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Punishment and Inclusion: Race, Membership, and the Limits of American Liberalism

Book Prospectus
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1. Abstract

With remarkable regularity, felon disenfranchisement—the restriction of voting rights for individuals convicted of certain criminal offenses—is analyzed and denounced by political theorists and philosophers. The practice, they rightly observe, is at odds with basic principles of liberal proportionality, republican conceptions of civic education, and any accepted penological ends. And yet, it persists throughout the United States, continuing to shape the outcome of political contests, and asserting itself each and every time Americans line up at the voting booth. What larger lessons does the fact of felon disenfranchisement’s persistence teach us about American law, politics, and principles?

Punishment and Inclusion argues that the particular history of felon disenfranchisement, rooted in post-slavery restrictions on suffrage and the contemporaneous emergence of the modern American penal system, shows the deep connections between two American political institutions often thought to be separate, revealing the work of membership done quietly by our criminal justice system, and, conversely, the work of punishment done by the electoral franchise. By treating disenfranchisement as a symptomatic marker of the deep tension *and* interdependence that persists in democratic politics between who is considered a member of the polity and how that polity punishes persons who violate its laws, *Punishment and Inclusion* opens new critical perspectives on the philosophy of punishment, the institution of American citizenship, and the internal limits of liberal political theory. In doing so, it goes beyond existing scholarly accounts of disenfranchisement that primarily focus either on the question of its efficacy as a form of punishment, or on the question of the legitimacy of its restrictions on the franchise, without considering the relation between these issues, which is where felon disenfranchisement’s deepest significance lies.

This account of disenfranchisement tells the larger story of how legal techniques, punitive practices, and political discourses have been routinely deployed to manage an internal tension in liberalism by displacing that tension onto the bodies of criminalized others. Disenfranchisement does its productive work by fabricating the figures of the innocent citizen and the dangerous felon, attempting to alleviate the broader anxieties of living in a social world where harm at our own hands

or those of another is a constant possibility. Since liberal theories of justice rely on such displacements, I call for a broader rethinking of the meaning justice itself and the normative frameworks we use to judge our penal practices that is sensitive to the contingency of one's political and legal standing, the production and fabrication of criminal kinds, and the social, political, and epistemological work done by the very practices we seek to adjudicate.

By consciously focusing on a relationship between theory and practice, the book works simultaneously in theoretical, historical, and empirical registers. As such, it draws on a wide range of resources, ranging from the rich documentary record of Maryland's several constitutional conventions during the 19th and 20th centuries to the theoretically informed historical account of American citizenship developed in the legal philosophy of Judith Shklar (as well as some aspects of the history of American debates over the franchise that Shklar ignores), to the work of John Locke, Michel Foucault, Ida B. Wells, Frederick Douglass, W.E.B. DuBois, and Iris Marion Young, each of whom contributes in different ways to my own account of the relationship between citizenship and punishment. Similarly, it employs a range of interpretive and critical methods, including close reading of philosophical and popular texts, original archival research, legal analysis, and discursive genealogy.

2. Outline of Chapters

The book makes its argument in seven substantive chapters, along with an introduction and conclusion. The first chapter, "Unjust, Ineffective, and Productive," diagnoses felon disenfranchisement as more than a simple failure to enforce liberal principles of justice, proportionality, and self-government. While granting that it is such a failure, I show how the true paradox of disenfranchisement is that it is a *productive failure*, in that it is symptomatic of liberalism's typical refusal to address the foundational tension between state punishment and political membership. The chapter shows how standard normative and empirical approaches to disenfranchisement reflect this symptomatic blindness as well, as they are caught up in justificatory frameworks that disable a consideration of how disenfranchisement produces and maintains the very subjects that are excluded from the franchise.

Chapter two, "To Kill a Thief" demonstrates the depth of connection between punishment and membership through a reading of John Locke's *Second Treatise of Civil Government*. As a founding text of Western liberalism centrally concerned with the role of punishment in defining and maintaining a contractual body politic, Locke's account reveals the way in which punishment and membership are inextricably linked in the liberal tradition, and shows that this connection has not always been disavowed. Drawing on original archival research on the 17th century figure of the "highwayman," "outlaw," and "bandit" as well as a careful reading of Locke's usage of the "thief" as a central figure of his political thought, this chapter demonstrates how the origins of liberal political orders are soundly rooted in the terms of punishment. Moreover, it reveals how the difficulty and instability of punishing transgressors is managed by producing subjects who can be so punished to make the foundational violence of civil society palatable.

The third chapter, "Fabricating Delinquents and Citizens," explores how contemporary liberal theory becomes blind to this subject-generating function of liberal punishment and membership practices through a Foucauldian critique of Judith Shklar's account of American citizenship. Shklar offers a powerful corrective to legal accounts of citizenship, arguing that citizenship is an expression of a relational public standing signified by the rights to work and vote, rather than as a legal status. She fails, however, to acknowledge that these rights are not simply conferred to given identity groups within a polity, but are instrumental in producing those very identities, causing her to

strangely insist that universal suffrage has been achieved in the United States despite longstanding exclusions of criminals. This blindness to criminal exclusions is symptomatic of a larger liberal blindness to the discursive fabrication of criminological figures. Through an examination of her wider corpus, I demonstrate Shklar's presumption of an underlying subjective "truth" to the moral standing of criminals. Given Foucault's account of the discursive fabrication of criminological figures (the delinquent, the abnormal, and *homo aeconomicus*, in particular), and the previous chapter's reading of Locke, there is little reason to assume that categories of "guilty" and "innocent" are at all stable reflections of one's actions. I argue that a Foucauldian turn to practices of political exclusion, even those that exclude bad acts and actors, exposes how the figure of the American citizen is produced as white, able-bodied, and innocent throughout the 19th and 20th centuries.

Chapter four, "The Impossibility of Free Black Labor," focuses on such practices during the re-foundation of the United States following the Civil War. As was noted by Ida B. Wells, Frederick Douglass, and W.E.B. Du Bois among others, the deployment of the convict lease system substituted a prison economy for a slave economy, and a penal system for a slave system. The exceptions in 13th and 14th amendments to the Constitution allowing for "involuntary servitude" as a form of punishment and the restriction of suffrage for persons participating in "rebellion, or other crime[s]" ensured that any re-founding of the American polity could be limited through punitive techniques and the express figuration of free black labor as an inherently criminal form: larceny. Despite her own careful attention to the role that slavery plays in the conferral of standing through work and the franchise, Shklar's blind-spot to criminal exclusions occurs precisely because of a failure to recognize the discursive impossibility of "free black labor" following the civil war, which served as the basis for the persistent articulation of a citizen's independence and standing through race, suffrage, work, and punishment.

Chapters five and six work in concert, tracing a genealogy of suffrage restrictions in Maryland. As a border state with a fraught history of slavery, manumission, and emancipation from the colonial period onward, it serves as an exemplary case to unpack the previous chapter's account of labor, suffrage, and figures of black criminality. Most importantly, Maryland has held fourteen separate constitutional conventions since 1774, including a series of conventions immediately before, during, and following the civil war in 1850, 1864, and 1867. During these 19th century conventions, the delegates debated the limits of political membership and the franchise in direct context of a perceived crisis of "free negro labor." The suffrage restrictions that emerged from these debates persisted through the 20th century, and have only recently become the object of electoral reform during the past decade. Using the verbatim transcripts of these constitutional debates, these chapters explore the discursive nexus of race, labor, disability, and the morally inflected status of white supremacy that continues to ground felon disenfranchisement in Maryland and throughout the United States. Chapter five, "Incurable Blackness" focuses on the contradictory yet complementary logics of competence, responsibility, guilt, and dependency to show how civil and political disabilities have been constructed both within and against understandings of disability in general, and mental disability in particular. Chapter six, "Punishing Blackness at the Ballot Box," turns to the specific nexus of criminality and blackness posited by convention delegates. I argue that the convention debates show that the delegates understood disenfranchisement as a practice that managed the boundaries of full citizenship through the courts' power to determine criminal guilt and mental competence. The figure of the "free negro" was persistently invoked to do this work: free blacks were figured as inherently criminal, irrational, and dependent to reduce the threat that their new freedom imposed on the standing of white workingmen.

The seventh chapter, “American Justice and Neo-Liberal Penalty,” explains how the 19th century understandings of penalty and citizenship have been reconfigured in the 20th century. As it became increasingly impossible for white supremacist discourses to openly manage the internal liberal tension of punishment and membership, the language of the 19th century convention debates paved the way for a series of discursive shifts in 20th century disenfranchisement provisions: first, a move from “infamy” to “felony” as the primary marker of criminal exclusions; second, the increased deferment of questions of “idiocy” to questions of guardianship; and third, the movement of all disenfranchisement provisions from the state constitution to election law. These discursive shifts were attempts to manage the instability of punishment and membership through separation. They were attempts to split the discourses of punishment, ability, and citizenship and ultimately to rationalize disenfranchisement provisions. The ultimate effect of these changes has not been to undo racialized or ableist conceptions of citizenship, but simply to mask the continuing work of social and political differentiation performed by disenfranchisement: the maintenance of the ideal citizen as white, innocent, and mentally independent. While current suffrage restrictions might be models of universal liberalism (i.e. they are seemingly “gender-blind” and “color-blind”), such universalism is purchased expressly through the maintenance of an ideal citizen that continues to support masculinist, ableist, and white supremacist norms of work and labor even under the terms of neo-liberalism.

The book’s conclusion thus calls for a turn away from the relatively moribund literatures in the study of justice and instead look to communicative and deliberative theories of democratic practice that begin by theorizing *injustice*, difference, and subjectivity. Drawing on the ethical theories of Iris Marion Young and Michel Foucault, I argue that our normative evaluation of felon disenfranchisement (as well as the entire regime of collateral consequences of mass incarceration) must *begin* by recognizing what it is as a practice, and that it is successful in managing the liberal punishment/membership paradox precisely because it is a seeming failure. We must accept the relationship between criminal justice and the boundaries of political membership, and instead rethink our practical and institutional articulations of exclusion and punishment. There is, sadly, no getting punishment or citizenship “right.” Instead, we must confront the tension *as a tension* and manage it openly through a critical and self-reflective democratic practice.

3. Audience and Market Position

This book self-consciously straddles boundaries between political theory, philosophy, American political development, and critical legal studies. Methodologically, rhetorically, and substantively it is intended to be of interest for audiences in multiple fields and traditions, including:

- **Normative political theorists** interested in the discursive roots, histories, and complexities of justificatory terms upon which normative arguments are advanced, such as justice, proportionality, desert, inclusion and exclusion, and responsibility;
- **Historians of political thought**, including specialists in the thought of John Locke, Michel Foucault, Judith Shklar, Ida B. Wells, Frederick Douglass, and W.E.B. DuBois, as well as those interested in the connections between early modern and contemporary articulations of liberalism, the social contract tradition, citizenship, punishment, and rights;
- **Philosophers and critical theorists** who are interested in a critical engagement with the ideas of justice, law, power, sovereignty, normalization, performativity, and the state;

- **Legal theorists** and **law and society scholars** in both the social scientific and humanistic traditions, interested in how legal provisions and constitutional arrangements both reflect and construct the political and social order;
- **Political Scientists** interested in civil rights, voting behavior, judicial politics, and race and politics;
- **Critical race theorists** interested in the legal construction of race, the relationship between punishment and labor mediated through racial categories, the construction of whiteness as a marker of political and social membership, and the history and maintenance of white supremacy in the United States since the 19th century;
- **Criminologists** and **sociologists** studying mass incarceration, collateral consequences, the empirical and theoretical meanings of punitive practices, and the racially disparate effects of the American criminal justice system.

As a work of political theory driven by an in-depth account of a specific social and political practice, the book complements and builds upon recent works by political theorists such as Keally McBride's *Punishment and Political Order* (Michigan), Leonard Feldman's *Citizens Without Shelter: Homelessness, Democracy, and Political Exclusion* (Cornell), and Jennifer Culbert's *Dead Certainty: The Death Penalty and the Problem of Judgement* (Stanford), each of which approach the study of political theory through the lens of punitive practice and policy. The historical depth of my argument, as seen in its account of 17th century highway robbery and sovereignty and the genealogy of 19th and 20th century constitutional debates over disenfranchisement nicely complements similar work on crime and punishment in the Western tradition, especially Karl Shoemaker's recent *Sanctuary and Crime in the Middle Ages, 400-1500* (Fordham), Ladelle McWhorter's *Racism and Sexual Oppression in Anglo-America* (Indiana), and Khalil Gibran Muhammad's *The Condemnation of Blackness: Race Crime, and the Making of Urban America* (Harvard).

As an empirical intervention into the study of race, punishment, and American democracy, the book offers a robust account of the connections between race and citizenship in the U.S., attending to the racially disparate effects of mass incarceration in the late 20th and early 21st century. It extends and elaborates upon recent work in Sociology and Criminology, such as Loïc Wacquant's *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke), Devah Pager's *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (University of Chicago), Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Free Press), Katherine Beckett and Steven Herbert's *Banished: The New Social Control in Urban America* (Oxford), Jonathan Simon's *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford), and Todd Clear's *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (Oxford).

The book is thus well suited for course adoption in advanced undergraduate and graduate level courses across a wide variety of disciplines and fields, including Political Science, Sociology, Legal Studies, Criminology, African-American Studies, History, and Philosophy. In particular, it is appropriate for courses focused narrowly on punishment, crime and social policy, civil rights (especially on the history and meaning of the franchise), philosophy of law, race and politics, and critical race theory. It would also work well in broadly thematic courses on topics such as justice, rights, liberalism, and citizenship.

4. Contributions

While there are well established literatures in political and social theory on punishment, citizenship, and race, as well as a rapidly emerging normative and empirical literature on felon disenfranchisement and collateral consequences, this book moves beyond these literatures in the following ways:

- The central theoretical argument of the book, that the discourses of punishment and citizenship are deeply intertwined and support each other in liberal and republican political traditions, is seriously underdeveloped within political theory and philosophy. This sociological insight made by Emile Durkheim over a century ago, has in many respects failed to be taken up within mainstream political theory and political philosophy. In 20th century legal theory, there has been an active resistance to theorizing the two domains together. The book demonstrates this connection not only within canonical thinkers in the social contract tradition, but also in historical legal practice and contemporary liberal theory. More than simply calling for a renewed attention to this discursive overlap, the book exposes how even despite the general resistance of political theorists to explicitly deal with these two domains simultaneously, the discourses implicitly motivate and enable their explicit separation.
- While John Locke's *Second Treatise of Civil Government* is one of the most widely read and commented upon texts in the Western canon of political theory, I offer an important corrective in how we understand the text. This contextualist reading of Locke takes seriously the fact that the right to punish is the motivating device of the text's rhetoric, and in turn, is central to Locke's proto-liberal theory of consent, obligation, and the right of rebellion.
- In the wake of Michel Foucault's interventions into the study of punishment and governance, this book provides an account of how, within the modern American context, criminological figures have been fabricated to manage contradictory discursive interactions by giving a genealogy of how this process emerged through the convict lease system following the civil war. This approach, in turn, helps explain the persistent gap in mainstream liberal theory's understanding of criminological figures. In the end, I show how the contemporary "universal" subject has been fabricated at the strategic intersection of discourses of white supremacy, ableism, labor, and criminality, giving us new insight into the mechanisms of state and non-state racism.
- While there is a large and developing empirical and normative literature about the collateral consequences of mass incarceration, to date, these interventions are driven by a limited normative framework or are purely descriptive accounts. I investigate the social and political *meaning* of these practices and develop new normative grounds that address the foundational connections between punishment and membership. The approach of this book allows for a deeper understanding of disenfranchisement as a central part of collateral consequences, and as a *productive failure* of public policy.
- Where previous accounts of felon disenfranchisement have easily identified the racially disparate *effects* of the practice, given its ancient roots and its colonial origins in the United States, it has widely been assumed that there is no way to demonstrate its racially motivated and discriminatory *intent*. This is largely because the seemingly color-blind language of the statutes have not been analyzed in the context of the anxieties of free black labor (figured as a paradigmatic form of larceny) leading up to and following the civil war. The figuration of blacks as criminal in nature that pervades the documentary evidence exposes the racialized roots of the practice and contends with the thesis that the practice can withstand judicial scrutiny under the Voting Rights Act or the 14th Amendment to the Constitution.

5. Timeline and Revisions

As of July 2010, all but the seventh chapter are in draft form. A complete draft of the entire manuscript will be ready for review in the spring of 2011 and is expected to be approximately 90,000 to 100,000 words in length. Chapter one has been completed and only requires bibliographic revisions and updates to reflect recent work on collateral consequences as well as recent judicial developments of several cases that are up for review by the Court. A version of chapter two is complete, and will be expanded to include additional archival research on 17th century conceptions of highway robbery and legal punishments for bandits. An edited selection from this chapter is currently under-review for publication in the journal *Political Theory*. Chapters three and four represent a reorganization of two completed dissertation chapters to make the thematic connections between Foucault and Shklar more apparent, and to give Wells, Douglass, and DuBois their own chapter. Drafts of chapters five and six are complete, and a modified version of Chapter five is slated for publication in the journal *Social Text* in 2011. Chapter seven is currently in progress. Most of these chapters have been presented and critiqued through the interdisciplinary workshop system at the University of Chicago. As a member of the Society of Fellows in the Liberal Arts at the University of Chicago for the past two years, I have presented chapters two, five, and six at Society workshops and conferences, receiving extensive comments from other members of the Society in the Social Sciences and Humanities. I am of course happy to consider recommendations for more substantial revisions from editors and reviewers.