas jurisdictions where "courts create the conditions whereby society's most despised population, a population disproportionately comprised of people of color, may routinely suffer systematic abuses of state power without any meaningful judicial check".[173]

C. Greater transparency needed

The central problem with these decisions is that the approach of the courts is opaque. For example, it is unclear how far the "air of reality" about life in prison can justify searches that would otherwise be unreasonable.[174] It is clear that in prison, limitations on rights are more easily justified. But there is a stopping point to that reasoning, as shown in the unreasonable search and seizure cases where the court will usually not accept that an unlawful search could be reasonable.

For freedom of expression, the court courts are willing to uphold limitations based on the regulation of the prison, but the reasons they uphold those limitations are not clearly articulated. The courts do not engage in a full *Hansen* analysis or a clear balancing of rights and conflicting interests in these decisions. Debeljak writes that "decision-making that is not rights-justified, and decisions-makers who are not willing to justify decisions in rights terms, are no longer acceptable in 'the age of rights'."[175] That justification problem is apparent in New Zealand, too, even if the courts are less deferential to Corrections. Just two of the cases analysed apply the *Hansen* demonstrable justification test. The balancing test applied in the freedom of expression decisions is a less rigorous evaluation of Corrections' reasons for limiting a right. The balancing test assesses the right and the reason for the limitation as being equally weighted, even though one of the concerns involves human rights and the other does not. Under the heading of a balancing test, the courts have begun to assess the proportionality of limitations in terms of rational connection.[176] Proportionality

[173] Dolovich, above n 38, at 978.
[174] *Forrest,* above n 128, at [37].
[175] Debeljak, above n 48, at 1382.
[176] See, for example, *Watson (No 1),* above n 106, at [67] and *Smith expression,* above n 121, at [40].

analysis of limitations is necessary in the prison context, where rights are frequently limited.

Debeljak highlights that full proportionality analysis of limitations, as through the *Hansen* test, is central to ensuring that prisoners' rights are protected. She writes that "proportionality analysis often provides the solution to the rights restrictions - it helps to identify overreaches and excesses of laws and decisions, allows such excesses to be softened, helps to ensure the minimum intrusion on rights, highlights requisite safeguards, and ensures individualised decision-making."[177] A balancing analysis, as the New Zealand courts undertake in the freedom of expression cases, does not include the same consideration of the alternatives available to Corrections. Debeljak concludes that in the prison context, slanted as it is against the prisoner, limitations on rights "must be fully articulated against the standards of reasonableness and justifiability, providing transparency of and accountability for decision-making."[178] A similar process of holding Corrections to a high standard of rights justification would provide greater transparency around the rights restrictions in prisons.

D. Corrections fails to uphold the carceral burden

The cases on these three rights demonstrate that the Court is willing to protect prisoners' rights with the NZBORA. But in the prison, the effect of those NZBORA judgments is limited.[179] For example, both the freedom of expression cases and the strip search cases show a pattern of Corrections breaching the same rights repeatedly, even after judgments from the Court of Appeal stating that blanket decisions were unlawful. On the other hand, the right to vote has been returned to prisoners serving sentences of three years or less with an amendment to the law after the *Taylor (Voting)* judgment from the Supreme Court. But prisoners have since raised concerns about their access to enrolment, which is regulated by Corrections.[180] Even if the law is responding to concerns about prisoners' rights, the flow-on effects of the law depend to a large extent on whether or not it influences the Corrections Officers who have

[177] Debeljak, above n 48, at 1381.
[178] Debeljak, above n 48, at 1337.
[179] Stanley, above n 52, at 10.
[180] Anna Leask "Prisoner voting: Inmates 'denied' information on election, referendums, says high profile ex-con" *The New Zealand Herald* (online ed, Auckland, 15 September 2020).

discretion in prisons. Without that culture of rights respect in the prisons, it falls to prisoners to litigate for their rights in individual cases.

It is questionable whether the state is meeting its carceral burden in New Zealand. The carceral burden cannot depend on constant judicial enforcement of rights, because that situation leaves it to individual prisoners to identify and litigate on rights breaches. That creates inequitable outcomes because "the causal or cumulative effects of colonisation, criminalisation or inequalities go unaddressed by individualised legal processes."[181] Compared to an awareness of and respect for rights within Corrections, litigation has little prospect of making real change. The *Mitchell* strip search case demonstrates the issue. Although Mitchell brought the case, she was aware of her rights and had resisted the strip search. The other women in the block were not aware of their rights, so had undergone the "degrading and invasive" search.[182] But the other women probably did not have the legal awareness or the resources to litigate against Corrections. Mitchell could not get a monetary remedy on their behalf because they were not involved in the litigation.

This is a common problem that cannot necessarily be solved by the courts or amendments to the NZBORA. Even with the entrenched rights-protections offered by the Canadian Charter, which is more powerful than the NZBORA, prisoners have found the instrument to have a relatively low impact on their rights. Parkes notes that "at a minimum" the Charter would be expected to act as a check on the government's power in closed institutions like prisons, but "the experience of daily life in prisons and jails" does not reflect the fact of legislative rights recognition.[183] Parkes' conclusion does not express much hope that the courts will be able to influence the rights culture in prisons, no matter what remedies they are empowered to provide for prisoners. "To be sure, the courts alone cannot ensure that a *"Charter* culture" prevails in Canadian prisons. In fact, experience has taught us that effective oversight and accountability of prisons is extremely difficult to put in place, perhaps due to the nature of imprisonment itself which arguably represents the very antithesis of fundamental values such as liberty and human dignity."[184]

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[181] Stanley, above n 52, at 9.
[182] *Mitchell*, above n 140, at [60].
[183] Parkes, above n 47, at 630.
[184] Parkes, above n 47, at 675.

The outlook is better in New Zealand. Our legal system certainly does not face the outcome identified by Parkes that "prisoners have, in some significant ways, been treated by courts and legislatures as temporary outcasts from a meaningful form of rights protection."[185] Prisoner litigation is not a perfect protection, but it is relatively common and frequently successful. In cases of particularly serious breaches, the Court will award tangible compensation in the form of *Baigent's* damages.[186] The cases recognise that the human rights of prisoners cannot be easily swept away with operational concerns about the prison, which is an acknowledgement of something like the carceral burden: because we put people in prison, as a society, we are obliged to protect their rights. But Corrections does not exhibit the same recognition of prisoners' rights. The line of cases on strip searches, in particular, demonstrates that even after multiple judgments stating that a blanket decision to strip search was unlawful, Corrections continued to make such decisions. It was only when monetary penalties started to be imposed that Corrections dropped the practice.[187]

E. Conclusion on prisoners' rights

All three of the rights I have analysed are affected by a sentence of imprisonment in some way. Fundamentally, Corrections need to do more to ensure that they are respecting the basic human rights of prisoners and the courts need to make it clear which rights should be respected and when. Currently, the decisions on these three lines of cases involve a mixture of balancing tests and presumptions that do not amount to a coherent theory of rights in the prison. Both the courts and Corrections need to respect prisoners' rights. It should not fall to prisoners to enforce their own individual rights. Finally, while prisoner litigation has been successful in New Zealand, its prevalence has also illustrated the broad range of rights that are infringed in a sentence of imprisonment.

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[185] Parkes, above n 47, at 629.
[186] Although this does not often reach prisoners because of the Prisoners' and Victims' Claims Act 2005.
[187] See Noel Whitty "Human rights as risk: UK prisons and the management of risk and rights" (2011) 13 Punishment & Society 123 at 124.

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