

Outlaws

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Source: *The Good Society*, Vol. 23, No. 1 (2014), pp. 103-113

Published by: Penn State University Press

Stable URL: <https://www.jstor.org/stable/10.5325/goodsociety.23.1.0103>

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Outlaws

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Abstract

In this article, I argue that mass incarceration belongs to a category of social status interventions by which the modern state either withholds the ordinary protections and benefits of the law from outlawed groups or subjects them to private punishment based on their mere membership in those groups. In the US these groups include immigrants and resident Latinos, the homeless, the poor and poor blacks, sex workers, and ex-convicts. Outlawry is a fundamentally anti-democratic practice that cannot be justified in terms of deterrence and is incompatible with public safety.

Keywords: *Law, outlawry, democracy, homelessness, felons, criminal status, democratic culture, private punishment, mass incarceration*

I. Outlawry in the Modern Democratic State

Mass incarceration is one aspect of patterns of law enforcement by which the state creates outcast groups. Much attention has been paid to the role of mass incarceration in perpetuating the outcast status of blacks.¹ Yet the law functions to create other outcast groups, and by means in addition to incarceration.

Consider the following examples. In 2008, a University of Michigan Law School student offered sexual services on Craigslist. When her client beat

THE GOOD SOCIETY, VOL. 23, NO. 1, 2014

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her, she attempted to file a complaint with the police. Instead of pursuing battery charges against her assailant, the police arrested her for prostitution.² In 2007, a Houston waitress and her boyfriend, on their way to buying a used car with cash, were stopped by police for driving in the left lane too long. Although the police found no drugs, they seized the couple's cash under a civil forfeiture law and threatened to charge them with money laundering and child endangerment if they did not waive their rights to challenge the seizure.³ The same year, a Southeast Asian couple on their honeymoon traveled to the United States on a tourist visa and were lured by an acquaintance into working for his nursing home. Fearing they would get into legal trouble for abandoning the demented patients, they worked until their visas expired, at which point the acquaintance threatened to turn them over to punitive immigration authorities if they did not continue to work for him.⁴ In 2001, Milwaukee passed an ordinance imposing a fine on owners of "nuisance properties," identified by the number of 911 calls they generate. As a result, landlords have discouraged victims of domestic violence from calling 911 by threatening them with eviction.⁵ In 2011, Jacksonville Florida police shut down a church's project of feeding the homeless, citing an ordinance against that activity.⁶ Between January 2004 and June 2012, the NYPD made 4.4 million stops. In 98.5% of stops, no weapon was found, and in 88% of stops, no arrest was made or summons issued. Overall, 83% of stops were of blacks or Latinos. Yet police were more likely to find weapons or illegal drugs on whites.⁷ At the same time, the NYPD was turning away actual victims of crime in black and Latino neighborhoods, intimidating them from making complaints, refusing to file their complaints, and classifying robberies and thefts as lost property.⁸

These seemingly disparate cases manifest a social status, a relationship of individuals to the state and to private parties, that I shall call *modern outlawry*. Traditionally, the outlaw was someone cast outside the protections of the law. Anyone, whether a state official or private person, was legally entitled to do anything to an outlaw. Modern outlawry, while not so extreme, creates *classes of persons* from whom *some of the ordinary protections and benefits of the law are withheld* or who are subject to *private punishment* in virtue of their membership in an outlaw class. The state makes persons outlaws through the following types of policy:

1. *Criminalizing status* or *victimless activity* with such penalties that persons with that status or engaged in that activity are deterred from, or punished as a result of, seeking protection from the state against criminal victimization.

2. *Barring access to legal recourse* against victimization by police or private parties.
3. *Suspending due process protections* against incarceration or property forfeiture, or *creating causes for incarceration* on the basis of actions or omissions that are not crimes.
4. *Requiring or encouraging private parties to punish or withhold benefits* from certain classes of people.
5. *Imposing pervasive disabilities on participation in civic, economic, and social life.*

Who is an outlaw in the United States today? Keeping in mind that the grounds of outlawry are intersecting and so only crudely divisible into non-exclusive groups, a partial list includes the following:

Immigrants, both legal and undocumented, and Latino permanent residents and citizens. While living in the U.S. without legal authorization is not a crime, having that status can lead to draconian consequences. One million children are currently undocumented;⁹ many more are adults who came to the U.S. as children. Notwithstanding President Obama's temporary suspension of deportations for some of them, all are legally subject to deportation to a "native" country they have no significant experience with or personal ties to. Even legal permanent residents without such experience or ties can be deported for trivial infractions, such as possession of a single marijuana cigarette.¹⁰ Deportation quotas for undocumented immigrants lead to racial profiling of Latinos.¹¹ Minimal procedural protections, involving rushed hearings, little opportunity to present evidence, and no right to publicly provided counsel, lead to numerous unjust deportations. Bona fide refugees from war-torn countries, some of whom have lived in the U.S. since infancy, unaccompanied minors as young as 6 years old, and U.S. citizens have been deported.¹² Hospitals, acting without any legal process, have deported comatose patients.¹³ Because undocumented immigrants risk deportation or imprisonment if they reveal themselves to the police, they are especially vulnerable to criminal victimization. Harsh immigration laws are a key factor behind trafficking and forced labor.¹⁴ Undocumented female immigrants are particularly vulnerable to domestic violence.¹⁵ Legal immigrant wives entering as "dependent spouses" are also vulnerable because their right to stay in the U.S. depends on their husbands' wills.¹⁶

The homeless. The homeless lack any place where they are legally entitled to be for any significant length of time. Police use loitering laws to evict them from public spaces normally open to all. This lack of legal entitlement turns their exercise of biologically necessary human functions, such

as urination, sleeping, and eating, and socially necessary functions such as washing and changing clothes, into crimes when the homeless carry them out in the only spaces temporarily available to them—in public. Some cities prohibit private parties from feeding the homeless or letting them use one's property. The homeless lack any place to legally store their possessions and consequently have no secure right to property. Ordinances often forbid them from begging.¹⁷ They also lack effective 4th Amendment protections against unreasonable search and seizure, as they lack spaces they can claim as private.¹⁸

Low-wage workers. Low-wage workers are vulnerable to labor exploitation, including wage theft, being forced to work off the clock, illegal unpaid internships, and misclassification as independent contractors to exclude them from legal protections to which employees are entitled. The scale of unpaid overtime alone amounts to \$19 billion stolen from millions of workers each year.¹⁹ One survey of thousands of low-wage workers in major cities found that, in the previous week, 26% were paid below the minimum wage, 19% were underpaid or not paid for overtime work, 17% were forced to work off-the-clock, and 12% of tipped workers suffered theft of their tips. In the previous 12 months, 44% of surveyed workers suffered some type of pay violation.²⁰ Employers can steal from low-wage workers with impunity because the state largely ignores labor law violations and has erected barriers against legal relief. Enforcement of labor laws overwhelmingly depends on workers initiating complaints. But 43% of surveyed workers who complained or tried to organize a labor union suffered retaliation.²¹ The courts have also blocked redress for low-wage workers by upholding mandatory arbitration clauses in employment contracts that bar class actions for labor law violations. Because arbitration costs are so high relative to individual damages, denial of class actions effectively bars low-wage workers from recovery.²²

The poor, especially poor blacks. People in high-poverty neighborhoods, particularly blacks, are subject to intensive policing and police harassment that cannot be justified by individualized suspicion or neighborhood crime rates.²³ Welfare recipients, who are also disproportionately black, are subject to drug testing in the absence of individualized suspicion.²⁴ Civil forfeiture laws strike the poor particularly hard. The state does not have to prosecute, much less convict, the property owner for a crime to legally seize the owner's property. Often, the property owner is innocent and suffers forfeiture because a friend or relative was arrested for drug possession while using the owner's property. At the Federal level, prosecution of the owner occurs

in less than 20% of cases. In most states, police can seize property without a warrant and place the burden on owners to prove that their property was not involved in a crime. The poor face insuperable obstacles to the recovery of their property, because they are not entitled to a public defender in civil forfeiture cases and cannot afford court costs, which they must pay even if they win their case.²⁵ The functional equivalent of debtor's prison for the poor has also been revived and used on a large scale by debt collection agencies in more than a third of the states. Agencies issue summonses to force debtors to appear in court to disclose their assets; if they miss their appointment (of which they have often not been informed), they are thrown in jail, and any bail paid is transferred to the creditor, whose claims of unpaid debts are accepted at face value. Individuals may also be jailed for failing to meet the terms of a court-ordered repayment arrangement;²⁶ while employers routinely use insolvency, as reflected in low credit ratings, as a ground for denying employment to job applicants.²⁷

Sex workers. Because prostitutes are subject to arrest, the overwhelming majority do not seek police protection when victimized by crime, even though they are often subject to assault, robbery, and rape. Police refuse to file their complaints, or demand sexual services as a condition of pursuing their complaints, and often subject prostitutes to sexual assault and rape.²⁸

Ex-convicts. For many convicts, the sentence for their crime is less harmful than the collateral or civil consequences of conviction, which burden convicts' lives after they have completed their sentence. These impose disabilities on virtually every dimension of social life. Depending on their crime and jurisdiction, ex-convicts may be disenfranchised and barred from jury service and running for political office. They may be barred from government contracts, professional and business licenses, and being an officer in an incorporated business. Numerous occupations, such as taxi driver, teacher, day-care worker, nurse, commercial fisher, beautician, or bartender, may be closed to them. They may be ineligible for state education programs, educational loans, and financial aid. They may be banned from living in most neighborhoods, in public housing, or from receiving state housing subsidies. They may lose custody, visitation, or all parental rights to their children. They may be ineligible for recreational fishing, hunting, and motor vehicle licenses. They may be denied Medicaid, Medicare, and numerous other state benefits such as welfare, workers' compensation, veterans' benefits, and retiree benefits. They may be barred from traveling, or, if not a U.S. citizen, deported. The state, by mandating notification of criminal offender status, or authorizing

private parties to obtain this information, also licenses private parties to administer their own punishments of ex-convicts, by refusing to offer them employment, housing, and other opportunities. The American Bar Association's National Inventory of the Collateral Consequences of Conviction lists more than 38,000 penalties imposed for various crimes by all jurisdictions.²⁹ The disabilities imposed on ex-convicts are so numerous, pervasive, and burdensome that one scholar has characterized them as amounting to "civil death," because they prevent millions of convicts from re-integrating into society.³⁰

II. Outlawry as an Anti-Democratic Practice

The United States incarcerates a far greater proportion of its residents than any other country. I have highlighted features of the U.S. legal system that extend beyond the prison, to show how hyperincarceration is incorporated into a larger system of outlawry. The state, by withdrawing the protections and benefits of the law from large classes of people, recruiting private parties into the punishment regime, and barring them from helping outlaws, reduces these groups to legal and social outcasts.

Outlawry cannot be justified on grounds of deterrence. The fact that police often refuse to pursue complaints of victimization by outlaw groups undermines the claim that outlawry deters crime. The criminalization of status, as for the homeless, immigrants, ex-convicts, and the poor, makes these groups vulnerable to criminal victimization by police and private parties, because they lack recourse to the protections the law provides to other groups. Others know this, and thereby are more likely to victimize outlaws. By inviting and even encouraging private parties to exclude members of these groups from employment, housing, and other opportunities, and by barring their access to welfare, education, and other state benefits, outlawry creates additional obstacles to their ability to survive by legal means, and thereby causes them to resort to extralegal or illegal means of support, such as the underground economy, drug dealing, prostitution, theft, and welfare fraud.

How should we analyze this phenomenon from the standpoint of democratic values? Democracy can be understood at three levels of analysis: as a membership organization, a cultural formation of civil society, and as a mode of governance.³¹ As a membership organization, it requires (actual

or easy access to) universal and equal citizenship of all permanent denizens of a state. As a culture, it involves free interaction and cooperation of members from all walks of life. As a mode of governance, it involves institutions such as periodic competitive elections of individuals to major public offices, a universal franchise, transparency of state operations, the rule of law, and equality under the law. Outlawry undermines democracy at all three levels.

Much attention has been paid to the implications for democratic governance of the collateral consequences of conviction in the hypercarceral state: the fact that so many ex-convicts are disenfranchised and barred from the other basic modes of political participation, including jury service and running for political office. This fact undermines the democratic character of the state, especially given the disparate impact of mass incarceration on racial and ethnic groups historically excluded from political participation.

In locating mass incarceration within larger practices of outlawry, I aim to draw attention to more pervasive and foundational ways in which our system of laws undermines democracy. Outlawry not only creates groups of second-class citizens; it creates classes of individuals who are virtual non-persons with respect to claiming even the procedural rights that the U.S. Constitution and human rights treaties are supposed to accord to *all* human beings. This threatens democracy as a membership organization, as a system of governance based on the rule of law and equality under the law, and as a culture of equality, cooperation, and inclusion.

Membership. This point especially applies to immigrants, including the undocumented. Even granting that the right to control borders is inherent to sovereignty, it does not follow that all immigration policies are consistent with a democratic society. More than eleven million undocumented immigrants reside in the United States today by popular economic demand, where they contribute vital goods and services to the economy, raise families, and acquire an education. They are participating members of society in every respect except for the ways the law excludes them. From the perspective of membership, no democracy can flourish when a large class of *de facto* permanent denizens is barred from access to citizenship.³² The membership goal of any decent democracy should be open access to citizenship on the part of all permanent denizens.

Rule of law and equality under the law. A necessary condition for any state to claim legitimacy is conformity to the rule of law. This entails, at least, that state discretion in meting out benefits and burdens be legally

constrained, and that it respect due process. Outlawry undermines the rule of law in two ways.

First, by suspending due process for outlaws, it empowers state authorities to act against them in sweeping, arbitrary ways. This applies to immigration deportation procedures, civil forfeiture, stop-and-frisk policing, mass drug testing for welfare recipients, and police treatment of the homeless. Even worse, status crimes create classes of people who have no recourse against criminal victimization by law enforcement authorities. This is a particularly noteworthy problem for sex workers and juveniles in detention, who are subject to high rates of sexual assault by police and prison guards.³³

Second, by encouraging private parties to pile punishments on outlaws above and beyond those imposed by the state, outlawry exposes individuals to arbitrary and abusive treatment. This undermines the rule of law. Notwithstanding disclaimers by the state that sex offender lists are not to be used for vigilante punishment, they function as tools for private parties to enforce outcast status on offenders, who may be guilty of nothing worse than public urination or an impulsive act of indecent exposure. More generally, notification requirements placed on ex-convicts invite employers, landlords, and others to raise further barriers to their re-integration into society and hence their ability to participate in and contribute to society. By inviting private parties to use virtually unlimited discretion in adding private punishments to court-ordered sentences, outlawry outsources punishment in ways that, as we have seen, undermine the deterrence value of the law as well as principles of horizontal equity in punishment. In this respect, outsourcing punishment is akin to lynching, a form of mob rule inconsistent with the rule of law.³⁴

A necessary condition for any legitimate state to be a democracy is the establishment of equality under the law. When whole classes of people are excluded from protection against victimization by private parties, equality under the law is violated. When different classes of citizens are subject to different legal regimes simply due to their status, as for the homeless and ex-convicts who have completed their sentences, this also undermines equality under the law.

Democratic culture. A fully democratic society is one in which its participants interact freely and cooperatively on terms of equality, across all walks of life. Outlawry, in creating legal outcasts, obstructs such interaction by legal prohibitions. It also expresses powerful stigmatizing messages that discourage inclusion of outlaws in the mainstream. By putting blacks,

Latinos, immigrants, the homeless, ex-convicts, and other groups under constant surveillance and police harassment, the law represents them as inherently criminally suspect and dangerous. By ignoring their needs for protection from victimization, the law sends the message that they are properly prey to others. One can hardly be surprised if others take the state at its word and treat them accordingly.

Outlawry expresses a conception of humanity as essentially divided into criminal and non-criminal types. It suggests that the ex-convict, or anyone suspected of criminality, is so radically alien and hostile to law-abiding persons that they can never be treated as ordinary people who merely made a mistake, or as people entitled to a decent chance in life. Outlaws are, instead, treated as the permanently socially unassimilable. A democratic culture cannot be constructed on such a basis.

Mass incarceration is represented as necessary for crime control. By situating mass incarceration into larger systems of outlawry, we can see how the pretense of crime control is betrayed by the actual operations of the law. Outlawry is incompatible not only with public safety, but with democracy itself.

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