

# Race as civic felony\*

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The highly particular conception of ‘race’ as national ‘principle of social vision and division’ (Bourdieu 1989) that America has invented, virtually matchless in the world for its rigidity and consequentiality, is a direct outcome of the momentous collision between slavery and democracy *after* bondage had been established as the major form of labor conscription and control in an underpopulated colony home to an agrarian system of commercialised production (Fields 1982). No other society has combined those two contrary principles of social and political organisation: bondage was abolished in the Cape colony in 1834, seven decades before the latter merged into the nascent South African Republic; the French restored slavery under Napoleon in 1802 after suppressing it in 1794 but it concerned only far-away colonies and it was eradicated in 1848, long before the Third Republic firmly established democratic principles; Brazil retained slavery longer but it was a moribund institution that persisted until 1888 under a monarchical regime. That the USA alone was a *slaveholding republic* premised on the doctrine of natural rights explains its elaboration of an aversive and all-encompassing conception of ‘race’ as denegated ethnicity geared to reconciling the ‘self-evident truth’ that ‘all men are created equal’ and endowed ‘with certain unalienable rights’ with the arrant violation of

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these very same truths by the bondage of millions of blacks.

The Jim Crow regime reworked the racialised boundary between slave and free into a rigid caste separation between ‘whites’ and ‘Negroes’ – comprising all persons of known African ancestry, no matter how minimal or (in)visible – that infected every crevice of the postbellum social system and culture in the South. With abolition, ‘status segregation’

anchored by the division between free and unfree labor turned into a ‘vertical social system of super- and subordination’ that ‘integrat[ed] the ethnically divided communities into one political unit’ and fostered the continued monopolisation of honour by whites (Weber 1920, p. 934). The ghetto, in turn, imprinted this dichotomy onto the spatial makeup and institutional schemas of the industrial metropo-

lis. So much so that in the wake of the ‘urban riots’ of the 1960s, which in truth were uprisings against intersecting caste and class subordination, urban and black became near-synonymous in policy-making as well as everyday parlance. And the ‘crisis’ of the ‘inner city’, which by then replaced the ‘wicked city’ of the late-nineteenth century as the incarnation of urban dread and socio-moral dissolution in the nation’s collective conscience, came to stand for the continuing contradiction between the individualistic and

competitive tenor of American life, on the one hand, and the enduring socio-spatial seclusion of African Americans from it, on the other.

As a new century dawns, it is up to another 'peculiar institution' born of the adjoining of the hyperghetto with the carceral system to uphold the social and spatial isolation of their residents and remould the social meaning and significance of 'race' in accordance with the dictates of the deregulated economy and the post-Keynesian state (Wacquant 2000). Now, the penal apparatus has long served as accessory to ethno-racial domination by helping to stabilise a regime under attack or to bridge the hiatus between successive regimes. Thus the 'Black Codes' of the 1860s served to keep African-American labour in place following the demise of slavery (Myers 1998) while the criminalisation of civil rights protests in the South in the 1950s aimed to retard the agony of Jim Crow (O'Brien 1999). But the role of the carceral institution today is different in that, for the first time in US history, it has been elevated to the rank of main machine for 'race making'. Its material stranglehold and classificatory activity have assumed a salience and reach that are wholly unprecedented in American history as well as unparalleled in any other society.

## The resurgent dangerousness of blackness

Among the manifold effects of the wedding of ghetto and prison into an extended carceral mesh, perhaps the most consequential is the practical revivification and official *solidification of the centuries-old association of blackness with criminality* and devious violence. The condemnation of Negrophobia in the public sphere has not extinguished the fear and contempt commonly felt by whites towards a group they continue to regard with suspicion and whose lower-class members they virtually identify with social disorder, sexual dissolution, school deterioration, welfare profiteering, neighbourhood decline, economic regression, and most significantly violent crime (Hurwitz & Peffley 1998, Terkel 1992). Surveys of fear of crime have consistently found that Americans are more scared of being victimised by black than white strangers, while studies of the determinants of perceived criminality in large cities have shown

that the percentage of young black men is positively associated with the belief that street crime is a serious problem, net of the effect of individual and neighbourhood characteristics (Quillian & Pager 2001, St. John & Bates 1995). The equation of anonymous African-American males with peril on the street is moreover not limited to the white neighbourhoods and dwellers of the dualising metropolis. By the 1980s, a 'siege mentality' had diffused into black districts that inclined its residents to be 'suspicious of unfamiliar black males they encounter[ed]' in public places (Anderson 1990, p. 5). The result is that everywhere the dominant strategy for ensuring physical safety in urban space is to avoid younger African Americans. In the dualising metropolis, the appraisive slogan 'black is beautiful' has been effectively supplanted by the vituperative adage 'black is dangerous.'

Along with the return of Lombroso-style mythologies about criminal atavism and the wide diffusion of bestial metaphors in the journalistic and political fields (where mentions of 'pre-social superpredators', 'wolf-packs', 'animals' and the like are commonplace), the massive over-incarceration of blacks has supplied a powerful common-sense warrant for 'using colour as a proxy for dangerousness' (Kennedy 1997, p. 136). In recent years, American courts have consistently authorised the police to employ race as 'a negative signal of increased risk of criminality' and legal scholars have rushed to endorse it as 'a rational adaptation to the demographics of crime', made salient and verified, as it were, by the rapid blackening of the prison population after the ghetto riots of the 1960s, even though such practice entails major inconsistencies from the standpoint of constitutional law (Kennedy 1997, pp. 143, 146). Throughout the urban criminal justice system, the formula 'Young + Black + Male' is routinely equated with 'probable cause' justifying the arrest, questioning, bodily search, and detention of millions of African-American males every year (Gaynes 1993).

In its 1968 decision *Terry v. Ohio*, just as race riots were roiling the metropolis, the US Supreme Court authorised the police to carry out stops and searches on the 'reasonable suspicion' that criminal activity is afoot based on mere presence in a high-crime area and evasive behaviour. In the decades since, the

steady lowering of the threshold of evidence set by the judiciary to meet this ‘location plus evasion’ standard has ‘resulted in stops and frisks of residents of inner cities – primarily poor persons, African-Americans, and Hispanic Americans – far out of proportion to their numbers, and often without justification’ (Harris 1994, pp. 622–623), setting off a self-perpetuating cycle whereby the police arrest ghetto residents for the primary reason that the latter avoid them on account of the very ongoing harassment to which they are subjected by the police. Civil-rights organisations have so incorporated this practice in their normal ‘horizon of expectations’ that they have taken to training black youths in major cities on how to handle routine checks, stop-and-frisk campaigns, and street sweeps. In the Maryland suburbs of Washington, for instance, the local chapter of the NAACP and the Black Lawyers’ Association joined with teachers and the police to run courses in high schools in which adolescents rehearsed with real officers their probable future arrest, bodily search, and interrogation so as to minimise the likelihood of a serious incident and injury (Miller 1997, pp. 100–101).

But the conflation of blackness and criminality is not limited to the perimeter of the racialised urban core: in other districts of the metropolis, the police have elaborated and the courts have endorsed the ‘out-of-place’ doctrine according to which a law-enforcement officer is warranted to find suspicious a person of one ethnicity observed in an area primarily populated by another. Thus when black men enter white neighbourhoods their race is read as an outward indicator of potential unlawful activity and used as justification for stopping, questioning, and searching them. When whites enter the ghetto, on the other hand, the assumption of the police is *either* that they are engaged in criminal activity, typically as consumers of drugs or prostitution, *or* that they have lost their way and are in need of assistance lest they be harmed. (When we drove to and from the boxing gym where I conducted ethnographic fieldwork in the Chicago ghetto neighbourhood of Woodlawn for three years, my coach DeeDee always instructed me to keep a brisk speed for fear that the police would stop us on grounds that a young white man and an old black man riding together in a beat-up Plymouth Valiant in that

area must be up to legal mischief.) The ‘out-of-place’ doctrine applied in white areas and ‘random’ investigatory stops and street sweeps applied in black ones ‘indicate how race is often the sole predictor in deciding which criminal suspects to detain’ (Johnson 1995, p. 656; on the prevalence of racial bias in street searches and sweeps, pretext stops, drug prohibition enforcement, and quality-of-life policing, see also Cole 2000).

Together with the practice of pandemic overcharging, the widespread acceptance by the courts of race as probative of criminal activity and the steady erosion of the probable-cause requirement set by the Terry decision ensure that poor urban African Americans find themselves caught in the clutches of the penal system in numbers and with an intensity far out of proportion with their criminal involvement (Maclin 1998, Roberts 1999). The conflation of blackness and crime in collective representation and justice policy (the other side of this equation being the conflation of blackness and welfare receipt in the social policy debate) thus re-activates ‘race’ by giving a legitimate outlet to the expression of anti-black animus in the form of the public vituperation of criminals and prisoners. As writer John Edgar Wideman (1995, p. 504) points out:

It’s respectable to tar and feather criminals, to advocate locking them up and throwing away the key. It’s not racist to be against crime, even though the archetypal criminal in the media and the public imagination almost always wears ‘Willie’ Horton’s face. Gradually, ‘urban’ and ‘ghetto’ have become code words for terrible places where only blacks reside. Prison is rapidly being relexified in the same segregated fashion.

### ***Civilliter mortuus*: the triple exclusion of convicts**

By assuming a central role in the post-Keynesian government of race and poverty at the cross-roads of the deregulated low-wage labour market, a revamped ‘welfare-workfare’ apparatus designed to support casual employment, and the vestiges of the ghetto, the overgrown carceral system of the USA has become a major engine of symbolic production in its own right.<sup>1</sup> It is not only the preeminent institution for signifying and enforcing blackness, much as slavery was

during the first three centuries of US history. Just as bondage effected the 'social death' of imported African captives and their descendants on American soil by tearing them apart from all recognised social relations (Patterson 1982), *mass incarceration also induces the civic death* of those it ensnares by extruding them from the social compact, thereby making them *civilliter mortui*. Inmates are the target of a threefold movement of exclusionary closure instigated from above by the state and supported from below by the fearful middle class and resentful fractions of the working class.

1. Prisoners are denied access to institutionalised *cultural capital*: just as university credentials have become a prerequisite for employment in the (semi-)protected sector of the labour market, inmates have been made ineligible for Pell Grants, the main federal programme subsidising college tuition for low-income students, starting with drug offenders in 1988, continuing with convicts sentenced to death or lifelong confinement without the possibility of parole in 1992, and ending with all remaining state and federal prisoners in 1994. This expulsion from higher education was voted by Congress in knowing disregard of overwhelming evidence that prison college programmes sharply reduce recidivism as well as help maintain carceral order for the sole purpose of dramatising the divide between convicted felons and 'law-abiding citizens' (a detailed historical and analytical account of the campaign to suppress public funding of higher-education programs in US prisons in the 1990s is Page 2004). Expulsion was extended a few years later by a clause of the Higher Education Act of 1998 that bars students convicted of a drug-related offence from receiving any public grant, loan, or work assistance.

In the parliamentary and media debates, opponents of federal sponsorship of higher education in prison wildly exaggerated its scope and financial weight, alleging that inmate scholarships had undergone 'exponential increase' to 200 million dollars and would soon bloat past the billion-dollar mark; and they claimed that, as a result of this misplaced liberality, 'honest and hard-working Americans' were being 'elbowed out' of college. Oblivious to ridicule, senator Kay Bailey Hutchison of Texas even asserted

that shrewd convicts were now committing crimes for the express purpose of gaining a university degree for free behind bars (see Congressional Record, US Senate, 103<sup>rd</sup> Congress, vol. 139, n.157 [November 1993], 1<sup>st</sup> Session, Tuesday 2 November 1993). In reality, at the time of their final deletion from the programme, felons receiving federal tuition credit numbered not 200,000 (as maintained by their detractors) but 27,000 for a total outlay of 35 million dollars amounting to *one-half of one per cent* of the total Pell appropriation of \$6.3 billion. In addition to gross exaggeration, the opponents of college education in prison rhetorically set up a dichotomous opposition and a zero-sum game between convicts and the 'children of low-income working people' that are both spurious: first, prisoners themselves stem essentially from the lower fractions of the working class and, second, their access to tuition support did not deprive other applicants since the Pell grant program functions in the manner of a quasi-entitlement in which all students meeting income qualifications receive funding.

But the nightmarish picture of lavish government support for (black) prisoners robbing ordinary Americans committed to work, morality, and respectability of their fair shot at 'the American dream' resonated powerfully with the racially inflected anti-welfare state sentiment surging through the country as well as with the well-worn theme of the 'coddling of criminals' in 'five-star prisons' (Flanagan & Longmire 1996, Gilens 1999). And it adroitly tapped widespread middle-class anxiety over the fast-rising cost of college and the increased intensity and unpredictability of educational competition: the price tag for higher education expressed as a function of the average hourly wage doubled between 1972 and 1992 while the overall number of fellowships declined, not to mention that 'higher education no longer offers a guarantee of economic security' (Mare 1995). Just when they are a *sine qua non* for membership in the middle and upper classes, tertiary credentials have become so expensive that by 1995 nine states had established programmes of anticipated tuition payment allowing parents to start 'purchasing' a future seat at the public university from the birth of their child, and most states had instituted '529 plans' providing tax benefits for families saving money for paying for college. It is

far more expedient politically and financially sparing for elected officials to lambaste the funding of college education for prisoners, however negligible it may be, than to confront the sources of the rising cost and decreasing yield of strategies of middle-class reproduction through the transmission of cultural capital. What is most remarkable about this episode is that politicians were willing to brush off the unanimous recommendation of correctional officials, wardens, and penologists to retain college education behind bars and dismantled one of the few effective and efficient programmes proven to reduce criminal offending (the three-year recidivism rate of former prisoners with a college degree is 5% compared with a national average of 40%) for the sheer sake of deploying populist penal rhetoric portraying the most unworthy of the unworthy poor – convicted felons – as social parasites festering on an overgrown welfare state and sucking the ‘hard-earned tax dollars’ of honest citizens who, though they work and save, struggle to transmit their middle-class status to their offspring.

2. Prisoners are systematically excluded from *social redistribution* and public aid in an age when work insecurity makes such programmes more vital than ever for those dwelling in the lower regions of social space. Federal laws deny welfare payments, disability support, veterans’ benefits, and food stamps to anyone in detention for more than 60 days on grounds that inmates already receive food, clothing, shelter, and medical care from correctional authorities. They also prohibit convicted felons from many jobs in government or with federal contractors, curtail their parental rights, and strike them out from scores of federal benefits.<sup>2</sup> The Work Opportunity and Personal Responsibility Reconciliation Act of 1996 that ended ‘welfare as we know it’ further banishes many ex-convicts from Medicaid, public housing, Section 8 vouchers (a governmental rental subsidy), and related forms of means-tested assistance. It also excludes from public aid parole and probation violators (regardless of the condition they infringed) and denies assistance for ten years to anyone convicted of misrepresenting their residence to obtain support. Section 115 of the Act even institutes a *lifetime ban* on access to Temporary Assistance to Needy Families (the successor

programme to AFDC) and public housing for all persons convicted of a felony offence for using or selling drugs – without exception, not even for the most destitute and desperate such as pregnant and addicted mothers in single-parent households (Hirsch 2001).

This federal ban, which is imposed uniquely on narcotics violators (and not, for instance, on multiple murderers and serial rapists), was debated in the Senate for a grand total of two minutes, one minute each per party, and not at all in the House before being adopted by an overwhelming majority in both houses. Though the law accords them the flexibility to opt out of this measure, most states have elected to adopt it: 22 apply the interdiction in full and another 20 have only modified its scope and terms, including 10 that make benefits contingent on undergoing regular drug testing or drug treatment (Rubinstein & Mukamal 2002). The loss of welfare benefits gravely undercuts the ability of poor women to sustain themselves and to meet the basic needs of their children, increasing the likelihood that these will be placed in state group homes, in keeping with the Adoption and Safe Family Act of 1997 which accelerates the termination of parental rights for women serving mandatory minimum sentences (typically for federal drug offences). It also diminishes their chance to escape from addiction as they cannot enter detoxification centres after a criminal conviction since they no longer receive the public aid with which to pay for their room and board as they could before. Altogether, this disposition has struck some 92,000 women and 135,000 children, over half of whom are African American and Hispanic (Allard 2002).

Other federal legislation passed in 1996 and 1998 in the wake of ‘welfare reform’ establishes strict criteria for admission to and eviction from public housing under a new policy, proudly announced in 1996 by President Clinton in person, called ‘One Strike and You’re Out’. These new rules, speedily adopted by three-quarters of the nation’s housing authorities, grant the latter wide discretion to eject tenants convicted of a drug-related offence and even to evict an entire family for criminal violations committed by any one of its members inside or outside of the housing complex. Some agencies have gone so far as to expel households after one

resident had minimal involvement with law-enforcement agencies, even a simple arrest by the police leading to no criminal charges (Rubinstein & Mukamal 2002, p. 48). This state strategy of public housing exclusion has impacted a relatively small population thus far, numbering about 20,000 as of mid-2002, but its effect is draconian since it aggravates their social instability and makes family reunification after incarceration considerably more risky and difficult. And the message it sends is crystal clear: commit a drug infraction at the bottom of the class and caste order and you will have cast yourself out of the civic community, possibly making your family homeless.

It should be pointed out that no comparable ban on government redistribution is enforced at the other end of the social spectrum, for instance through the suppression of tax deductions for mortgage interest payments for middle- and upper-class households whose members commit drug felonies or other 'crimes of prosperity' such as tax cheating, insider trading, or financial fraud. It should also be noted that the extensive efforts of the Social Security Administration to detect cases of erroneous payments of Supplemental Security Income (a means-tested programme providing cash payments to aged, blind, or disabled individuals to help them meet basic needs) have targeted only residents of jails and prisons and left out inmates of other public institutions such as hospitals, clinics, nursing homes, shelters, and drug and alcohol rehabilitation centres, who are also legally ineligible for aid but mostly middle-class (USGAO 1995, pp. 2–3).

3. Convicts are banned from *political participation* via 'criminal disenfranchisement' practiced on a scale and with a vigour unimagined in any other country. All members of the Union except Maine and Vermont deny the vote to mentally competent adults held in state prisons and 44 extend this denial to jail detainees. Thirty-four states further forbid felony convicts placed on probation from exercising their political rights while 29 also interdict parolees from the booth. In 14 states, most or all *former* felons are barred from voting even when they are no longer under criminal justice supervision – *for life* in eight of them (Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Tennessee, Virginia, and

Wyoming).<sup>3</sup> The result of the combination of widespread and broad ballot restrictions based on penal sanction and astronomical conviction rates is that at the end of 2000 an estimated 4.7 million Americans – one of every forty-three adults – had temporarily or permanently lost the ability to vote, including 1.8 million who were not behind bars and another 1.7 million who had served their sentence in full, making felons and ex-felons the 'largest single group of American citizens who are barred by law' from taking part in elections (Keyssar 2000, p. 308. Numerical estimates vary with the sources; these are taken from Appendix A in Uggen & Manza 2002, table p. 797). Given the ethnically skewed composition of the population under criminal justice supervision, these statutes strike a particularly severe blow at the electoral capacity of blacks: of the 1.2 million state and federal prisoners kept from the polls, some 632,000 are African-Americans; of the 1.6 million ex-felons denied the franchise, over one half-million are blacks. A mere thirty years after finally acceding to the voting booth thanks to the Civil Rights Revolution, fully 1.84 million African Americans – corresponding to *one black man in six nationwide* – are banned from participating in elections through penal prohibitions. By 1997, seven states had permanently disallowed the vote of more than one-quarter of their black male residents (Fellner & Mauer 1998, p. 8).

The disproportionate impact of felon disenfranchisement laws across the colour line, with African Americans comprising a shocking 40% of all persons thus barred from the polls, should come as no surprise, for the long pedigree of these laws ties them intimately to the history of racial domination in the USA. Though they are impeccably colour-blind on the face of it, most originate in the strategies of racial containment deployed by Southern legislatures in the late 1860s and 1870s, when denying the vote to broad categories of convicts was an expedient device to exclude blacks while formally abiding by the 15th Amendment to the US Constitution prohibiting voting restrictions based on 'race, color or previous condition of servitude'.<sup>4</sup> To illustrate, the Constitutional Convention of 1890 in Mississippi, which had as its explicit aim to forbid 'Negro domination' at the polls, instituted franchise qualifications selected specifi-

cally to prohibit blacks first and foremost: residency was chosen because whites thought that the former slaves were an inherently 'rootless' and 'migratory race'; the poll tax was introduced because Negroes were believed to be naturally shiftless and improvident; literacy requirements were well suited to select out members of a community denied access to education; finally 'the list of disqualifying offences – which included arson, bigamy, fraud, and petty theft, but not murder, rape, or grand larceny – was tailored, in the opinion of the state supreme court, to bar blacks, a "patient, docile people (. . .) given rather to furtive offences than to the robust crimes of the whites" (McMillen 1989, pp. 42–43).<sup>5</sup> Together with discrimination, intimidation, and violent suppression, these measures caused the number of black voters to plummet from 87,000 in 1868 to 9,000 in 1892 (and a paltry 28,000 as late as 1964) while the number of white voters held steady at 70,000 (it topped half a million by the passage of the Voting Rights Act of 1965). Even at their peak, registered blacks never tallied 10% of the African-American population of voting age in Mississippi.

A sophisticated event-history analysis using decennial data from censuses from 1850 to 2002 confirms 'a strong and consistent relationship between racial threat as measured by the percentage of nonwhite state prisoners and laws restricting felon voting rights': states with larger shares of African Americans behind bars have been more likely to adopt broad statutes forbidding convicts and ex-convicts from the booth after controlling statistically for region, timing, economic competition, partisan political power, population makeup, and incarceration rate (Behrens *et al.* 2003). Even in those states where felon disqualification was not adopted for purposes of racial exclusion, it has operated with such glaringly divergent effects across the colour line that the Director of the United States Commission on Civil Rights pointed out as early as 1974 that, whatever their intent, such laws 'established an invidious racial discrimination against minority citizens' (quoted in Hench 1998, p. 768).

The fact that generalised felon exclusion from the ballot was one in a panoply of measures adopted during and after Reconstruction to shore up white supremacy by shrinking or

annihilating the black vote helps explain that many states re-enfranchised ex-convicts during the 1960s and 70s after the Jim Crow regime came tumbling down and the Northern urban ghetto was rocked to its foundation by the frontal attack of blacks and their progressive allies in a political field made momentarily responsive to pressures from below by the external imperatives of the Cold War (Dudziak 2000) and the 'pacification' of Vietnam. It explains why liberal voting laws ebbed again in the 1980s and 1990s as many states reinstated restrictions against the backdrop of anti-black backlash and the waning of public commitment to combat racial inequality (Reed, 2001, Steinberg 1995). Finally, the mutual entanglement of caste division and legal restriction also accounts for the fact that the US criminal disenfranchising practice is unique in the world for its severity and scope. Numerous liberal democracies such as Sweden, Ireland, Australia, and Spain allow their inmates to vote but that is not the real differentiating factor here; what sets America apart is the political exclusion of convicts not under lock and of ex-convicts who have completed their sentences. Many Western countries such as Belgium, Italy, and Canada impose penal restrictions on the franchise for persons placed on probation or parole but these are limited in time and closely calibrated to their individual offence: civic disabilities are inflicted as a penal sanction running alongside other penalties and typically concern small numbers of offenders. A few other countries, among them France and Germany, disqualify some ex-felons through judicial fiat but, again, strictly in cases of serious violations of the electoral code or civic crimes such as treason, and then only for a few years after their prison term or other sanction has been served. The USA is the sole country in the so-called Free World to exclude by law, without the possibility of judicial adjudication and recourse, broad categories of ex-convicts from the polls in disregard of the specifics of their infraction and background, and, even more so, to exclude them for life.

In addition, much as they use incarceration profusely to respond to a wide gamut of offences that are typically punished by community sanctions or suspended prison sentences in other advanced societies (Tonry & Frase 2001), the American authorities do not reserve disen-

franchisement solely for violent 'career' criminals who, one might plausibly argue, have *de facto* severed themselves from the body civic. In several states post-sentence disqualification is triggered by convictions that do not entail imprisonment, as in the case of a resident of Mississippi who discovered that he was debarred from the polls for life due to having pleaded guilty to passing a bad cheque in the amount of 150 dollars (Fellner & Mauer 1998, p. 5). This points to one last feature that sets the USA further apart from other liberal democracies that practice limited penal disenfranchisement: its furtive, nearly invisible, implementation. Every year tens of thousands of Americans are stripped of the franchise without even knowing it due to the prevalence of plea bargaining that carries as a silent and distant rider the loss of this fundamental civic power. This is particularly the case in juvenile justice, where 'an 18-year old who exchanges a guilty plea for a lenient non-prison sentence (as almost all first-timers do, whether or not they are guilty) may unwittingly sacrifice forever his right to vote' without even being informed of it by the prosecutor (Shapiro 1997, p. 62).

Finally, most of the US states that exclude persons with a criminal background have clemency and rights recovery procedures but these are generally so complex, costly, and cumbersome as to ensure that few former convicts regain the right to enter the booth. In Florida, which alone disqualifies one-third of the disenfranchised nationwide, the sheer quantity of paperwork required of an ex-felon to apply for restoration of his voting prerogative, to quote an attorney specialising in the procedure, 'fill[s] two file cabinets, with fifty sources spanning twenty to fifty years of a person's life' (Dugree-Pearson 2002, p. 381), among them complete documentation of his educational, residential, and employment history (with the names of all his supervisors) for over a quarter-century, copies of all his financial, credit, and tax records, as well as all court documents from all jurisdictions in which he appears (including all traffic tickets received in his lifetime along with proof of payment for each). After his file has been assembled and reviewed, the applicant is put through a personal hearing before the governor and his cabinet members, at the end of which the governor makes a final decision at

his discretion. The entire procedure takes about two years and costs several thousand dollars, a sum well beyond the means of the average ex-convict who, in addition, rarely has the cultural skills to navigate government offices and the leisure to spend weeks and months travelling to and from them to amass the needed documents. This explains why every year some 40,000 residents of Florida are newly disenfranchised as against fewer than 2,000 who regain their voting rights (Dugree-Pearson 2002, p. 382–383).

Yet arguably the most striking feature of the mass disenfranchisement of former felons in the USA is that it is utterly *devoid of policy or penological rationale*. Legislators, legal scholars, and judicial professionals have been at a loss to specify and agree on its purpose. The official rationale, based on the 'fear that ex-convicts might use their votes to alter the content or administration of the criminal law' (Harvard Law Review Association 1989, p. 1301) is easily shown to be without foundation. First, no evidence has ever been adduced that ex-felons vote differently than others on matters of crime and justice and, were they to do so, they constitute such a tiny fraction of the electorate (about 0.8% nationwide at their peak today) that they are unlikely to affect the dispensation of penal sanctions. Second, a blanket exception banning all ex-felons from the booth to guard against recidivism on the part of those of them sentenced for election violations is both over-inclusive (it disqualifies masses of former convicts who never committed voting fraud) and under-inclusive (several states do not disqualify violators of electoral laws).

Broader philosophical justifications for the civic exclusion of 'ex-cons' are equally thin and unconvincing. The social contract argument, rooted in Lockean liberalism, and the civic-republican argument for disenfranchisement, according to which former felons should be excluded because they have demonstrated 'moral turpitude' that makes them 'unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship' (Harvard Law Review Association 1989, pp. 1083–1084) turn out upon examination to be similarly groundless. In particular, the view that 'the manifest purpose' of denying the vote to ex-



convicts is ‘to preserve the purity of the ballot box, which is the only sure foundation of republican liberty’ (as expressed by the landmark 1894 Alabama Supreme Court case *Washington v. State*) is incompatible with the basic commitment of the modern state to inclusion and equality.<sup>6</sup> And the racial imbalance caused by felon disenfranchisement effectively violates the equal protection clause of the Fourteenth Amendment due to its demonstrably disproportionate impact on an identifiable section of the national population, which effectively ‘deplet[es] a minority community’s voting strength over time’ (Hench 1998, p. 787). Close examination of both the American liberal and republican traditions converges with cross-national comparison, then, to lead to the conclusion that the generalised and indefinite disenfranchisement of felons serves no compelling government interest and is fundamentally ‘incompatible with a modern understanding of citizenship, voting, and criminal justice’ (Ewald 2002, pp. 1134–1135). And that this expansive policy of civic excommunication of convicts is joined at the hip with the country’s rigid racial division, past and present.

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Penological warrants for the civic extirpation of former convicts are even weaker than political or philosophical ones. The measure cannot possibly serve the purpose of deterrence given its near-invisibility as well as the weak and fading involvement of the lower-class electorate that is its primary target (Teixeira 1992). It is an ‘incoherent extension of punishment theory’ from the perspective of rehabilitation since it takes no prospective account of the likelihood to re-offend and ‘fails to include an opportunity for the offender’s reintegration into society’ (Johnson-Parris 2003, p. 136; Keyssar 2000, pp. 162–163, 307–308). It is also devoid of value from the standpoint of incapacitation as it leaves ex-felons free to commit all manners of crimes outside the voting booth. And it blatantly violates the principles of proportionality and parsimony central to the doctrine of ‘just desserts’ by applying the same blanket exclusion on all criminals irrespective of the seriousness and civic pertinence of their infraction (von

Hirsch 1993, pp. 6–19). Much as the doctrines of liberalism and republicanism can provide only a thin rhetorical veneer to embellish the mass disenfranchisement of current and former felons, no consistent theory of punishment can validate and still less mandate this practice, especially on the scale and with the severity it has assumed at the threshold of the twenty-first century.

The same applies to the policies of criminal debarment from university credentials and from state-sponsored social redistribution. All three of these forms of exclusionary closure trained on past and present prisoners are driven not by practical or theoretical penological aims but by the political imperative to draw sharp symbolic boundaries that intensify and extend penal stigma by turning felons into long-term moral outsiders akin in many respects to an inferior caste. The etymology of felony, descended from the medieval Latin *fello* meaning villain or wicked and designating an evil person before it came to mean perpetrator of an infamous crime, reminds us that felon disenfranchisement is quintessentially ‘a symbolic act of political banishment, an assertion of the state’s power to exclude those who violated prevailing norms’ (Keyssar 2000, p. 163).

But then one must ask, what prevailing norms and how are they infringed upon? Here one comes upon what, in the opening lines of *The Souls of Black Folk*, W.E.B. Du Bois (1903, p. 3) wistfully calls ‘the strange meaning of being black here’ in America. From the birth of the colony to the present day, albeit with variations in intensity and scope, blacks have been cast in the role of the living antithesis to the ‘model American’, even when, given the opportunity, they have embraced that nation’s core values and myths with more zest and abandon than any other group. After the social and symbolic separation of European servants and African slaves crystallised in the closing decades of the seventeenth century, slaves were merged into a compact faceless mass deemed untrustworthy, dissipated, and slothful – in short, the walking-and-breathing despoliation of the Protestant ideal, at once civic and religious, of the ‘dependable, orderly, and industrious worker’ that the Puritans sought to create by creating the Republic, and vice versa (Kolchin 1993, p. 68). During the revolutionary period, citizens of the

new nation were taught to equate the term 'freeman' with political freedom and economic independence, again by contraposition to the dark-skinned slave, who was forcibly denied these twin prerogatives of membership on the spurious grounds that (s)he was congenitally incapable of assuming them. By the mid-nineteenth century, working-class formation operated via racial consolidation by fusing blackness and servility as the reviled antonym of genuine Americanness, 'the perils and pride of Republican citizenship' being defined by opposition to a black population pictured as the embodiment of 'the preindustrial, erotic, careless style of life the white worker hated and longed for' as he was being pressed into the ambit of wage work and subjected to crushing industrial discipline (Roediger 1991, pp. 11, 14). Throughout most of the twentieth century, the racialist strain of Americanism that construes the nation 'as a people held together by common blood and skin color and an inherent fitness for self-government' prevailed even as the universalistic forces of civic nationalism gained strength (e.g., the 1790 law limiting US naturalisation to 'free white persons' was formally abrogated only in 1952, even as a law of 1870 included 'persons of African nativity and African descent' among eligible categories). The slow and begrudging acceptance of Southern and Eastern European immigrants into 'God's melting pot' confirmed and reinforced the continued socio-symbolic marginality of African Americans, as liberal leaders committed on principle to colour-blind inclusiveness 'periodically reinscribed racialist notions in their rhetoric and policies' (Gerstle 2001, p. 5).

Race or, to be more precise, *blackness* – for, since the origins, it is the presence of dishonoured dark-skinned persons brought in chains from Africa that has necessitated the (re)invention and perpetuation of racial vision and division – is properly understood as America's *primeval civic felony*. Not in a rhetorical or metaphorical sense but in full accord with the Durkheimian conception of crime as 'an act' that 'offends strong and definite states of the collective conscience' of the society (Durkheim [1893] 1930, p. 47),<sup>7</sup> in this case imputed ways of being and behaving that breach America's idealised representation of itself as the promised land of freedom, equality, and self-determina-

tion. For nearly four centuries, blacks have been consistently constructed symbolically and handled institutionally, not merely as non-citizens laying outside of the inaugural social compact of the republic, but as veritable 'anti-citizens' (Roediger 1991, p. 57) standing over and against it. This explains the recurrence of schemes and movements aimed at extirpating them from the societal body by migrating them back to Africa, from Thomas Jefferson's advocacy of deportation after eventual emancipation to the creation by white philanthropists of the American Colonization Society in 1816 to the popular success of the Universal Negro Improvement Association of Marcus Garvey with its plan to repatriate African Americans to Liberia a century later. It also accounts for the prohibition against blacks enlisting in the US military until 1862 and for the cataclysmic socio-symbolic impact of their service under the flag during the two world wars of the twentieth century, which did more to shake the social and mental foundations of the US caste order than all the internal movements of protest until then by eroding the divide between Negroes and whites inside the most honorific organ of the state apparatus, the military (Gerstle 2001, chapters 5–6; Klinkner & Smith 1999, pp. 200–201, McAdam 1989).

Blacks were not part of this 'We the People' that formed 'a more perfect Union' to 'secure the Blessings of Liberty to [them]selves and [their] posterity', to quote the preamble of the US Constitution. The African and African-American slave, later the Negro sharecropper and the black industrial proletarian, and today the heinous member of the inner-city 'underclass' have been persistently pictured and processed in national discourse and public policy as *enemies* of the nation – as slaves have been throughout world history.<sup>8</sup> Richard Wright vividly captured this sense of combined strangerhood and nefariousness in *Native Son*, the signal allegorical portrait of the black-American condition at mid-twentieth century, torn between the glorious profession of democracy and the gruesome reality of caste domination. In the scene of the trial of Bigger Thomas, a clumsy black youth who, out of broiling racial confusion and resentment, accidentally kills a young white beauty, the bohemian daughter of an upstanding patrician family from Chicago, Thomas's attor-

ney utters this plea on behalf of the murderer and alleged rapist (for whites cannot imagine that the slaying was not sexually motivated) who, because of the very enormity of his offence (after smothering his victim in panic, he cuts her head off to throw her body into the furnace of her parents' mansion), is made to stand for every black person in America:

Excluded from, and unassimilated in our society, yet longing to gratify impulses akin to our own but denied the objects and channels evolved through long centuries for their socialized expression, every sunrise and sunset makes him guilty of subversive actions. Every movement of his body is an unconscious protest. Every desire, every dream, no matter how intimate or personal, is a plot or a conspiracy. Every hope is a plan for insurrection. Every glance of the eye is a threat. *His very existence is a crime against the state.* (Wright 1939, p. 821; emphasis in original)

Thus the routine resort, particularly pronounced in periods of transition between regimes of racial rule, to the penal apparatus to ensure that 'the swarthy specter sits in its accustomed seat at the Nation's feast' (Du Bois 1903, p. 10).<sup>9</sup> Thus also the persistent refusal, in the administration of penal law as in public discourse more generally, to individualise blacks, resulting in their lumping into a collective type defined by the status and deeds not of the average member but of the lowest and most fearsome (Walton 1992, pp. 397–401) – such that blacks are always liable to be treated as *humiliores* whenever they fail to furnish tangible proof, by appearance, conduct, or title, that they deserve to be accorded the minimal dignities of civic membership, as in the urban tale of the black Harvard professor who cannot flag down a city taxicab at night. Save for the qualifier 'impermissible', legal scholar George Fletcher is on the right track, then, when he argues that 'categorical divestment of voting rights introduces an impermissible element of caste into the American political system' insofar as it treats former convicts 'as inherently unreliable not only for purposes of voting but also in giving sworn testimony at trial', as persons whose social standing is terminally impaired by prior convictions. With the accelerating conflation of blackness and criminality, felon disenfranchisement is indeed a 'continuation of *infamia*' (Fletcher 1999, pp. 1895–1908) tapping the discredit of slavery and the sub-

sequent sully of caste separation via Jim Crow and the urban ghetto as reactivated by indelible penal sanction.

Replacing current penal trends within the full arc of ethnoracial domination promptly divulges the close kinship between the rhetoric and policy of political exclusion of felons and ex-felons in the late twentieth century, on the one hand, and, on the other, the discourse and practice of racial division in its two pivotal periods of the revolutionary upheaval against the British Crown and the post-Civil War decades, that is, the two historical conjunctures in which criminal disenfranchisement rules were first introduced and then broadened.<sup>10</sup> In both the *notion of 'purity'* – of the ballot in one case and the white community in the other – is the national treasure to be preserved. In both the abridgement of 'natural rights' and the dilution of constitutional protection are forcefully effected to excise from the social body categories deemed inherently defective and indefinitely defiling. (In *Washington v. State*, the 1884 Alabama Supreme Court case that codified the 'purity of the ballot' doctrine, felons are assimilated to 'idiots, insane persons, and minors,' i.e., individuals constitutively lacking in 'the requisite judgment and discretion which fit them' for voting). In both, the category thus struck by public banishment is made into a permanently subordinate outgroup held responsible for its own civic liminality and inferior legal status, which absolves the ingroup of its role and responsibility in producing that very distinction and condition. As with the imposition of a naturalised caste boundary, 'the disenfranchisement of ex-offenders simultaneously justifies and is justified by an idea that deviants are the source and embodiment of corruption, pollution, and moral turpitude; that they can and must be isolated, fenced out, and politically sterilized' (Harvard Law Review Association 1989, pp. 1314–1315, 1316).

The penal alienation of today's convicts makes them social similes if not legal replicas of antebellum slaves in yet another respect: although they are barred from civic participation, they nonetheless weigh on the political scale at the behest and to the benefit of those who control their bodies, much as bondpeople benefited their plantation masters under the 'three-fifths' clause of the US Constitution. Because inmates are tallied by the census as

residents of the counties where they serve their sentence, they artificially inflate the population count as well as lower the average income level of the rural towns that harbour most prisons. As a result, these towns accrue added political power in terms of representation in their state legislature as well as garner extra federal funding intended to remedy poverty: public monies that would go to providing services such as education, medical care, and transportation and housing subsidies to poor blacks in the inner city are diverted to the benefit of the predominantly white population of prison municipalities. It is estimated that Cook County will lose \$88 million in federal funding during the current decade because of the 26,000-odd Chicagoans (78% of them black) reckoned as residents of the downstate districts where they are incarcerated (Dugan, 2000).

Similarly, the enumeration of convicts transfers political influence from their home to their host county, thereby diluting the electoral strength of blacks and Latinos living in the metropolitan districts from which most prisoners stem – and the more so as detention facilities are located further away from major cities. Thus 80% of New York state prisoners are African-American and Hispanic and two-thirds come from New York City; but 91% of them are housed upstate, in the conservative lily-white districts where all of the new penitentiaries built since 1982 are located. Counting urban prisoners as rural dwellers for purposes of representation (even though the state constitution specifies that penal confinement does not entail loss or change of residence) violates the one-man, one-vote rule, and translates into a net loss of 43,740 residents for New York City, which is computed to have cost urban Democrats two seats in each of the state house and senate (Wagner 2002, p. 10–12). And, just as counting slaves boosted the political power of Southern states and allowed them to entrench slavery by controlling the national agenda, the ‘phantom’ population of black and brown prisoners enhances the political influence of white politicians who pursue social and penal platforms antithetical to the interests of ghetto residents. In particular, these elected officials have acquired a vested interest in the punitive policies of criminalisation of poverty and carceral escalation suited to replenishing the supply of unruly black bodies that guarantee

correctional jobs, taxes, subsidies, and political pull to their communities, to the direct detriment of the segregated urban districts that furnish these convicts.

In light of the fiasco capping the 2000 presidential contest, it is ironic as well as iconic of the increasingly constrictive impact of American electoral codes regarding felons to note that Florida leads the nation with 827,000 disenfranchised convicts and ex-convicts, distributed among 71,200 prison inmates, 131,100 probationers, a paltry 6,000 parolees (testifying to the strictness of correctional policy in that state), and a staggering 613,500 *former felons* who, though they have fully repaid their debt to society, will never cast a ballot for the remainder of their lives. In November of 2000, over 256,000 of these potential voters kept from the rolls were black. Had Albert Gore, Jr., the Democratic candidate, collected the vote of a mere one per cent of these electors – many of whom were *illegally* barred from the booth due to data recording and processing errors by the private firm contracted by the Florida Election Board to verify the eligibility of former felons who migrated across state lines<sup>11</sup> – he would have handily won the Sunshine state and conquered the presidency. But there is a measure of poetic justice in his court-ordered defeat in that for eight years Gore served as Vice-President in an administration that worked to increase the number of convicts and ex-convicts with a zeal and efficiency unmatched by any other in American history (Wacquant 2005b).

The debarment of ex-felons from the ballot years after they have served their sentence constituted a far more potent bias than all of the ‘hanging chads’ and misdesigned ‘butterfly ballots’ of Broward County that consumed public attention during the weeks and months after the aborted Florida election. This episode has reenergised social activists and analysts alike in their denunciation of the seeming infringement on the sanctity of the democratic compact it entails. In a systematic study of the impact of felon disenfranchisement laws on electoral outcomes over the past three decades, Uggen and Manza (2002) have confirmed that, because they strike primarily black and poor potential voters, criminal disqualifications subtract more votes from the Democratic than from the Republican camp and have likely reversed the results of

seven US Senate elections in addition to the 2000 presidential race by curtailing the minority vote. But this justifiable concern for the skewing of electoral *outcomes* skirts the deeper significance of the *process* of felon exclusion, which is to enforce and communicate the degraded status of convicts by turning them into a quasi-outcaste of the American civic community, irrespective of its influence on this or that vote. It is instructive here to recall that, during the phase of imposition of the racial restrictions that gradually erected the Jim Crow regime, opposition to the Negro vote in the segregationist South was *not* proportional to the actual or potential weight of blacks at the polls. Rather, it was a principled opposition based on the racial syllogism (or, rather, parallogism): voting signifies political equality, which implies social equality, which in turn incites sexual assaults on white women, i.e., threatens the societal myth of the racial purity of whites (Litwack 1998, p. 221). It was not political expediency so much as caste necessity that mandated the political exclusion of the descendants of slaves. The same may well be true today about felons as they have been made over into the latest historical avatar of the ‘bad nigger’.

Indeed, it suffices to break with the dominant ideology of civic universalism, running from Alexis de Tocqueville to Gunnar Myrdal and Louis Hartz and their latter-day epigones, according to which American citizenship was *ab initio* accessible to all those willing to embrace its liberal ideals and republican institutions, and to recognise, with recent revisionist political history, that US democracy has been founded from its inception on a *restricted compact for the deserving* in which only the ethnically and spiritually worthy partake, for racially skewed felon disenfranchisement laws to cease to appear anomalous.<sup>12</sup> Far from ‘eroding democracy’, as their critics complain, these laws reactivate and update one of its deepest springs and remind us that caste division has been a core and not a peripheral trait of US society, a constitutive and not a teratological feature of American republicanism. Measures shutting out felons from the distribution of valued cultural capital, social-welfare redistribution, and the vote converge to perpetuate a ‘sphere of group exclusiveness’ – to recall Herbert Blumer’s (1958, p. 4) expansive definition of racial prejudice – and testify to the stratified and restrictive complexion of American citizenship at the dawn of the new millennium.

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## Notes

\*This article is the abridged version of a talk by the same title presented to the Colloquium on Inequality and Culture of Department of Sociology, Princeton University, on 1<sup>st</sup> March 2004, prepared with the editorial counsel of Daniel Sabbagh. It draws on chapter 4 of my book *Deadly Symbiosis: Race and the Rise of Neoliberal Penalty* (Cambridge, Polity Press, in press). I am grateful to Bruce Western for his invitation and to the colloquium participants for their patient attention and vigorous questioning.

1. This argument is indebted to David Garland’s explication of ‘penalty as a set of signifying practices’ that ‘help produce

subjectivities, forms of authority and social relations’ at large (Garland 1991).

2. In 1997, the Bureau of Justice Assistance’s ‘Fact Sheet’ on *Denial of Federal Benefits Program and Clearinghouse* listed 750 programmes for which eligibility was potentially affected by felonious status (Olivares *et al.* 1996).

3. For a more detailed discussion of the evolving legal complexities of penal disqualification and its variants than is possible here, the reader is referred to Harvard Law Review Association (2002), and the literature cited therein.

4. A thorough historiographical account of black disenfranchisement in and after the Reconstruction era is Kousser (1974). Free blacks had already been the target of a sweeping movement of political excommunication during the half-century prior to the Civil War, alongside paupers, vagrants, and felons (Keyssar 2000, p. 54–65).

5. When blacks protested that these measures effectively annulled the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments to the US Constitution, Governor James K. Vardaman replied forthrightly that the convention was ‘held for no other purpose than to eliminate the nigger from politics; not the ‘ignorant and vicious’ as some of

those apologists would have you believe, but the nigger.’ The state’s leading newspaper, the *Clarion-Ledger*, echoed for good measure: ‘They do not object to negroes voting on account of ignorance, but on account of color’ (McMillen 1998, pp. 43–44).

6. For a fuller discussion and refutation of this argument see Wacquant (2005a, chapter 5).

7. Durkheim goes on to elaborate: ‘We must not say that an act offends the common conscience because it is criminal, but that it is criminal because it offends the common conscience. We do not reprove of it because it is a crime; rather, it is a crime because we reprove of it’ (1930, p. 48; my translation).

8. ‘No master, whether in Ancient Rome, medieval Tuscany, or seventeenth-century Brazil, could forget that the obsequious servant might also be a ‘domestic enemy’ bent on theft, poisoning, or arson. Throughout history it has been

said that slaves, if occasionally as loyal and as faithful as good dogs, were for the most part lazy, irresponsible, cunning, rebellious, untrustworthy, and sexually promiscuous’ (Davis 1976, p. 40–1). Note that this litany of adjectives contains the qualifiers most commonly applied to the urban ‘underclass’ in the America of the 1980s.

9. Remember that, for Durkheim, punishment is a social function that arises ‘wherever a commanding power establishes itself’ whose ‘primary and principal function is to (...) defend the common conscience against all the enemies of the interior as of the exterior’ (1930, p. 51; my translation).

10. In the initial period from 1776 to 1830, civic disabilities were attached to the commission of infamous crimes, in accordance with English and ancient Roman law, and also struck paupers and transients. Between 1870 and 1920, criminal disfranchisement

was generalised across states and extended to lesser crimes (Keyssar 2000, pp. 61–63, 162–163).

11. The state Election Division purged from the rolls voters whose names and birthdate merely *resembled* those of people listed in felony databases in spite of warnings from its own experts that this would automatically result in the unlawful elimination of thousands of eligible voters. A recent study disclosed that black voters were thus expurgated at ten times the rate of whites (Donziger 2002, p. 2).

12. See in particular Smith (1999) on ‘inegalitarian ascriptive Americanism’ based on race, national origins, and gender; Gerstle (2001) on ‘racial nationalism’ and its conflictive interplay with ‘civic nationalism’; and King (2002) on the enduring commitment to whiteness as touchstone of the differential desirability and ‘assimilability’ of groups seeking to become Americans.

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