

# Penalization, Depoliticization, Racialization: On the Over-incarceration of Immigrants in the European Union<sup>1</sup>

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## Introduction

In 1989, for the first time in history, the population entering state prisons in the United States turned majority black. As a result of the crumbling of the urban ghetto and of the ‘War on Drugs’ launched by the federal government as part of a broad law-and-order policy designed to restabilize racial boundaries in the city and reassert state power against the backdrop of rapid economic restructuring and steep welfare retrenchment,<sup>2</sup> the incarceration rate of African Americans doubled in just ten years, jumping from 3,544 inmates per 100,000 adults in 1985 to a staggering 6,926 per 100,000 in 1995, nearly eight times the figure for their white compatriots (919 per 100,000) and over twenty times the rates posted by the larger countries of continental Europe. If individuals held in jail, sentenced to probation, or released on parole are taken into account, it turns out that more than one of every three young black men aged 18 to 35 (and upwards of two in three at the core of the big cities in the deindustrializing Rust Belt) find themselves under supervision of the criminal justice system.

If blacks have become the favoured ‘clients’ of the carceral system of the United States, it is not on account of some special propensity that this community would have for deviance and crime; nor is it due to a sudden increase in

<sup>1</sup> This chapter is an extended version of a shorter piece circulated *in absentia* at the session on ‘The Power to Punish’ at the Scottish Criminology Conference, held in Edinburgh, Scotland, on 11–12 September 2003, based on chapter 6 of my book *Deadly Symbiosis* (2006), and is reproduced here with the kind permission of Polity Press. I am thankful to the participants and colleagues who reacted to it via e-mail afterwards and otherwise stimulated me to enter this debate (with special mention to David Garland and Richard Sparks), as well as to Sarah Armstrong and Lesley McAra for their patience and persistence in getting me to revise it for this volume.

<sup>2</sup> For an analysis of the dimensions, causes, and functions of the rise of the US penal state after the mid-1970s, see Wacquant (2005b).

their share of the nation's offences against the law. It is because they stand at the point of intersection of the three nexû of forces that, together, determine and feed the unprecedented regime of carceral hyperinflation that America has experienced for the past quarter-century after discarding the Fordist-Keynesian social compact and the frontal attack on the caste regime by the US Civil Rights movement and its urban offshoots:

- (1) the dualization of the labour market and the generalization of precarious employment and un(der)employment at its lower pole;
- (2) the gradual dismantlement of public assistance for the most vulnerable members of society (itself necessitated by the spread of desocialized wage-labour) and its eventual replacement by disciplinary programmes designed to push them into the substandard jobs of the deregulated service economy; and,
- (3) the crisis of the ghetto as instrument of control and confinement of a stigmatized population deemed unassimilable to the national body and turned supernumerary on both economic and political counts: their labour power is no longer needed, given their lack of skills and replenished reserves of pliant immigrant workers; their ballots can be ignored in the wake of the dealignment of party voting, the tightening stranglehold of corporate interests on policy-making, and the shift of the country's electoral epicenter from city to suburb (Wacquant 2006).

*Extreme* though it has been in scale, slope, and velocity, the carceral trajectory of African Americans in the post-Civil Rights era may be less idiosyncratic than the woolly notion of 'American exceptionalism' would lead one to believe. One can hypothesize that the advanced societies of Western Europe will generate *analogous*, albeit less sudden and pronounced, situations of lopsided incarceration to the extent that they, too, embrace neo-liberal penalty and embark on the path of the punitive management of urban inequality and marginality, deploying their prison system not only to curb crime but also to regulate the lower segments of the employment market, to warehouse labour turned redundant, and to hold at bay populations judged disreputable, derelict, and dangerous. From this point of view, *Third World foreigners and quasi-foreigners would be 'the blacks' of Europe at the fin de siècle* inasmuch as they occupy a homologous position at the confluence of the system of forces polarizing the occupational structure, fraying the social safety net, and eroding the established ethno-national boundaries and make-up of the countries of the Old World.

With the closing of state-sponsored schemes of foreign labour import in the 1970s, the immigrant 'guest worker' from the colonial periphery has mutated into the immigrant *tout court* whose persistent presence at the core is increasingly perceived at once as an occupational threat (he displaces and undercuts native labour), an economic burden (he is unemployed and drains scarce public services), and a social menace (having failed to 'integrate', he and his offspring are vectors of

corrosive cultural alterity, criminal deviance, and urban violence). With the acceleration of supranational integration after the Maastricht Treaty and the Schengen Agreements (see Mathiesen, Chapter 7), the visible presence of non-white foreigners has become doubly anomalous since the very drawing of the outer boundaries of the European Union is predicated on a clear-cut opposition between ‘us’ Europeans and ‘them’ the Third-World migrants who are no longer welcome – even as they continue to be needed (Sayad 1999: esp. 417–26, Geddes 2000, Santel 1995, Stolcke 1995).

As we shall see in this chapter, the building of ‘fortress Europe’ in the age of labour flexibility and generalized social insecurity has indeed accelerated a twofold movement of ostracization of unwanted *Gastarbeiter* turned *Ausländer*, through *external removal* via expulsion and *internal extirpation* via expanded incarceration directly aimed at those populations embodying the social and symbolic ‘exterior’ of the emergent postnational Europe. In the process, the penal arm of the state has assumed a pivotal role in articulating the discursive and organizational construction of internal and external insecurity to the point where they have been fused, projecting the darker-skinned illegal or criminal alien – the two adjectives have become virtual synonyms – as the living antithesis of the New European in the making.

### Sizing up Ethno-national Disproportionality

Over the past three decades, nearly all the countries of the European Union have experienced significant and steady increases, and in several cases explosive growth, in their prison population, coinciding with the onset of mass unemployment, the casualization of wage work, and the official curtailment of labour migration. Between 1983 and 2001, these increases reached one-third to one-half in several of the larger countries, with the number of inmates (including those in remand detention) rising from 43,400 to 67,100 in England, from 41,400 to 55,200 in Italy, and from 39,100 to 54,000 in France. Carceral inflation has been even more spectacular in smaller countries and alongside the Mediterranean, with Portugal (6,100 to 13,500), Greece (3,700 to 8,300), and Ireland (1,400 to 3,000) sporting a doubling and Spain (14,700 to 46,900) and the Netherlands (4,000 to 15,300) more than a tripling of their carceral stock (Tournier 2002).<sup>3</sup> Despite periodic recourse to mass pardons (for example in France on Bastille Day every year since 1991) and waves of early releases that have become commonplace (in Italy, Spain, Belgium, and Portugal), the continent’s store of inmates has swollen relentlessly and penitentiaries everywhere are full to overflowing (Kuhn *et al* 2000: 136–7).

<sup>3</sup> It should be noted that the larger increases affect countries that have small correctional populations and started from inordinately low rates of incarceration. For a more nuanced analysis of trends by country, see Kuhn (1998) and Snacken *et al* (1995: 18–53); also, the data periodically compiled by the International Centre for Prison Studies at King’s College in London.

But, above all, throughout Europe foreigners, migrants, and so-called 'second-generation' immigrants of non-Western extraction, and persons of colour, who figure among the most vulnerable categories both on the labour market and *vis-à-vis* the social welfare sector of the state, owing to their lower class distribution, paucity of credentials, and the multiple forms of discrimination they endure (Wrench *et al* 1999), are massively over-represented within the confined population, and this to a degree comparable, nay in most places superior, to the 'racial disproportionality' afflicting blacks in the United States.

As a first approximation of 'ethno-national disproportionality' in the European Union, one may use the percentage of foreigners behind bars weighed by the share of aliens in the country's population. Admittedly, this is an imperfect indicator that should be manipulated with caution since both numerator and denominator are fraught with problems of accuracy, reliability, and consistency across time and national boundaries. It lumps together, in different proportions, immigrants from the global periphery and foreigners from other countries of the Euro-American sphere. Notwithstanding these limitations, this indicator is revealing of striking transatlantic parallels. Table 5.1 shows that the presence of foreigners inside European houses of detention far exceeds their weight in the general population in every single nation-state of the continent. And that, in nine of fourteen members of the European Union, the disproportionate

**Table 5.1.** Foreigners in the carceral population of the European Union, 1997

Country	Foreign inmates	Proportion of carceral population (%)	Proportion of foreigners in total population (%)	Ratio
Spain	7,700	18	1.6	11.2
Italy	10,900	22	2.1	10.5
Greece	2,200	39	4.7	8.3
Netherlands	3,700	32	4.3	7.4
Portugal	1,600	11	1.8	6.1
France	14,200	26	5.6	4.6
Belgium	3,200	38	8.9	4.3
Sweden	1,100	26*	6.0	4.3
Norway	339	15	3.6	4.1
<b>US blacks</b>	<b>816,600</b>	<b>47</b>	<b>12</b>	<b>3.9</b>
Germany	25,000	34*	9.0	3.8
Austria	1,900	27	9.1	3.0
Denmark	450	14	4.7	3.0
Finland	127	4.5	1.6	2.8
Ireland	203	8	3.1	2.6
England	4,800	7.8*	3.6	2.2

\* Estimates

Source: *Statistique pénale annuelle du Conseil de l'Europe, Enquête 1997* (Strasbourg, Editions du Conseil de l'Europe, 1999: 17), for European prison figures; OECD, *OECD Social Indicators 2002* (Paris: OECD, 2003), table G3, for the percentage of foreigners; Bureau of Justice Statistics, *Correctional Populations of the United States 1997* (Washington: Government Printing Office, 2000: 2), for blacks in the United States.

**Table 5.2.** Evolution of the share of foreigners (%) in the carceral population of selected European countries, 1985–95

Country	1985	1995	Increase (%)
Belgium	27.6	41.0	48
Germany	14.5	29.4	103
France	26.4	28.5	8
Italy	8.9	17.4	95
Spain	10.6	15.5	46
England-Wales	1.3	7.8	500
Ireland	1.8	6.4	255

*Source:* André Kuhn, Pierre Tournier and Roger Walmsley, *Le Surpeuplement des prisons et l'inflation carcérale* (Strasbourg: Editions du Conseil de l'Europe, 2000: 37).

incarceration of foreigners is superior to the demographic over-representation of blacks in American jails and prisons.<sup>4</sup>

Even more striking than their sheer over-representation behind bars is the fact that, during the very period when rates of black incarceration were sky-rocketing in the United States as the policy of penal management of poverty and inequality was going into full swing, there was a uniform and often spectacular increase, in nearly all European countries, of the share of foreigners in the population under lock and key, as indicated in Table 5.2. In the decade 1985–95, the proportion of aliens confined in jails and prisons rose consistently by five percentage points in Spain, England, and Ireland, and by ten to fifteen points in Belgium, Italy, and Germany; the European record for 1995 was held by quiet Switzerland with 57.6 per cent (for a foreign population approaching 20 per cent, resulting in a comparatively low disproportionality – due to their recent Malthusian policy as regards both political asylum and labour import in spite of the country's long tradition of mass migration and continued need for foreign workers). While the documented and undocumented foreign population grew during this period in most of the countries concerned, this growth was limited and cannot possibly account for, say, the doubling of the share of non-nationals among the confined in Italy and Germany.

Part of the disproportionate incarceration of European foreigners is presumably caused by their higher overall rates of offending – although this is a contentious issue that cannot be adjudicated empirically in most cases owing to the lack of adequate statistical data – which can itself stem from their skewed class, age, and spatial distribution as well as from the different opportunity structure for life strategies they face (Engbersen and van der Leun 1999). Part of

<sup>4</sup> This directly refutes the notion, accepted as a matter of common sense among most European and North American criminologists, that 'the extraordinary overrepresentation of African Americans in the population incarcerated or under criminal justice supervision is not found on the same scale in European countries' in the case of foreigners (Landreville 2002: 429).

it is likely to be due, as with blacks in the United States, to the preferential targeting of aliens by the police and their differential processing in the courts, as well as to the application of neutral criteria (such as holding a legal job as a condition for release on bail) that systematically handicap aliens in the administration of punishment. Finally, a fraction of the excess confinement of foreigners derives from offences such as unlawful entry and residence that by definition cannot be committed by nationals (or only as accomplices), or germane infractions such as the fraudulent fabrication and manipulation of official documents (identity cards, marriage certificates, residence permits, etc).

While it does not allow one to consistently weigh these various factors, a methodical mining of available studies of bias in the penal treatment of aliens and related ethnic categories among nationals, bears out both the prevalence and the deepening of the over-incarceration of foreigners and immigrants in the European Union. And it confirms that, with the onset of neo-liberal hegemony, penal segmentation has become a key modality of the drawing and enforcing of salient social boundaries in the Old World as in the New world.

### Selective Targeting and Preferential Confinement

In England, following the urban riots of the early 1980s, officially diagnosed as in part 'racial' by the government report of the Scarman Commission, the question of street crime, often reduced to the sole offence of 'mugging' has been confounded, in public perception as well as in the routine practices of the police, with the presence and demands of subjects of the Empire who come from the Caribbean. Whereas British blacks had been viewed as a low-offending group until the mid-1970s, by the mid-1980s 'crime, in the form of both street disorder and robbery, was gradually identified as *an expression of black culture*'; and 'the populist potential of the black crime theme' enabled the conflation of supposed black crime and black ethnicity to cross the divisions of the political field and suffuse the media (Gilroy 1987: 109, see also Cashmore and McLaughlin 1997). The shift towards authoritarian forms of social regulation, multi-agency policing, and intensified surveillance of 'criminal areas' closely overlapping with inner-city neighbourhoods of Afro-Caribbean concentration correlates with the fact that blacks are seven times more likely to be incarcerated than their white or Asian counterparts (and West-Indian women ten times more likely).

This wide ethno-racial gap can be explained in part by the differential propensity of blacks and whites to commit offences. Much like their American counterparts, blacks in Britain are more likely to engage in street crime due to the fact that they are of lower class provenance and poorer, more likely to suffer high unemployment, and to reside in distressed and declining neighbourhoods (Modood *et al* 1997) where illegal activities in public space are more common and thus easier to engage in, detect, and repress. But their grossly bloated

presence in prison also stems from the cumulative effect of the selective targeting and differential treatment of Afro-Caribbeans by law enforcement agencies: they are more prone than white Britons to be stopped and arrested on general suspicion by the police, to be prosecuted rather than cautioned in the case of juveniles, and to be tried in Crown Courts rather than before magistrates as well as to be remanded in custody, both of which, *ceteris paribus*, result in a higher rate of prison sentences (Walker 1989, Hood 1993).

A similar phenomenon can be observed in Germany where the question of *Ausländerkriminalität* has become a staple of political and even criminological debate, as the media and parties across the ideological spectrum have fastened on the increased presence of foreigners as the putative cause for urban crime and disorder (Walter and Kubink 1993). The over-imprisonment of foreigners and visible non-national ethnics has increased dramatically over the past two decades, reaching astronomical levels in many regions, even as the overall use of incarceration declined due to a deliberate Malthusian penal policy that reduced the national population behind bars for much of that period. In North-Rhine-Westphalia, for example, Sinti and Roma Gypsies originating from Romania sport incarceration rates more than twenty times that of native citizens; for Moroccans the figure is eight times, and for Turks between three and four times. And, the proportion of foreigners among those awaiting trial in detention rose from one-third in 1989 to one-half five years later. In Germany too, differential rates of offending cannot possibly account for the breadth of such ethnic disparities in incarceration and for their speedy growth in recent years. The widely held belief that teenage foreigners are more prone to delinquency than their German counterparts, for instance, does not withstand a methodical examination of police investigations and court processing (Geissler and Marissen 1990).

In the Netherlands (whose carceral population has quadrupled over the past twenty years, as successive governments consciously sought to align Dutch penal policy on the more punitive European mean, and comprised a hefty 43 percent foreigners in 1993) the probability of being sanctioned with an unsuspended prison sentence is systematically higher for the same first offence when the person convicted is of Surinamese or Moroccan origin (Junger-Tas 1997). Studies using quasi-experimental and field observation methods have shown that, although the incidence of police arrest is not biased by the ethnicity of suspects, once arrested non-whites have a greater likelihood of being convicted and of receiving a custodial sanction. In line with the American pattern, in which authorities have historically displayed pronounced indulgence for offences committed within black neighbourhoods, punishment in Dutch society also turns out to be less likely and less severe when the crime victim is a member of a subordinate ethnic category (Junger 1998, Engbersen 1995).

After plummeting from 50,000 at the close of the Second World War to 10,500 in 1968, the prison population of Spain has doubled every ten years since 1975 to return to 55,000 today along with the rise in recorded crime

accompanying the democratization of society following Franco's death and the deregulation of the economy. The growth of casual wage employment and the wide tolerance, even encouragement, of undocumented labour inflow from Morocco, against the backdrop of an official policy of rationing of immigration, have combined to push growing numbers of African migrants into a legal limbo at the margins of society. Together with xenophobic media campaigns and periodic police sweeps intended to reaffirm state power and stem mounting social anxiety caused by accelerating economic and demographic trends, changes in the criminal code that have hardened sentences for petty crimes against property and narcotics offences and penal procedures that deny foreigners the benefit of alternatives to short prison sentences (such as weekend custody and day fines) have translated into a doubling of the share of foreigners behind bars since 1985 (Serrano 1993, Cid and Larrauri 1998, Rivera Beiras 1999). Among Spanish nationals, a similar process of differential penal targeting and preferential confinement impacts on the Gypsies: one of every four Spanish female inmates in the Iberian peninsula is a *gitana*, even though Gypsies comprise only 1.6 per cent of the country's population (Hernández *et al* 2001).

In France, the share of non-nationals in jails and prisons has ballooned from 18 per cent in 1975 to 29 per cent twenty years later, even though foreigners account for only 6 per cent of the country's population and about 15 per cent of police suspects throughout that period. And this figure does not register the pronounced carceral 'over-consumption' of French citizens perceived and treated as foreigners by the police and judicial apparatus, such as youths born in France to Maghrebine immigrants (*beurs*) or who come from the predominantly black French overseas dominions and territories.<sup>5</sup> Suffice it to say that the cells of France have grown distinctly 'coloured' these past years, since two-thirds of the 15,000-odd foreign prisoners officially recorded in 1995 originated from North Africa (53 per cent) and Sub-Saharan Africa (16 per cent). That year the jails and prisons of Greater Paris, which hold a quarter of the country's inmates, harboured a population 44 per cent foreigner and thus *majority non-white*, if one includes French inmates of colour (Gaillègue 2000). Aside from their higher unemployment and poverty rates, the 'ethno-national disproportionality' that afflicts residents from France's former colonial empire arises from the fact that, for the same offence, the courts resort to confinement more readily when the condemned does not possess French citizenship. Suspended sentences and non-custodial sanctions are practically monopolized by nationals, on grounds that they offer better social and legal guarantees of 'community attachment'. Thus foreigners make up 10 per cent of offenders punished with community service (*travail d'intérêt général*) and 13 per cent of those receiving a fine, but one-third

<sup>5</sup> 'Beur', a street slang (*verlan*) term for 'arabe', designates so-called second-generation North Africans, the French offspring of Algerian, Moroccan, and Tunisian immigrants drawn to France during the 'thirty glorious years' of post-war economic growth.

of persons sanctioned by an unsuspended prison term and over one-half of convicts sent behind bars for more than five years. Demographer Pierre Tournier has shown that, depending on the charges, the probability of being sentenced to prison is 1.8 to 2.4 times higher for a foreigner than for a Frenchman (all persons tried taken together, without regard to prior record) (Tournier 1996).

Far from resulting from an alleged increase in their criminality, as the ambient xenophobic discourses of elected officials, police experts, and the media would have it, the growing share of foreigners in the confined population of France turns out to be due *exclusively* to the tripling in twenty years of incarcerations for violations of immigration statutes. If inmates sentenced for this charge are excluded from correctional statistics, the ratio of over-incarceration of aliens to citizens drops from six to three. As with blacks in the United States, then, the disproportionate share of foreigners in French custodial institutions expresses not simply their lower class composition but also the greater severity of the penal institution towards them, as well as the 'deliberate choice to repress illegal immigration by means of imprisonment' (Tournier 1996: 158) instead of a gamut of non-custodial sanctions, as in earlier decades.

This confirms that we are dealing here with penal captivity that is first and foremost a *confinement of differentiation* or segregation, aiming to keep a definite group separate and to prevent its amalgamation into, or to facilitate its subtraction from, the societal body – as distinct from 'confinement of authority', intended to reassert the legitimate power of the state, or 'confinement of safety', aimed at neutralizing dangerous individuals.<sup>6</sup> This is why such confinement results more and more frequently in deportation and banishment from the national territories that compose the European Union.

### The Penal Management of Foreign Intrusion and Extrusion

To the foreigners and quasi-foreigners held in jails and prisons, often in tiers segregated according to ethno-national origin (as in the jail of La Santé, at the heart of Paris, where inmates are distributed into four separate and hostile wards, 'white', 'African', 'Arab', and 'rest of the world'), one must thus add the tens of thousands of migrants without papers arrested at border-crossings or awaiting deportation, especially owing to the generalization of 'double sentencing' procedures that attach a decree of expulsion to a penal sanction.<sup>7</sup> This floating

<sup>6</sup> This ideal-typical distinction between three forms of confinement is elaborated by Faugeron (1994).

<sup>7</sup> Under penal law in France, as in several other European countries, foreigners can be subjected to '*double peine*': they are sanctioned, first, by imprisonment for the offence they committed (including illegal entry and sojourn) and, secondly, by expulsion from European territory after they have served their sentence in the case of undocumented immigrants or legal aliens deemed to 'pose a threat to public order' (a clause routinely invoked by the authorities to deport repeat offenders).

population is corralled and detained in those *state-sponsored enclaves of juridical limbo that are the 'waiting areas' and 'retention centres'* which have proliferated across the European Union over the past dozen years.

A 1999 parliamentary commission on France's retention centres likened entering them to 'entering another country, in another epoch, far away from the Republic', and forthrightly deplored the appalling conditions of overcrowding and lack of hygiene, the rampant violation of rights, and the multifarious administrative irregularities committed in them (Mermaz 2001). A concurrent report by the Cimade, a non-governmental agency charged by the French government with assisting the populations passing through these facilities (where length of stay averages four to five days), reveals the common reliance by the authorities on improper documents, the theft of the personal papers and belongings of detainees, the near total absence of legal counselling, and repeated instances of expulsion of single adolescents as well as children born in France and sick persons under medical treatment (including detainees suffering from full-blown AIDS). This is all an effort to accelerate procedures, disengage the establishments, and increase the yearly count of the deported.

In Belgium, where the number of aliens held in the custody of the *Bureau des Étrangers* increased nine-fold between 1974 and 1994, persons consigned in the detention centres for foreigners '*en situation irrégulière*' fall under the authority of the Interior Ministry (in charge of public order) and not of the Justice Ministry, and they are thus omitted from the statistics of the correctional system. Conditions in these centres evince the same routine denial of rights, services, and dignity as in their French counterparts. Five so-called closed centres, surrounded by a double row of barbed-wired fences and under permanent video surveillance, serve as launching pad for the deportation of 15,000 foreigners each year: this is the official government target number given as express proof of the 'realistic' immigration policy implemented with the professed aim of cutting the ground out from under the far right, which meanwhile has continued to prosper as never before (Vanpaeschen *et al* 1998, Brion 1996). In Italy, deportation orders quintupled in only four years to peak at 57,000 in 1994, even though there are ample indications that illegal immigration subsided during that period and that the vast majority of foreigners who do not have proper papers enter the country legally to fill 'black market' jobs disdained by the natives (Pallida 1996) – as the government of Massimo D'Alema implicitly recognized when it increased by a factor of six the number of residence and work permits initially granted as part of the 'regularization' programme launched in winter 1998.

Under the provisions of the Schengen and Maastricht treaties (aimed at accelerating juridical integration so as to ensure the effective 'free circulation' of citizens of the Union), immigration has been redefined by the signatory countries as a continental and, by implication, national matter of *security*, under the same heading as organized crime and terrorism, onto which it has been grafted at the level of both discourse and administrative regulation (Bigo 1992, see also

Mathiesen, Chapter 7).<sup>8</sup> Throughout Europe, police, judicial, and prison practices and policies have converged in that they are applied with special diligence and severity to persons of non-European phenotype, who are easily spotted and made to bend to penal injunctions, to the point that one may speak of a process of criminalization of immigrants that tends, through its destructuring and criminogenic effects, to (co)produce the very phenomenon it is supposed to combat, in accord with the well-known mechanism of the 'self-fulfilling prophecy' (Merton 1968). Its main impact, indeed, is to push its target populations deeper into clandestinity and illegality, to feed their fear of authorities, and to foster the durable structuring of specific networks of sociability and mutual help, as well as of a parallel economy that escapes state regulation, an outcome well-suited to justifying in return the special attention given to them by law enforcement agencies (Dal Lago 1998; on the Dutch case, Engbersen 1997; and on Germany, Kubink 1993). Managing immigration with the penal wing of the state transmutes bureaucratic violations into criminal acts and fosters the selective police targeting and differential treatment by the courts that amplify initial differences between natives and aliens in the composition and incidence of offending. It also forces foreigners to live in a submerged world in the shadow of legality, setting off a *fatal dialectic of criminality and criminalization* that becomes self-sustaining, with the added pressing demands of the journalistic and political field for dramatic displays of the state's capacity to tame this insidious threat to national cohesion and European integrity.

With the redefinition of peregrination from outside the European compact as a problem of 'security' synecdochically linked to crime, the expulsion of undocumented foreigners and alien convicts sentenced to territorial banishment has turned into a media theatre onto whose brightly-lit stage elected officials vie to step up and display their professed resolve to 'stop clandestine immigration', and thus symbolically stem the tide of unemployment, delinquency, dependency, and assorted cultural maladies commonly attributed to it. In France, for nearly two decades successive Ministers of the Interior of both the right and the left have boasted of boosting the number of deported migrants yearly and have eagerly sought public credit for forcible mass deportation via specially chartered aircraft. By the late 1990s, various European countries were cooperating with France to pool their deportees onto jointly commissioned planes and then unload them in Senegal, Mali, Ivory Coast, Zaire, Romania, and China. One night in late September 1996, for instance, 43 Zairians and 23 Senegalese, 18 of them embarked in the Netherlands and three brought in from Germany, were forcibly heaved onto a Euralair jet for the sixth European 'exilee' charter flight to Kinshasa from Roissy-Charles-de-Gaulle that year. These operations have become frequent and large enough to foster the creation and ensure the

<sup>8</sup> The officially stated goal of the Schengen treaty was to establish a transnational legal and administrative framework to reduce crime while encouraging open borders (Kapteyn 1991).

prosperity of airlines specializing in the transport on-demand of expelled aliens – some estimates put the total number of foreigners thus banished from ‘Fortress Europe’ at 200,000 annually (De Stoop 1996: 26).

These operations effect a *reductio ad absurdum* of immigration policy to pure penal ceremony and brute bureaucratic myth. They are not rites of passage, marking a temporal transition from a ‘before’ to an ‘after’, but *rites of institution* drawing a clear-cut frontier separating those whom the rite concerns – unwanted aliens, undocumented or delinquent, thus amalgamated together – from those who cannot and will not undergo it – members of the community of European nationals, which is thereby set apart and solidified.<sup>9</sup> They purport to dramatize the capacity of the state to police its internal boundaries and to protect its external borders through penal means, just as both are coming unglued under the press of global economic restructuring, on the side of the market, and European integration, on the side of political sovereignty. Yet upon close scrutiny they evince little more than the derisory character of such pretension.

Penal expulsions are intended to reaffirm legality, yet they induce a multiplication of administrative irregularities (the deported often have not exhausted their legal recourses and appeals or they are later found to be ineligible for eviction) and a routinization of illegalities and state-sanctioned violence that can escalate to homicidal proportions. Of the 23,100 individuals placed in France’s ‘waiting zones’ in 2001, some 14,000 were ejected abroad, including 1,733 under close police escort following their refusal to board flights back to their presumed home country – the refusal rate among convicted aliens deported under ‘double sentencing’ is considerably higher, nearing one-third. In such cases, the exiles must be pushed, pulled, and dragged aboard the plane and then physically suppressed throughout the journey. They are commonly injected with sedatives in blatant violation of French law, their hands and feet bound with manacles and chains, their mouths taped shut with duct tape, their torsos immobilized with belts or blankets. They are forcibly manhandled, with physical commotion frequently causing trauma, injury, and in several instances death. These ‘charters of aliens’ further undermine the rule of law in that they appear to violate both Protocol 4 of the European Convention on Human Rights and Article 19 of the Charter of Fundamental Rights of the European Union, which stipulates that ‘collective expulsions are forbidden’ and that ‘no one can be sent away, expelled or extradited to a state where there exists a serious risk that he [sic] will be subjected to the death penalty, tortured, or receive other inhumane or degrading sanctions and treatments’.<sup>10</sup> Officials of the European Union have

<sup>9</sup> ‘To speak of rite of institution is to indicate that all rites tend to consecrate or legitimate an arbitrary boundary, that is, to cause it to be misrecognized as arbitrary and recognized as legitimate, natural. . . . By solemnly marking the passage over a line that establishes a fundamental division of the social order, the rite draws the attention of the observer to the passing (whence the expression ‘rite of passage’) when what matters is the line’ (Bourdieu 1991: 118, author’s translation).

defended the legality of the policy by arguing that these are not ‘collective expulsions’ but ‘grouped expulsions’ of persons, each of whom has been served an individual decree of eviction.

### Penalization, Depoliticization, Racialization

In many respects, the spread of the ritualized mass expulsion of illegal or convicted aliens in the European Union as penal spectacle stands as the structural analogue to the reintroduction of chain gangs, striped uniforms, and assorted shaming punishments harking back to a bygone era of social cruelty towards black convicts in the United States.<sup>11</sup> First, it fulfils the same function, namely to convey to the witnessing public the resurgent *penal fortitude of the authorities* by staging their commitment to act in an openly retributive manner towards categories that conspicuously disrupt the (supra)national symbolic order. Secondly, it offers an expressive vehicle for the social amplification and cultural *legitimation of collective feelings of resentment* towards these same categories.

In his path-breaking studies of Algerian peregrinations to and through France, Adbelmalek Sayad (1991: 305–6) has shown how ‘emigration-immigration always engages two political orders, two nations and two nationalities, and not simply two countries, two societies, or two economies as we are accustomed to consider’. This implies that migration expresses ‘a relation of domination between different socioeconomic formations’ and thus between the governments that rule them; it is the precipitate of an *interstate nexus* that is eminently political also, in that it necessarily entails ‘the transfer of citizens and thus of nationals, and in the final analysis of political subjects’. Yet, magically as it were, through such penal rituals as collective expulsion, the doublet emigration-immigration is reduced to the singleton of immigration, itself shrunk to the illicit and intolerable presence of postcolonial foreigners. Through such state ceremonies, ‘the relation of state to state that is at the very foundation of immigration [is] negated’ so that the phenomenon ‘becomes a domestic matter, pertaining to the sole competency of the receiving state’ (Sayad 1991: 267 and 304; see also Portes and Böröcz 1987). That state can then (pretend to) act to extirpate and rid itself of unwanted persons, who are thereby obliterated as nationals and political subjects, much as convicts are erased from the civic map of the United States through extensive and expansive disenfranchisement laws.

<sup>10</sup> See *Chartes des droits fondamentaux de l’Union européenne*, available on line at the site of the *Ligue des droits de l’homme*: <<http://www.ldh-france.asso.fr>>. Mass expulsions of aliens have been chronically denounced by Amnesty International, the International Observatory of Prisons, and other human rights organizations in the major countries of Europe.

<sup>11</sup> The racial tenor of public chain gangs comes from the fact that the last inmates to be visibly punished in this fashion in the interwar South were African Americans (Lichtenstein 1996: 160).

Next, 'charter deportations' turn out to be just as financially ruinous, organizationally wasteful, and penologically pointless – if not counterproductive – as contemporary chain gangs. The latter were reinstated with much fanfare in August of 1995 by the state of Alabama (and later by Florida, Arizona, Wisconsin, and Iowa), whose Department of Corrections took the trouble to organize media visits and bus tours for tourists to come and witness the shackling of inmates made to break rocks inside Livermore penitentiary. But a short four years later this experiment in vengeful punishment had to be aborted as it turned out to be legally intractable, practically troublesome, and excessively costly in that it required too many guards for too few inmates (Allen and Abril 1997, Ozimek 1997). Similarly, expulsion under 'double sentencing' is a labour-intensive operation that absorbs a growing share of the resources of the border police, derails the normal processing of inmates, and aggravates prison overcrowding. Many foreign convicts facing a decree of deportation choose to serve their sentence in full rather than opt for an early release, since they will be transferred from the prison straight into a remote detention centre; they then often commit additional crimes, physically resist, self-mutilate, or attempt suicide (for example by swallowing razor blades on the day of their deportation) to avoid eviction thousands of miles away, which leads them to serve additional time behind bars for 'refusal to comply' with a banishment order. And they generate vitriolic controversy and intense public and legal scrutiny that make for fast diminishing political and journalistic returns when an incident, such as the death of a deportee, breaks into the top of the news (thanks to video footage) or leads to years of litigation embroiling leading political figures.

Much like the stylized reassertion of retribution for retribution's sake that temporarily obviates the need to face the absence of an operant philosophy of incarceration in the United States, the fixation on the politics of the intrusion and extrusion of extracommunitarian aliens serves as a substitute and subterfuge for the *lack of a policy of incorporation* of immigrants and assimilated categories. The hysterical obsession with the former contrasts sharply with, and indeed serves as mask for, the 'vertiginous void of public action' as regards the latter (Faber 2000).<sup>12</sup> And, just as rolling out the carceral system to restrain and contain the troublesome segments of the African American community in the remnants of the historic Black Belts allows the United States to continue to avoid addressing the threefold legacy of slavery, Jim Crow, and the urban ghetto, as well as the persistently peculiar position of blacks in America's social and symbolic space (as expressed by their inordinately high levels of residential

<sup>12</sup> Faber goes on to write: 'France no longer knows what to do with its immigrants. It has laboured relentlessly to regulate their entry and exit, with all the more ferocity as it was fleeing the question, otherwise more important, of what to do with those who remain with us' (2000: 15–16). Jean Faber is the pseudonym of a high-ranking state official formerly in charge of immigrant 'integration policy' in the French government, a domain he contends is a political and bureaucratic wasteland.

segregation, near-total ethnic endogamy, and the subtle undercurrent of denigration in public perception), the deployment of the penal apparatus to deal with immigration enables Europe to shun facing its deep-seated entanglement in the fate of the postcolonial societies of its former empires as well as the multifarious forms of social and state ostracization that continue to derail the path of non-European migrants in national life even as they gain legal status.

On both sides of the Atlantic, penalization operates as a *conduit for the depoliticization of problems*, ethno-racial division, and immigrant incorporation, that are quintessentially political in that they engage the definition of core 'membership' in the national or supranational community (Benhabib 1999, Walzer 1983). This transmutation of political issues – inclusion-exclusion from the civic compact and state-to-state relations – into technical questions of order maintenance along the country's internal or external borders, liable to receive a penal solution through the targeted activation of the police, courts, and carceral apparatus, whereby established or putative members of the civic compact are made over into deviant bodies to be marked, neutralized, and removed, is emblematic of neo-liberal penalty. So is the paradoxical articulation of high technology – jet aircraft, advanced video surveillance systems, massive electronic databases that can be consulted from countless locations to determine instantly the juridical status of any individual – and antiquated imagery: in the United States, public chain gangs are meant to evoke a bygone epoch of racially inflected penal punitiveness directly descended from the days of Southern slavery; in Europe, aircraft expulsions reactivate the cultural logic and long dormant representations of transportation and penal relegation as practised by Britain and major continental countries from the seventeenth to the nineteenth century. It is no happenstance, then, if mass deportation by charter flights and chain gangs share a profoundly archaic quality (Oshinsky 1996, Ekirch 1987, Balibar *et al* 1999).

Finally, the generalization of 'double sentencing' laws in Europe not only helps to *produce* the very criminality that such laws are meant to suppress via the geographical 'neutralization' of would-be offenders, in that they force an ever-growing and self-centred population of undocumented aliens and returning deportees into a submerged life made of illicit employment, administrative subterfuge, unstable residence, identity manipulation, and avoidance of the authorities, all of which normalize and intensify delinquent activities. It also *institutes a bifurcated and asymmetric juridical space*: the nationals are sanctioned once, for the criminal offence they have perpetrated; the foreigner on the other hand, even when legally established and socially integrated, is struck twice, once for the acts (s)he has committed and a second time for who (s)he is. His or her very being triggers an extra dose of punishment, sending the unmistakable signal that (s)he is not part of the emerging European civic community. This differential treatment partakes of the racialization of foreigners insofar as it *treats foreignness as an inherently criminal property* that automatically warrants an

aggravation of retribution. Being an extra-communitarian alien thus functions as a permanent and indelible penal handicap much in the manner that convict status (and blackness) does in the United States (Wacquant 2005a).

Now, anti-immigrant sentiments in European countries have a long and lush history. Foreigners and visible 'ethnics' throughout the continent have been recurrently associated with the gamut of disorders ranging from public health threats and political dissidence to sexual degeneracy and street crime since the onset of the urban industrial era. The trajectory of transborder migration across the Old World is stamped by the contrapuntal interplay of ascending nationalism and gusting xenophobia (Miles 1993). But, if anti-foreign animus is a relative constant, or at least a regularly recurring factor, the configuration crystallizing at the turn of the millennium differs from previous iterations of capitalist transformation and ethno-national conflict in at least three important respects:

- (1) Old World nationals presently face, as it were, a double menace: the one arises *from below* through the consolidation of unwanted 'foreign intrusion' in the nether regions of social space made more palpable by the gradual conversion of labour migration into settlement migration; the other comes *from above*, in the guise of a juridical and bureaucratic process of European integration that converges with the global neo-liberal revolution to strip from the nation-state its capacity to penetrate and protect the social body. This pincer movement exacerbates the sense of group vulnerability and rivalry at the bottom of the social structure and intensifies the quest for collective scapegoats as well as the urge to exclude rather than absorb them (Bourdieu *et al* 1999: 23–36, 106–22, 317–20).<sup>13</sup>
- (2) The deployment of the police, courts, and prisons to tackle extra-communitarian foreigners partakes of a broader, epochal shift from the social-welfare to the penal treatment of problem categories and territories in the dualizing metropolis (see Downes and Hansen, Chapter 8). To be more precise, the 'extrusion' of immigrants from both declining lower-class neighbourhoods (via disproportionate arrest, prosecution, and incarceration) and from the national territory (via criminal expulsion and administrative banishment) serves as a *spearhead* to implement the penalization of urban poverty designed to complement economic deregulation and welfare retrenchment insofar as it elicits less resistance and even generates support for such punitive policy from among the precarious fractions of the native working class that constitute its main foil.

<sup>13</sup> There are partial historical precedents: xenophobic stereotyping and hostility towards foreigners in south-eastern France in the 1930s was intensified by the sense of vulnerability of the country's borders to foreign powers during that decade, as argued by Lawrence (2000).

- (3) Penalization strikes at vulnerable and stigmatized categories against the backdrop of the *decomposition of the working class and its historic territories*, such that no centripetal forces of solidarity can effectively counteract it. In previous eras of economic transformation, industrial conflict and union mobilization supplied both an operant organizational vehicle and a potent idiom to unify the disparate segments of the labour force issued from various countries, to fuse issues of work and community, and to convert ‘foreigners into nationals’. By swamping nationality with class in and around the workplace, unions and assorted labourers’ associations joined with left parties to fashion a compact bloc presenting collective claims to the state that cut across and even erased putative ethnic lines in the public sphere. Nowadays, the fragmentation of the working class into atomized households facing a structural crisis of reproduction simultaneously on the labour market, in the neighbourhood, and in the school system, just as they are being deprived of a voice in the political field by the rightward shift of socialist parties, has stripped unskilled immigrants from the institutional and cultural buffer they enjoyed in the previous era of class consolidation anchored by the Keynesian-Fordist compact (Tripier 1990, Beaud and Pialoux 1999).

It is not hostility against foreigners that is novel, then, nor the degree of cultural alterity or phenotypical distinctiveness of the latest wave of migrants that explains the sharp spike in the salience of foreigners on the criminal scene and their massive presence in the prisons of Europe. Rather, it is the vastly *greater capacity and propensity of the state to deploy its penal resources* at both the national and the supranational levels to ‘resolve’ the problems they pose or embody, whether real or imagined, connected to transborder perigration or displaced from the broader broiling arenas of work, place, and identity.<sup>14</sup> Indeed, exclusionary impulses and punitive formulas have dominated the media construction and bureaucratic management of extracommunitarian migration throughout Europe, with limited legalization schemes, expanded border control, and mass deportation the three most prevalent responses given throughout the continent to the continuation of transnational movement, family reunification, and irregular labour import. The extensive discursive cum organizational linkage between the ‘domestic side’ of the criminal justice system and its ‘foreign side’, fostered by the accelerating construction of a European-level system of penal measures to check the intrusion and amplify the extrusion of unwanted aliens, is a novel phenomenon.

Darker skinned, uneducated, unattached and uncouth, prone to crime and violence: undocumented immigrants are not so much ‘non-persons’ leading an invisible existence in the shadowy zones of the city, as Alessandro Dal Lago

<sup>14</sup> The acceleration of the top-down creation of a European penal space after the 1992 Maastricht Treaty and the 1997 Amsterdam Treaty is tracked by Tulkens (2002).

(1999) has suggested, as *anti-persons*, negative tokens whose conspicuousness enables the germinating transnational personhood of Europeans to be delineated and affirmed via sociosymbolic contraposition, much like African slaves operated as anti-citizens in the early decades of the American Republic. On this account, the police targeting, court treatment, and correctional weight of postcolonial foreigners, immigrants, and assimilated categories – Maghrebines and *beurs* in France, West Indians in England, Turks and Roma in Germany, Tunisians and Yugoslavs in Italy, Moroccans and Gypsies in Spain, Africans in Belgium, Surinamese in the Netherlands, Angolans in Portugal, and Albanians in Greece – constitute a veritable litmus test, a shibboleth for Europe (Bourdieu 1998: 15–18). Their evolution allows us to assess the degree to which the European Union resists or, on the contrary, conforms to the American policy of criminalization of urban poverty and marginality as a complement to the generalization of social insecurity and the destabilization of ethnic hierarchy in the metropolis. Like the carceral fate of blacks in the United States, it gives us a precious and prescient indication of the type of city and state that Europe is in the midst of building onto the scaffolds of triumphant neo-liberalism.