

INNOCENT CITIZENS, GUILTY SUBJECTS

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Every Negro so sentenced not only means able-bodied men to swell the state's number of slaves, but every Negro so convicted is thereby *disfranchised*.
- Ida B Wells, "The Convict Lease System"¹

[I]f any slave, in the darkness of midnight, looks down upon himself, feeling his limbs and thinking himself a man, and entitled to the rights of a man, shall steal away from his hovel or quarter, snap the chain that bound his leg, break the fetter that linked him to slavery, and seek refuge from the free institutions of a democracy, within the boundary of a monarchy, that that slave, in all his windings by night and by day, in his way from the land of slavery to the abode of freedom, shall be liable to be hunted down like a felon, and dragged back to the hopeless bondage from which he was endeavouring to escape.

- Fredrick Douglass, "Farewell Speech to the British People," March 30, 1847²

1. Introduction

As Angela Davis put it recently during her interview with the philosopher Eduardo Mendieta in *Abolition Democracy*:

Why has the disenfranchisement of people convicted of felonies become so much a part of the common sense thought structures of people in this country? I believe that this also has its roots in slavery. A white contemporary of slavery might have remarked: "Of course slaves weren't supposed to vote. They weren't full citizens." In the same way people think today, "Of course prisoners aren't supposed to vote. They aren't really citizens any more. They are in prison."³

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¹ Ida B. Wells-Barnett, *The Reason Why the Colored American Is Not in the World's Columbian Exposition: The Afro-American's Contribution to Columbian Literature*, ed. Robert W. Rydell (Urbana: University of Illinois Press, 1999).

² Frederick Douglass and Philip Sheldon Foner, *The Life and Writings of Frederick Douglass*, 5 vols. (New York: International Publishers, 1950), 209.

³ Davis, *Abolition Democracy*, 38.

The analogy Davis draws works so well because our notions of punishment and citizenship in America are deeply connected, and certainly cannot be explained without reference to the pernicious history and continued presence of white supremacy as a political and social system. Yet understanding felon disenfranchisement as a practice that exposes this connection between who makes up the *demos* and who (and how) it *punishes* requires a broader analysis of American discourses of citizenship. As we have seen, Foucault teaches us to be attentive to the practices and discourses surrounding stigmatized and excluded figures, and to understand how those figures are produced by these very practices that appear only to refer to them. Locke points our attention squarely to the deep theoretical interconnection between the founding of a political society and its attempt to make punishment an acceptable expression of natural right. Yet, few scholars, when turning to the American experience of these excluded figures, to the history of political founding, or to the canonical expressions of membership in the American political sphere, are attentive in this way. More importantly, if we are going to understand the *meaning* of felon disenfranchisement, we must first understand the meaning of the franchise.

I focus my attention on a Judith Shklar's theory of citizenship and her analysis of voting through a close and sympathetic engagement with *American Citizenship: The Quest for Inclusion*.⁴ Her work on citizenship gives us a compelling but ultimately incomplete theory for understanding how disenfranchisement performs the useful work of establishing or confirming social standing. A salient feature of American citizenship drives her analysis: its primary social significance is to confer standing upon some individuals at the expense of others. In section two below, I identify and reconstruct three central aspects of her analysis: 1) that citizenship-as-standing is based on the American history of slavery, 2) that standing is conferred through denial

⁴ Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass.: Harvard University Press, 1991). Hereafter cited as "AC."

of equal rights, and 3) that the right to vote, rather than voting itself, is where that conferral of status occurs. Section three argues that her analysis is insightful, but does not go far enough, leaving unanswered questions regarding contemporary exclusions. Specifically, I show how her attention to slavery ignores its role in the social construction of race and its historical and functional connections to state punishment. Shklar mistakenly insists that there are no longer any remaining barriers for adults to vote in the United States, leading her to miss how citizenship continues to be defined through the discourse of crime and punishment as well as missing the performative nature of voting itself. To be clear, Shklar's analysis of the vote is profound and correct because she is attentive to the connection between slavery and voting. In overlooking the connection between slavery and punishment in the American experience, however, she misses the importance of continuing criminal exclusions to the franchise. That she misses this connection is both surprising and illustrative. She, like most liberal theorists before and following her, far too easily falls back onto essentialist notions, not just of race, gender, or sexuality, but also of the even more difficult constructions of good and bad persons, of criminals and innocents.

2. Citizenship, Voting, and Standing

The persistent proclamation of equality “in the accepted presence of its absolute denial,” Shklar argues, characterizes American citizenship (AC: 1). The meaning of American citizenship is primarily a matter of “social standing,” an admittedly “vague” notion that Shklar insists has salience with the American people and which they also realize is essentially at odds with democratic commitments to equality (AC: 2). If her book has one central purpose, it is to drive home the point that the American commitment to citizenship as an expression of equality derives its meaning from the persistent denial of equal standing to large groups of persons. To have

standing is to be recognized as having a place within a hierarchical society, and, in the American context, the standing conferred by citizenship is that of equality with those other citizens around you. Unlike social markers such as income, occupation, and education, which can confer numerous levels of hierarchical standing, American citizenship, understood as a form of standing, operates in a binary. Most simply, either one is a citizen, or one is not.

“The two great emblems of public standing, the vote and the opportunity to earn,” Shklar argues, confer this status (AC: 3). Shklar turns to an analysis of voting and earning because they have defined “what was unique about American citizenship” (AC: 15). What distinguishes these two practices as such effective markers of standing is that they are thoroughly steeped in the pernicious history of American slavery. Shklar does not mean to say that voting or earning do not mark other contexts of citizenship (i.e. outside of the American experience), but rather that these two practices have historically defined the boundaries of American citizenship through their limited availability to large swaths of the population. Insofar as their exclusive quality has driven the desire for these rights, they reveal the meaning of American citizenship as a marker of public standing. Shklar insists that the “years of denial have left their paradoxical marks upon this constitutional right” (AC: 15). Because citizenship is revealed to be about the conferral of social standing, its chief markers are misunderstood if they are not analyzed with attention to *how* they have been used to confer such standing.

Referring to the “four great expansions of suffrage” by colonists, white workingmen, blacks, and women, Shklar writes:

Only one thing was absolutely clear to everyone who used the word *citizen* in any of these early disputes about the vote: no slave was a citizen. Even before Justice Taney announced that no black person had any rights that white people needed to respect, black chattel slavery stood at the opposite social pole from full citizenship and so defined it. The importance of what I call citizenship as standing emerges out of this basic fact of our political history. The value of citizenship was

derived primarily from its denial to slaves, to some white men, and to all women (AC: 16).

This passage captures the two central points of Shklar's analysis: 1) citizenship, in the American context, has been articulated both literally and figuratively through *slavery*, and 2) citizenship's meaning for some rests expressly on its *denial* to others.

The right to vote has value, Shklar argues, only insofar as it is able to confer standing by distancing those who possess the right from "slaves" who cannot possibly have it. Each struggle for the expansion of suffrage explicitly made their claim to equal standing in these terms, in contradistinction to some other group who could not make such a claim, persistently figured as slaves of some kind. Shklar writes:

In the four great expansions of the suffrage, slavery was always a presence in the language of political argument. The Colonists rebelling against English rule, the white males disenfranchised by property and tax qualifications, the freedmen after the Civil War, and finally women all protested that they were reduced to the level of slaves if they did not have the vote and equal representation (AC: 16).

In each of these historical moments, the figure of the slave stands as the paradigmatic threat to freedom, as the antithesis of the American citizen who takes part in rule in addition to being ruled. The outright rejection of the idea of a citizen as a mere subject of the state defines the American citizen as a participant in rule, and links the practice of voting for one's magistrates inseparably to being a citizen. It is this dual commitment to an ideal of political equality and to some procedure of self-government that makes the vote fertile ground for conferring social standing. Shklar simply draws our attention to the fact that the struggle for equal standing was made precisely over the right to vote.

Shklar notes that "... Americans were very quick to complain that if the British government did not meet their demands, they were little better than slaves" (AC: 39). While the

language used by the American revolutionaries drew on the terms of political argument inherited from British sources, the very real existence of slavery in the colonies underscored their claims:

[T]he meaning of the word *slave* in America was not a mere metaphor for reduced political independence. It meant something far more concrete: the actual condition of most American blacks. And that this was a nightmare, though not a probability, for whites in America was at least in part due to the condition of indentured servants, who though far better off than black slaves were close enough to them to engrave the terror of enslavement upon many minds (AC: 39-40).

If the American Revolution was about representation and securing rights of self-determination and independence from British rule, then it is no surprise that slavery, as a condition of complete dependence, would be the referent for these claims. In the early 19th century when disenfranchised white workingmen made their claim of standing, they too drew upon the language and practice of slavery to make their claims. The Jacksonian movement, Shklar claims, was driven by a central contention that all workingmen must be granted the right to vote or else they would be no different from that other class of laborers that filled the country: slaves.⁵

For actual slaves, of course, the connection between the right to vote and their condition as property was self-evident: “The freedmen saw the vote as a mark of social standing. It was, after all, *the* public sign that their years of servitude were over, and that they were citizens at last” (AC: 52). That it took so long between the passage of the 13th, 14th, and 15th Amendments and the final removal of legal barriers to exercise the right codified there only underscores the claims made in support of the Voting Rights Act of 1965. Drawing on Fredrick Douglass’ insistence for the right to vote, Shklar writes, “No clearer statement of the idea of citizenship as standing could be imagined. This is hardly surprising, since the fear of slavery had always been at the very core of this particular conception of citizenship. *Who should express it better than an American ex-slave?*” (AC: 57, emphasis added).

⁵ See *American Citizenship*, pp. 47-52. On the question of dignity of labor itself, see pp. 79-85 as well.

For women, Shklar argues, the link between suffrage and slavery is more problematic. The 15th amendment, she writes, "... did nothing at all for women. And the result was bitter resentment" (AC: 57). The women's suffrage movement reveals what Shklar calls "the darker side of citizenship as standing" (AC: 57). On her account, the women's suffrage movement demonstrates how appeals to standing need not be made in the terms of equality, but can easily be made in terms of superiority. The problem for middle-class white women was that what they took to be a clearly inferior group had been granted the rights that they surely deserved more:

It is ... always possible to make a claim for the vote on grounds of superior, not equal, standing, as the advocates of property qualifications had done in the past. Women demanding the suffrage found that their cause might be better served by treating voting as a privilege limited to the educated and respectable, such as their own middle-class selves. It was in vain that Douglass, their supporter, pointed out the greater needs of the freedmen, compared to the many advantages enjoyed by these women. They did not see the difference between someone who can exercise all the privileges of legal citizenship except the vote, and someone who had no rights that a white man need respect (AC: 58).

The language of slavery even figures into the opposition to women's suffrage, Shklar argues. The rejection of the ERA can be partly understood by how many women chafed under the implication that, absent explicit protection of their right to vote, they could be considered little more than slaves. "It is the imputation of slavery," Shklar writes, "the very word *slave* when applied to homemakers, that arouses the deepest resentment on the part of conservative female opponents of the ERA" (AC: 20). From both sides of the argument, the figure of slavery is central. For those in support of the ERA, to be denied explicit standing is to be considered a slave. For those opposed to the ERA, the invocation of slavery was to call their current standing a form of slavery, a condition emphatically rejected by women who understand their position in life to be anything but slave-like. "In either case," Shklar writes, "the dreaded memory [of slavery] still lingers" (AC: 20).

What Shklar hopes to show with her gloss on the history of the vote is that slavery, both as a real institution of the American experience and as a conceptual bulwark, was central to every instance of the expansion of voting rights in the United States.⁶ Slavery, as the literal and figurative antithesis to freedom and independence, was also the antithesis of citizenship. While there might be space between full membership and slavery, some form of second-class citizenship, there is surely no doubt that to be a slave was to be definitively *not a citizen*. Conversely, to be secure in one's standing as a citizen had value precisely because it meant that one is definitively *not a slave*, an impossible condition to accept.

The utility of these terms, citizen and slave, is based on the denial of the vote in the face of a deeply held public commitment to equality. This is what invests the vote with such deep meaning: "What gave citizenship as standing its historical significance," Shklar writes, "is not that it was denied for so long to so many, but that this exclusion occurred in a republic that was overtly committed to political equality, and whose citizens believed that theirs was a free and fair society" (AC: 17). The claims made by the Colonists, by white workingmen, by former slaves, and by women were not that the republic should be recreated with their interests included as well, but that the republic, *as it was defined*, must respect that they too had equal standing in it. Denial of full citizenship under the claims of equality for members means that a denial to a group is not simply about difference, but about difference that indicates lower social standing. In the absence of this ideological attachment to equality, it could be the case that those not included are simply not members, and one could make a good-faith claim that this denial does not imply reduced standing. But in the face of a public commitment to equality, exclusion necessarily reveals a hierarchical relationship of some kind.

⁶ While Shklar's historical narrative is brief, it is quite accurate. Keyssar's more careful and less polemical history of voting rights confirms the centrality of slavery in suffrage discourses. Keyssar, *Right to Vote*.

Through each successive claim for the expansion of suffrage, the core injustice that the colonists, workingmen, blacks, and women identified was that their denial of the vote represented a public admission that they were being denied equality. Additionally, it is important to note that each successive claim for inclusion continues to be predicated on the denial of complete equality to some other group. As each struggle for inclusion has demonstrated, it is no accident that the claims have persistently had recourse to a “darker side,” maintaining an other whose continued exclusion demonstrates the true standing of those brought into the fold.

The history of the franchise reflects this tension between denial and equality, and as such, it has been the case that when claims of standing have been advanced, they have typically been made along existing cleavages of difference as claims of superiority. Shklar argues that it is entirely predictable, given the tension between equality and standing, that the classic boundaries between members and non-members are drawn along existing lines of difference taken as markers of superiority. Shklar writes:

No historically significant form of government or of citizenship is in principle incompatible with the exclusion of large groups of people, but natural-rights theory makes it very difficult to find good reasons for excluding anyone from full political membership in a modern republic. To be sure, Americans have always found plenty of ideological reasons, from racism to social Darwinism, from religious bigotry to nativism, to justify exclusionary and discriminatory policies. Racism and sexism generally did most of this work of repudiation, and they did it very successfully for a very long time. Nor did they ever disappear. When eventually they did give way to political reality, the barriers to citizenship, piece by piece, had to come down (AC: 38).

The *meaning* of the vote (and in turn, the value of citizenship itself) is defined precisely on the basis of such denials, exclusions, and refusals to recognize some persons as possessing equal standing.

The obvious danger of defining citizenship as a form of standing, even when that standing is explicitly stated in terms of the equality between members, is that there is no reason

why this necessarily prevents claims over the vote to be made in decidedly inegalitarian terms. “There is nothing equal about social standing in general,” Shklar writes, “Nothing is more unequally distributed than social respect and prestige. It is only citizenship perceived as a natural right that bears a promise of equal political standing in a democracy” (AC: 57). The challenge that citizenship-as-standing faces is how to bridge the conflicting attachments to equality with the socially productive work of exclusion. What makes this problem a uniquely *American* problem is its unavoidable tie to the history and practice of slavery in the United States. “It was this juxtaposition of slavery and constitutional democracy,” she writes, “above all else, that set America apart from other modern states” (AC: 28-29).

The central historical lesson that Shklar derives from this analysis is that we misunderstand the practice of voting itself. Social standing, as established through its denial to some, is attached not to the practice of voting or its instrumental function (i.e. an ability to alter the outcome of electoral races or to register interest through its aggregative function), but to the right to vote itself. *Voting*, rather than *the vote*, confers standing:

It was the denial of the suffrage to large groups of Americans that made the right to vote such a mark of social standing. To be refused the right was to be almost a slave, but once one possessed the right, it conferred no other personal advantages. *Not the exercise, only the right, signified deeply.* Without the right one was less than a citizen. Once the right was achieved, it had fulfilled its function in distancing the citizen from his inferiors, especially slaves and women (AC: 27, emphasis added).

The vote as a *right* has been the site of struggles for enfranchisement and inclusion because the dignity and standing conferred by being *allowed* to vote confirms group membership in the polity. The exercise of the vote does not signify this standing, and as such, is not what carries voting’s meaning. Recognizing this distinction, Shklar contends, helps make sense of the low voter turnout rates and captures the degree to which the vote itself, even legally secured, is meaningless unless it also represents a shift in the standing of the group in question. In this

sense, having the vote is the meaningful end (so long as it successfully confers standing), rather than a means to some other end:

[T]he right is not fundamental because it secures benefits or other rights directly for the individual voter acting alone; it does so only if he or she votes as a member of a group. ... Voting is the necessary first step, but in itself it is not enough; additional forms of social and political action are required to promote and protect the interests and rights of ordinary citizens. The deepest impulse for demanding the suffrage arises from the recognition that it is the characteristic, the identifying feature of democratic citizenship in America, not a means to other ends (AC: 55-56).

The difficulty in successfully conferring this standing is, Shklar argues, that the vote is not the only marker of standing in the American context. The right to achieve independence through work and earning also does this social work and is the remaining battleground for realizing the terms of political equality.

3. *Reconsidering Shklar*

Shklar's argument is powerful, and it forces a reconsideration of the terrain on which we speak and theorize about voting and what it means to be an American citizen. The history of struggle for suffrage is, in her analysis, a powerful demonstration of the importance of conceiving citizenship under these terms. Yet, as will be made clear below, there is a set of omissions in her account that limit its productivity as a way of accounting for the continuing forms of exclusion that characterize the American practices of citizenship and punishment. These exclusions are important to consider precisely because of her convincing argument that we must pay close attention to the work that citizenship does in conferring differential social standing between groups of people. Building upon each of the central features of her theory identified above – the importance of slavery and the difference between *the vote* and *voting* – in this section I consider how American citizenship, along each of these terms, is inflected with the discourse of racialized punishment. If slavery's "dreaded memory still lingers" in contemporary

citizenship, it is because slavery's institutions and practices were so easily taking up into punitive ones that outlived it.

3.1: Slavery, Race, and Punishment

If there is a single contribution in Shklar's treatment of citizenship that demands both our attention and our praise, it is her direct confrontation with the centrality of slavery in the American experience, and the importance of this attention should never be under-estimated. As Seyla Benhabib notes, Shklar was dedicated to theorizing politics "from the standpoint of the margins, from the standpoint of those who did not have a voice easily representable at the center [of public life]."⁷ Benhabib argues that Shklar's analysis of citizenship is itself a response to Arendt's *On Revolution*: "Instead of marginalizing and rendering invisible the plight of African-American slaves in the new republic as Arendt had done, Shklar places the injustice of slavery and the wounds it has inflicted on the meaning of American citizenship at the very center of her analysis."⁸ This is, indeed, one of the most moving aspects of Shklar's work: she demonstrates a concern for the excluded, the marginalized, and the exiled, placing questions about injustice squarely at the center of political theory. Yet, I want to push on two ways in which her analysis of slavery is in need of further elaboration. I argue that Shklar underplays the relationship between slavery and the formation of race and the racialized figure of the "white citizen." Second, Shklar pays no attention to the historical and functional connections between the institution of slavery and the discourse of punishment.

In *The Abolition of White Democracy*, Joel Olson argues that Shklar, while attentive to race-based exclusions and the history of slavery, misses that the American citizen comes into

⁷ Seyla Benhabib, "Judith Shklar's Dystopic Liberalism," *Social Research* 61, no. 2 (1994): 480.

⁸ *Ibid.*: 481.

existence as a necessarily *white* citizen.⁹ Olson argues that Shklar does not “complete the thread” connecting slavery to blackness to citizenship: “Citizenship was not just standing, as Shklar argues, but *racialized* standing.”¹⁰ While Shklar persuasively shows how the legacy of slavery persists even in the contemporary conception of citizenship, it does so under racialized terms. Based on the historic exclusion of blacks, by virtue not simply of overt racism, but by role as chattel slaves as the antithesis of the citizen, there is no escaping the fact that the “abstract” citizen, Olson argues, is in fact the *white citizen*. Olson re-interprets the claims of immigrant groups, laborers, and women for equal standing and full citizenship as struggles for inclusion in whiteness. Their successes reflect not simply an expansion of standing to these groups, but a remaking of the racial category of *white* to be relatively less nativist, class-specific, or gendered. While these cleavages continue to exist, he argues, they do so within the terms of overall white supremacy.

The primary reason for Shklar’s blindness to the obvious connection between slavery and blackness, and the subsequent construction of the citizen as white, Olson claims in a footnote, is due to her racial essentialism. He writes: “One possible reason why Shklar does not make this connection between whiteness and citizenship is because she holds a biological conception of race.”¹¹ While I agree that Shklar does tend towards conceptions of race and gender that assume them to be immutable ascriptive characteristics, it is not strictly true that Shklar is inattentive to how the line is drawn between groups. Shklar realizes that white workingmen fighting for the

⁹ Joel Olson, *The Abolition of White Democracy* (Minneapolis: University of Minnesota Press, 2004).

¹⁰ *Ibid.*, 43.

¹¹ Here, Olson quotes Shklar from “Obligation, Loyalty, Exile” where she writes: “And whether or not you choose your nationality is a very tricky question, but you are stuck with your race” (185). Interestingly, in an earlier article version of this chapter in Olson (2001), the footnote uses the term “essentialist” instead of biological. Joel Olson, “The Democratic Problem of the White Citizen,” *Constellations* 8, no. 2 (2001); Judith N. Shklar, “Obligation, Loyalty, Exile,” *Political Theory* 21, no. 2 (1993).

vote knew that the struggle for political exclusion was tied to their self-concept. “The vote was so important to these men,” she writes, “because it meant that they were citizens, unlike women and slaves, as they repeated over and over again. Their very identity as free males was at stake” (AC: 49).

Nevertheless, Shklar repeatedly demonstrates that the heart of the citizenship “problem” is the exploitation of lines of stable difference in opposition to the American commitment to equal standing and the principle of inclusion. The questions of continued racial or gender domination even after inclusion and the social construction of identity are largely off the table in her account here.¹² The only concern about “identity” Shklar has is that white men find their social standing threatened in opposition to what they know to be true about themselves (i.e. that they are full members with higher standing than “other” groups). Olson’s point is to demonstrate how this self-understanding comes into existence *through* the exclusion of women and blacks, rather than prior to it. Shklar’s analysis is stunted, according to Olson, because the question of American citizenship is about more than settling the boundaries of membership: settling these boundaries produces the very characteristics that serve as the basis for exclusion. She fails to see citizenship struggles as constitutive in the formation of race and gender in the American context, and in turn, this leaves her theory of democratic inclusion in jeopardy:

What Shklar implies but fails to elaborate, then, is that citizenship as standing links democracy to race. Standing not only reconciles equality and freedom with slavery; it builds white domination into democracy. Thus, the democratic problem is not simply the legacy of slavery and racial exclusion or the failure of American democratic practices to live up to American democratic ideals. The democratic problem lies in the white citizen itself.¹³

¹² It is true that she returns to some of these themes elsewhere, but not specifically within the context of suffrage nor of the boundaries of membership. Her concern is more specifically focused on the central question of preventing cruelty as the organizing principle of liberalism.

¹³ Olson, *The Abolition of White Democracy*, 44.

Shklar's failing is that she does not seem to realize the extent to which the history of slavery has shaped not just the practices and problems of democratic citizenship, but has shaped the very terms of abstract equality it relies upon. In a classic reversal, Olson writes, "One did not receive the rights of American citizenship because one was white but rather the reverse: one was white because one possessed such rights."¹⁴ The struggle for voting rights as a marker of citizenship-as-standing, thus, is importantly a struggle over the normalized conception of whiteness. This is most true in the context of the Jacksonian-era struggles for voting and working rights, Olson argues: "It was so important to become a citizen in the Jacksonian era in part because it was so important to become white. Once conjoined, the two identities were practically interchangeable."¹⁵

While in the Jacksonian era the homology between whiteness and citizenship was produced by black slavery, both Olson and Shklar seem to miss how this connection was maintained through punitive institutions in the antebellum period. Shklar is rightly drawn to the Civil-War era constitutional amendments to explain how extensions of suffrage signify extensions of political standing. She fails to note, however, that both the 13th and 14th Amendments carve out exceptions to the elimination of slavery and the right to vote. Section

¹⁴ Ibid., 45.

¹⁵ Ibid. It is important to note that Shklar herself does come very close in other works to this same reversal. See Judith N. Shklar, "Democracy and the Past: Jefferson and His Heirs," in *Redeeming American Political Thought*, ed. Stanley Hoffmann and Dennis F. Thompson (Chicago: University of Chicago Press, 1998), 179. In "Democracy and the Past" she writes, "To be a white male meant that one had to be a citizen" (179). This phrasing suggests the same priority of political rights that Olson emphasizes. Olson relies primarily on Noel Ignatiev's history of the Irish immigrant experience to explain how formal rights of citizenship were a pathway to whiteness, given that his primary interest is in exposing the hidden importance of race in the construction of American citizenship and democracy. Olson clearly prioritizes whiteness as more important (at least materially) than political membership. What Olson primarily wants to point out is Shklar's inattention to how the *manner* in which claims to citizenship were expressed (through explicitly racist actions and expressions) leaves the abstract citizen as necessarily white. It is this realization, he contends, that necessarily changes the terms of philosophical debates of inclusion and multiculturalism. Olson's interest in Shklar is, I think, instrumental to his larger argument, that two of the most central debates in political theory, which he terms the participation-inclusion debate and the multiculturalism debate, are inadequate on their own terms because they fail to take account of the fact that citizenship and democracy in the United States are constructed as *white*. See chapters 3 and 4 of *The Abolition of White Democracy*.

Two of the 14th Amendment declares that the right to vote will not be abridged, “except for participation in rebellion, or other crime.” The 13th Amendment carries a similar clause, and does not, contrary to popular belief, abolish slavery absolutely. In full, Section 1 of the amendment states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The language of the Amendment was the subject of contentious debate during first part of 1864, precisely over the “except as a punishment for crime” clause.¹⁶ The effect of this language’s insertion into the amendment, Esposito et al. argue, was driven by slave-holding interests in the Senate, and laid the basis for the development of the Black Codes used in the South to maintain not only the continued restrictions of the suffrage to freedmen, but to maintain the economic labor system of slavery, most perniciously through the convict-lease system.¹⁷

Drawing on Adam Hirsch’s history of the penitentiary in the US, Angela Davis argues that, “... both institutions [slavery and the penitentiary] deployed similar forms of punishment, and prison regulations were, in fact, very similar to the Slave Codes – the laws that deprived enslaved human beings of virtually all rights.”¹⁸ Davis argues that any history of American punishment begins with the institution of slavery, which was dramatically altered by the language of the 13th Amendment. Davis writes:

After the abolition of slavery, former slave states passed new legislation revising the Slave Codes in order to regulate the behavior of free blacks in ways similar to

¹⁶ Barbara Esposito et al., *Prison Slavery* (Washington, D.C.: Committee to Abolish Prison Slavery, 1982).

¹⁷ Milfred C. Fierce, *Slavery Revisited: Blacks and the Southern Convict Lease System, 1865-1933* (Brooklyn, N.Y.: Africana Studies Research Center Brooklyn College City University of New York, 1994); Alexander C. Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London ; New York: Verso, 1996); Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* (Columbia, S.C.: University of South Carolina Press, 1996).

¹⁸ Davis, *Are Prisons Obsolete?* , 27.

those that had existed during slavery. The new Black Codes proscribed a range of actions – such as vagrancy, absence from work, breach of job contracts, the possession of firearms, and insulting gestures or acts – that were criminalized only when the person charged was black. ... According to the Black Codes, there were crimes defined by state law for which only black people could be ‘duly convicted.’ Thus, former slaves, who had recently been extricated from a condition of hard labor for life, could be legally sentenced to penal servitude.¹⁹

The link between slavery and punishment was driven by the twofold interest in maintaining the economic structure of the slave economy and the social structure of white supremacy. The language of the 13th and 14th Amendments allowed for an increasing redefinition of criminality as blackness, and blackness as criminal. Black Codes, and more broadly in the legal structure of Jim Crow, immediately seized upon the space carved out in the amendment's exceptions. Davis notes, “Black people were imprisoned under the laws assembled in the various Black Codes of the southern states, which, because they were rearticulations of the Slave Codes, tended to racialize penalty and link it closely with previous regime of slavery.”²⁰ Slavery and the physical, social, and political degradation that it inflicted upon racialized bodies did not disappear with the Civil War, but was displaced into a different location: the discourse of punishment. The effect would be to both dramatically alter the racial make up of “criminals” in the United States and to dramatically alter the kind of work that an association with “crime” would have on social standing. Davis summarizes nicely by writing:

If ... the early incarnations of the U.S. Penitentiary in the North tended to mirror the institution of slavery in many important respects, the post-Civil War evolution of the punishment system was in very literal ways the continuation of a slave system, which was no longer legal in the ‘free’ world. The population of convicts, whose racial composition was dramatically transformed by the abolition of slavery, could be subjected to such intense exploitation and to such horrendous

¹⁹ Ibid., 28-29.

²⁰ Ibid., 31.

modes of punishment precisely because they continued to be perceived as slaves.²¹

The ability to maintain this perception rested on ensuring that the twin markers of standing (earning and suffrage), precisely the two which Shklar is interested in, would not be altered in fact by the end of slavery in the South. Wholesale political disenfranchisement through poll taxes, grandfather clauses, and especially criminal exclusions emerged immediately following the end of reconstruction.²² Slave-labor extraction was maintained by directing the resources of the criminal justice system to continue the management of former slave laborers.

Among the numerous late 19th and early 20th writers who drew attention to the connection between convict leasing and slavery²³, W.E.B Du Bois puts it most simply in a 1901 article: “[A] new slavery and slave-trade was established” with the convict leasing system.²⁴ Du Bois argues that the rise in “Negro Crime” in the South following the end of the Civil War had to be explained in part by the convict-lease system.²⁵ Convict leasing was a perfect solution to the fact that following the war, the southern states had no institutions to deal with either free black labor or increasing levels of crime. He even goes so far as to make the claim that a key reason why

²¹ Ibid.

²² As will be noted in the next chapter, most criminal disenfranchisement clauses were placed in state constitutions during the antebellum period.

²³ The problem of convict leasing, and its similarity to chattel slavery in both form and function was apparent to many writers in the late 19th and early 20th century, as noted in Davis, "Frederick Douglass and the Convict Lease System." and Fierce, *Slavery Revisited*.

In particular, see D. E. Tobias, "A Negro on the Position of the Negro in America," *Nineteenth Century: A Monthly Review* 46, no. 274 (1899); Wells-Barnett, *The Reason Why*.

I focus on Du Bois's analysis here because he, more than other analysts of the period, expressly saw convict leasing within broader questions of reconstruction and criminology. See Gabbidon and Greene who argue that Du Bois should rightly be considered part of the early American criminological school of thought. Shaun L. Gabbidon, "An Argument for Including W.E.B. Du Bois in the Criminology/Criminal Justice Literature," *Journal of Criminal Justice Education* 7, no. 1 (1996); Helen Taylor Greene and Shaun L. Gabbidon, *African American Criminological Thought* (Albany: State University of New York Press, 2000). Shaun L. Gabbidon, "W.E.B. Du Bois: Pioneering American Criminologist," *Journal of Black Studies* 31, no. 5 (2001).

²⁴ Quoted in Greene and Gabbidon, *African American Criminological Thought*, 33.

²⁵ Du Bois also cited explicitly racist courts, lynch law, and segregation as key factors explaining the source of “Negro Crime.” See Ibid., 39.

crime rates increased following the emancipation was because, “under a strict slave system there can scarcely be such a thing as crime.”²⁶ Du Bois explicitly links the question of political status with rising crime rates among freed slaves, but he insists that this increase is a direct result of freed blacks now being called criminals rather than errant slaves, and because “the police system of the South was primarily designed to control slaves.”²⁷ The structure of the antebellum police system is, Du Bois argues, little more than an expression of the color line itself, as whites automatically assume the role of law enforcement and blacks are automatically seen as criminals:

For such dealing with Criminals, white or black, the South had no machinery, no adequate jails or reformatories; its police system was arranged to deal with blacks alone, and tacitly assumed that every white man was *ipso facto* a member of that police. ... The police system of the South was originally designed to keep track of all Negroes, not simply of criminals; and when the Negroes were freed and the whole South was convinced of the impossibility of free Negro labor, the first and almost universal device was to use the courts as a means of reënslaving the blacks. It was not then a question of crime, but rather one of color, that settled a man’s conviction on almost any charge.²⁸

On Du Bois’ analysis, the convict lease system solved numerous “problems” facing whites following emancipation. It maintained an economic system predicated on forced labor, radically undermining any political standing that would have otherwise been improved by the 13th, 14th, and 15th amendments, and converted the every white man in the south into a *de facto* police force (absorbing former plantation over-seers state office). In his study *Black Reconstruction*, Du Bois writes:

In Georgia, at the outbreak of the Civil War, there were about 200 white felons confined at Milledgeville. There were no Negro convicts, since under the discipline of slavery, Negroes were punished on the plantation. The white convicts were released to fight in the Confederate armies. The whole criminal system came to be used as a method of keeping Negroes at work and intimidating

²⁶ W.E.B. Du Bois, *The Souls of Black Folk*, ed. Robert Gooding-Williams (Boston: Bedford Books, 1997), 141.

²⁷ *Ibid.*

²⁸ *Ibid.*, 141-142.

them. Consequently there began to be a demand for jails and penitentiaries beyond the natural demand due to the rise of crime.²⁹

This demand was driven, at least in part, by the beginning of the convict leasing system, which, as Du Bois notes, was in full swing by the mid 1870s, at the direction of Democrats in the southern statehouses.³⁰

The closing chapter of *Black Reconstruction* chronicles the countless nefarious devices employed by whites in the south during Redemption, and Du Bois draws special attention to the connection between crime, punishment, and the perpetuation of slavery and slave-like conditions. He quotes an “English traveler” writing in 1877, “I confess I am more and more suspicious about the criminal justice of these Southern states. In Georgia there is no regular penitentiary at all, but an organized system of letting out the prisoners for profit ... This does seem simply a return to another form of slavery.”³¹ Du Bois offers this commentary: “In no part of the modern world has there been so open and conscious a traffic in crime for deliberate social degradation and private profit as in the South since slavery.”³²

More recently, the sociological analysis of Loïc Wacquant provides a more structuralist account of this trajectory from slavery to punishment. Wacquant argues that slavery and the prison are tied together through a genealogy of the “four peculiar institutions” of race-making in the United States. He writes:

The task of *defining, confining, and controlling* African Americans in the United States has been successively shouldered by four ‘peculiar institutions’: slavery,

²⁹ W. E. B. Du Bois, *Black Reconstruction in America*, ed. David L. Lewis, 1st Touchstone ed. (New York: Simon & Schuster, 1995), 506.

³⁰ Ibid.

³¹ Anonymous “English Traveler” quoted in Ibid., 698.

³² Ibid.

the Jim Crow system, the urban ghetto, and the novel organizational compound formed by the vestiges of the ghetto and the expanding carceral system.³³

Bringing these four systems into line are a set of goals that remain perpetually in tension with one another: labor extraction and social ostracism. That is, each of these systems attempts to simultaneously manage a labor pool while also ensuring a social separation between groups. Wacquant argues that beyond the historical connection, slavery and incarceration are linked through a “triple relationship of functional equivalency, structural homology, and cultural fusion.”³⁴ The final point of his analysis, however, is not simply to point out these connections, but to demonstrate how these connections shed light on the contemporary carceral regime’s role in

[T]he ongoing *reconstruction* of the ‘*imagined community*’ of Americans around the polar opposition between praiseworthy ‘working families’ – implicitly white, suburban, and deserving – and the despicable ‘underclass’ of criminals, loafers, and leeches, a two-headed antisocial hydra personified by the dissolute teenage ‘welfare mother’ on the female side and the dangerous street ‘gang banger’ on the male side – by definition dark-skinned, urban, and undeserving.³⁵

What brings this distinction into effect are the collateral consequences of being incarcerated in the United States. Wacquant notes the “triple-exclusion” experienced by criminals in the denial of cultural capital (labor market and educational restrictions), social redistribution (i.e. denial of welfare benefits), and political participation (i.e. felon disenfranchisement), amounting to a modern form of *social death*, the term Orlando Patterson famously employed to capture the meaning of slavery.³⁶

³³ Wacquant, "Deadly Symbiosis," 99.

³⁴ Ibid.: 95.

³⁵ Ibid.: 120.

³⁶ Ibid.: 119. See also Wacquant, "Race as Civic Felony."

Complementing this structural account, Asatar Bair's recent economic analysis of prison labor has argued that the current conditions of convict labor are, quite simply, structured as a slave economy:

Slavery exists in U.S. prisons, although it is of a different form than our common conception of slavery in such sites as the Caribbean or the American south during the Antebellum period. Inmates are enslaved due to the unique structure of the production and appropriation of surplus labor, including the cultural, political, economic, and physical forces which overdetermine this class process.³⁷

From an economic analysis of labor, Bair argues, there is simply no other way to describe the contemporary structure of prison labor than as a slave economy. Drawing on Patterson's analysis of the formation of slave identity, Bair notes each of the key elements involved in the formation of slave identity are carefully attended to within the prison context: naming (exchanging one's name for a number), physical marking (exchanging one's own clothes for a prison uniform), and the severing of familial and community ties (incarceration, by definition, removes convicts from their social worlds and makes maintenance of those ties extremely difficult).³⁸ The creation of a "slave identity" forms the basis of surplus labor extraction through the form of prison labor, Bair argues. That is, the slavery/prison connection exists both through symbolic processes that directly echo slave societies as well as surplus labor extraction directly matching slave economies.

What these accounts indicate, beyond simply pointing out the striking similarity in practice between chattel slavery and convict leasing in both form and function, is that the entire criminal justice system that emerged following the war was expressly racialized in its conceptions of what constituted crime, its system of policing, and the forms of punishment

³⁷ Asatar P. Bair, *Prison Labor in the United States: An Economic Analysis* (New York: Routledge, 2008), 109.

³⁸ *Ibid.*, 30-33.

employed. As has been argued recently by Eduardo Mendieta and Jeffrey Paris in addition to Wacquant and Davis, American punishment was racialized following the Civil War, and even as modern penal law becomes increasingly “color-blind,” this has done little to correct this racialized character of punishment. This is what Olson also misses: that the construction of white citizenship is tied not just to black slavery, but the racialized practice of punishment. To speak of blackness in the post slavery period was to necessarily also speak of crime and punishment. To complete Olson’s argument that the abstract citizen is raced as white, we must also note that the abstract criminal was figured both as a non-citizen and as non-white.

This critique is meant to echo Shklar’s approach: we cannot rightly understand the meaning of American citizenship without attention to the exclusions over which it has been fought. She is correct to point us to the realization that slavery is *the* driving practice in the formation of the American polity. What is disappointing, however, is that she draws our attention to slavery while not recognizing the extent to which it has shaped the very terms of social groupings that are constituted through exclusion, and shaped the connections between slavery and the practice of punishment in the United States. Attention to these factors only underscores the relevance of her understanding of citizenship-as-standing, and more importantly, allows us to attend to those exclusions which, contrary to her unfortunate assertion that universal suffrage has been achieved, continue to define American citizenship.

3.2: Universal Suffrage?

Shklar’s interest in the vote is ultimately in service of drawing attention to the second “emblem” of American citizenship: the independence conferred through the right to work in order to earn. The historical connection, of course, between these two practices is the shared history of slavery. Just as the suffrage movement explicitly understood its achievement as a

distancing from metaphorical slavery (and in the case of freed blacks, literal slavery), the ability to earn from one's labor is an explicit rejection of the economic position of the slave.³⁹ Shklar's primary practical concern is not with suffrage, but rather the unrealized right to earn that persists in the post civil-rights era. "In spite of all the obstacles thrown in its way by injustice and discrimination in all its many forms, the vote was won," she writes, "but not that other emblem of equal citizenship, the opportunity to earn one's livelihood. The Great Society was a triumph for voting, but its struggle against poverty and unemployment was not a success. All adult Americans are now constituents, equal voters in their districts, but they are not equally independent, and too many do not earn anything" (AC: 62).⁴⁰

Shklar is certainly correct that voting is not the sole "emblem" of equal standing in the United States, and that the right to earn has also been a central battleground in the struggle for full membership in the American polity. The problem, however, is that while Shklar is right to draw our attention to the role of labor in American citizenship-as-standing, her conclusion that "the vote was won" is patently false. Foreigners, children, the mentally incapacitated, and felons are all excluded from the right to vote. Shklar at least makes mention of the children, but only to chide the "utter indifference of the young" who were granted the right to vote in the 26th Amendment, and then failed to turn out to vote en masse. At the very least, we need not worry ourselves too much in the case of children, because their lower standing is, by definition, "not a permanent physical or social condition" (AC: 18). Foreigners, who are not taken up explicitly by

³⁹ This shift in focus in the second half of *American Citizenship* to the importance of earning makes her omission of convict leasing all the more disappointing. While she is careful to note the fact of indentured servitude (see AC: 40), I have found no mention in her work of either convict leasing or even share-cropping. Convict leasing might well have served to make clear just how deeply linked slavery and the ideology of independent earning are in the American context.

⁴⁰ See also her reference earlier in the text to the role of the anxiety and fear that motivated white males to rally for the vote: "Not until very recently, when the last barriers to universal adult suffrage were removed, did this entire edifice of argument fall into disuse, to be all but forgotten" (AC: 46).

Shklar, can (in theory at least) shed their foreignness through some reasonably open process of naturalization. The mentally deficient or infirm present an entirely novel problem that Shklar ignores entirely, perhaps because, most simply, she is in the broad company of political theorists who simply fail to explicitly examine questions of disability. More sympathetically, it is true that there has been limited historical struggle among the disabled to secure their right to vote.⁴¹ The case of criminal exclusions, however, poses a different set of concerns, since the history of criminal exclusions in the United States has a far longer history than any other exclusion.⁴²

What makes this more puzzling is that in other works, Shklar is particularly attentive to the problem of being branded a “criminal” by the state. Comparing herself to the first of the great liberal ‘reformers’ of punishment, Cesare Beccaria, she argues in *The Liberalism of Fear* that the central state cruelty that must be guarded against is the state’s abuse of the criminal justice system.⁴³ The grounding principle of liberalism is this persistent fear of state power, captured nowhere better than in the extensive set of rights elaborated in the Bill of Rights for the protection of “the accused in criminal trials.”⁴⁴ The ultimate power of the state is nowhere more clear than in its ability to punish individuals, and as such, the greatest protections must be

⁴¹ This is, of course, an overly sympathetic reading, given that there most assuredly has been a widespread movement among physically, emotionally, and mentally disabled persons for the right to earn, to work, and to have access to public accommodations. Given that the entire second half of *American Citizenship* is dedicated to these struggles, Shklar is simply remiss in completely ignoring the diminished political standing of disabled persons.

⁴² There are two specific moments in *American Citizenship* that expressly seem to support the exclusions of criminals from equal standing, and by inference, the rights to vote and earn. First, in discussing the Rousseauian conception of the citizen, she is careful to note that the relationship between membership in the polity characterized by moral freedom, that state in which one understands the law as given to himself, includes even the acceptance of capital punishment: “And when he [the citizen] fails to obey the laws he has given himself, he is only ‘forced to be free,’ even in receiving capital punishment, since it is no more than a legal requirement which he agreed to impose on all citizens alike. *The lawbreaking citizen is really a traitor*” (AC: 35, emphasis added). Second, in the closing lines of the text, while referring to the possibility of some limited conception of a right to earn, Shklar includes this seeming non-sequitur: “*Like any right*, the right to earn can be forfeited, but that does not render it worthless” (AC: 101, emphasis added). What might signal a forfeiture of the right to earn, and by implication, a right to vote, is left unstated. Shklar’s conception of “universal suffrage” seems open to the possibility of some restrictions.

⁴³ Judith N. Shklar, “The Liberalism of Fear,” in *Liberalism and the Moral Life*, ed. Nancy L. Rosenblum (Cambridge, MA: Harvard University Press, 1989), 37.

⁴⁴ *Ibid.*

afforded to individuals to preserve themselves in the face of power. “Without well-defined procedures, honest judges, opportunities for counsel and for appeals, no one has a chance. Nor should we allow more acts to be criminalized than is necessary for our mutual safety,” she writes.⁴⁵ But her concern (oddly, given her self-avowed debt to Beccaria) is less with the treatment of those truly guilty of transgression, as with those who have been treated *unjustly*, who are, it turns out, *innocent*. In the very next line, her concern pivots from the accused to the victimized: “Finally, nothing speaks better for a liberal state than legal efforts to compensate the victims of crime rather than merely to punish the criminal for having violated the law. For he did injure, terrify, and abuse a human being first and foremost.”⁴⁶ The relevant point is there seems to be a distinction in Shklar’s mind between “true” criminals and those who are criminals only by virtue of state persecution.

The same inflection, between true and false criminals can be seen in, “Obligation, Loyalty, Exile.” Shklar turns to the problem of exiles to help understand the terms of obligation and loyalty. While exile is historically a form of punishment, Shklar takes those who have been exiled as a form of criminal that can only be understood as such because of some political transgression rather than a “real” crime (i.e. because some conflicting set of loyalties or obligations lead an individual to unjustly be expelled from their home nation). Her concern for such people, echoing Arendt, is that they are left without citizenship in any nation. These exiles are not criminals as such, but unfortunate victims of the abuse of political power. The mistake of “making political obligation dependent on group membership and loyalty both national and ethnic” has created the “refugee crisis” as a distinctly modern form of exile. Refugees excluded from their homes by virtue of their existing obligations to a kinship, ethnic, or linguistic group,

⁴⁵ Ibid

⁴⁶ Ibid.

are, expressly, “people who would obey the law.” As such, Shklar argues that the “plight of the dispersed and excluded is unbearable.”⁴⁷ Exile, historically an explicit form of punishment, presumes that obedience to the law is grounds to be considered a citizen of at least some state. We can deduce that persons who *would not* obey the law, must lose this claim.

It matters on Shklar’s terms (and typically on ours as well) whether or not one is guilty. But the power of Shklar’s analysis is that regardless of whether we think persons *should* be excluded even for “good” reasons, her account demands that we reflect on the fact that citizenship derives its meaning, and voting its value, *from these exclusions*. Just as Shklar charges her readers to take seriously the very real history of American slavery and discrimination against workingmen, blacks, and women, we must also take up those exclusions which persist despite her false claim that suffrage is universal. What, therefore, is the meaning of citizenship-as-standing under the terms of felon disenfranchisement? What can we learn from Shklar’s blindness to the continued exclusions facing criminals, whether they are “real” or not?

Citizenship-as-standing implies, with suffrage marking the hierarchical distinction, that felons (like women, blacks, and white workingmen before them) continue to be marked as having lower standing. In terms of American inclusion, they are not full citizens. Of course, many would argue that this is precisely the point. To be a criminal is to have at least forfeited one’s rights, or more precisely, to have *demonstrated* that one is not on the same position as others. But we should be troubled that the persons who find themselves in this position of lower standing, given the history of slavery (to which Shklar draws our attention) and its extension through the criminal justice system, are disproportionately black. Given this history, we should ask ourselves whether or not this idea of “real” criminals does more work than we recognize,

⁴⁷ Shklar, "Obligation, Loyalty, Exile," 196.

blinding Shklar (and us) to the disproportionate impact on some segments of the population over others.

3.3: *Voting Matters*

Taken together, these critiques of Shklar's analysis, the limited analysis of the race-making and criminal justice dimensions of the history of slavery and the seemingly acceptable exclusion of criminals from full membership, can be explained by a deeper problem in her analysis: a confusion over the terms of action and identity. This manifests itself through her essentialist understanding of race and gender, and in her odd contention that citizenship rights can be forfeited. The only exclusions she is attentive to are those which cohere with identity categories she takes as given. The effect is that she discounts the importance of *actual* voting practices as a part of the vote's meaning, and ultimately misunderstands the stakes for everyday political practice. We must, if we are to reconcile Shklar's omissions, take another look at her contention that the work of social standing is done by the right to vote, and not the voting itself.

I argue 1) that the practice of voting itself is crucial for the *maintenance* of the standing, 2) that under the conditions of felon disenfranchisement, voting itself becomes an expression of innocence, and 3) that precisely because voting has become a performance of social standing tied to "action" based exclusions (i.e. felon disenfranchisement), it has become a practice that stands in for any number of political commitments, statements, or demonstrations of superiority that have little to no basis in democratic theory. That is, voting has become infused with countless different meanings, all of which purport to demonstrate one's superiority.

Shklar is not arguing that the act of voting itself doesn't matter or isn't important, but that in so far as being allowed to vote is a marker of social standing, it is the *right* which confers this standing, not its exercise. The implication she draws from this is her own way of explaining the

kind of low turnout rates that plague the United States: given that suffrage has been extended, it is no longer a ground upon which to contest standing, and its significance is diminished. That is, given that the question of suffrage is relatively settled (unlike, she asserts, the grounds of labor), in her view, we should not be surprised that the actual voting doesn't happen as much as we might like, under a more participatory conception of citizenship. Voting itself might matter, but, she asserts, it simply does not do the work of conferring standing.

This leaves her blind to many commonplace and repeated activities that make up public life, and which are central to the performance of citizenship. This is because at the heart of Shklar's analysis of citizenship is the unavoidable, and unavoidably messy, problem of the relationship between action and identity. While she gives cursory attention to the connection between suffrage and identity (specifically male, white identity), she misses the importance of how this identity is maintained through repeated performances of voting itself.

I take it largely for granted that any theoretically robust understanding of what we might mean by "identity" is not a fixed or stable quality, however strongly tied to specific ascriptive and relatively immutable characteristics or social facts (e.g. sexual difference, phenotype, origin of birth, etc.). I draw explicitly on Butler's conception of gender (and sexual difference itself) as performative, based on a "*stylized repetition of acts.*"⁴⁸ Butler draws our attention primarily to the specific practices that must be repeatedly engaged in that generate the social content of gender. She additionally draws our attention to the discursive conditions under which these practices take place, typically those that articulate an essentialist discourse about the content of the identity in question, and which presume those essentialized attributes as the justificatory basis of continued domination, subjugation, and outright oppression. These repeated

⁴⁸ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 140.

performances generate the perceived stability of the identity in question. To sharpen her point, however, it is necessary to look as well at the specific practices of the relatively powerful who articulate the identity in question both through their prohibition and through the normal performance against which it is defined. We must pay attention, that is, both to the ban that is laid down upon some performance (like Jim Crow prohibitions blocking blacks from the polls), as well as the normative performances to which they are compared (like voting itself).

Janet Halley's work on the instability of sexual identity is illustrative here. Her careful analysis of the structure of action/identity or status/conduct distinctions at the heart of the 1993 "Don't Ask Don't Tell" policy and in the Supreme Court's jurisprudence in *Bowers v. Hardwick* illustrates three critical points.⁴⁹ First, the prohibitive law, particularly the criminal law, is a necessary component in articulating homosexual identity (e.g. the ban on sodomy is constitutive of sexual difference). Second, the seemingly silent category of heterosexual actions including so-called "normal" sex and performances of outright homophobia are performances of this difference. This is nowhere more than clear in the military's Don't Ask Don't Tell policy which enforces demonstrations of heterosexuality: there is no more effective demonstration than active and often violent anti-homosexual behavior. Third, and most importantly, Halley's critique fundamentally reveals that identities are basically unstable, and this instability is shown most clearly (and somewhat paradoxically) when attempts are made to stabilize and define the relationship between action and identity or status and conduct.

Shklar's analysis of citizenship as standing is striking because it is nicely attentive to the way in which the *meaning* of citizenship is the product of historical struggles. We can only surmise that she likewise takes the meaning and content of the *citizen* to be similarly produced

⁴⁹ Halley, *Don't*; Janet E. Halley, "Reasoning About Sodomy: Act and Identity in and after *Bowers V. Hardwick*," *Virginia Law Review* 79 (1993); Janet E. Halley, "Romer V. Hardwick," *University of Colorado Law Review* 68 (1997).

through these struggles. Because of her essentialist conception of identity, she seems to think that once a battle is over, once the status has been defined, the productive work has ended.

Considering Halley and Butler, this is surely not the case. Even if fewer and fewer people go to the polls each year, those who do are necessarily engaging in a performance of their full membership in the polity. During times when workingmen were excluded from the polls, performing membership by voting also expressed property ownership. When all blacks are excluded from the franchise (as Olson notes), voting becomes a performance of whiteness. When women are excluded, masculinity is necessarily a part of casting one's vote. And in the contemporary setting, when I walk into the polling place, find my name on the list and cast my vote, among the many things that I publicly declare in that moment, one surely must be that I am not a felon. What is most striking about this performance is that I have no control over this utterance of innocence. It is implied by my participation whether I approve or not. It is, in fact, not even predicated on my intentions or knowledge when I enter the voting booth. The common complaint made in response to this reading is, "But I didn't even know that felons can't vote, how could I be expressing my innocence?" This position, while perhaps true in the narrowest sense, is irrelevant to the meaning of the vote. The relevant question to ask oneself is whether one would feel any differently about voting or would be more or less likely to vote given the knowledge of criminal exclusions.

What must it mean to take seriously that citizenship is a form of social standing *and* to recognize that individuals convicted of criminals cannot vote? Both that criminals are, deductively, not full citizens *and* that my standing as demonstrated by my voting (and working) is purchased on their backs.⁵⁰ Shklar teaches us to look carefully at whose exclusion carries the

⁵⁰ Paterson's characterization of slavery as "human parasitism" comes to mind here. Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, Mass.: Harvard University Press, 1982).

burden of membership for those included. What she leaves open, however, is a blindness to the fact that these burdens continue to be carried, even if they are “guilty” and “criminal.” The result is that, precisely as she implicates, the vote is not really about self-government as much as it is about distinguishing oneself from one’s inferiors. But the outcome that she does not realize, for she is blinded by the “guilt” of those who have seemingly “forfeited” their rights, is that this leaves the citizen figured as expressly “innocent,” and the vote as a tool for demonstrating superiority.

This is the second, and perhaps stranger, result of citizenship-as-standing and its ties to the performative logic of casting a vote. Voting becomes expressive of far more than one’s articulated choice between options on the ballot. First, the fact of voting itself becomes as expression of superiority through innocence as opposed to guilt. Second, the content of one’s interest easily becomes an expression of superiority as well. Voting becomes about one’s claim of being a progressive (I’m voting green!), anti-racist (I’m voting for the black candidate!), or feminist (I’m voting for the female candidate!). There is nothing wrong with such claims in and of themselves, but in so far as voting derives its meaning from the *higher* social standing it confers, these expressions of what would otherwise be private preferences easily become expressions of those preferences as *higher* preferences. Voting (and vote-choice) becomes a vessel through which to articulate superior standing, hardly a democratic expression of membership.

4. Conclusion

The root of this distortion in what voting signifies is not that we have misunderstood the vote, but rather that we have failed to admit what it is and what it is not. Shklar’s analysis is a first step to realizing this. In the American context, the vote is deeply intertwined with the

pernicious history of slavery. Shklar's argument is that we should not be so surprised to discover that having achieved "universal suffrage," there still remain so many persons living as second-class citizens. Participation in electoral politics is not sufficient to ensure that everyone be granted equal standing, and so she directs our attention to what she sees as the more pressing concern: the right to earn a living.

But if we are willing to look deeper than Shklar does and pay attention to the continued exclusions that exist in the United States today, we must reckon with the *kind* of social standing that they confer. Voting, under the conditions of felon disenfranchisement, expresses social standing necessarily within the terms of a criminal justice system historically implicated in the maintenance of white supremacy. That this is the case might be a travesty, but it should be apparent to us if we are attentive to the historical connections and structural similarity between institutions such as slavery and the penitentiary technique. In the American experience, the projects of punishing and of marking citizens are deeply intertwined, and, if we are to make normative claims about who should and should not be included in the polity as citizens, it is imperative that we pay attention to these deep connections. The overlap between punishment and citizenship may well be unavoidable, but better that we bring them to the surface, acknowledge them, and be willing to own them, than to continue to disavow them, letting the exclusion of criminals continue to do work for us without paying them any mind.