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'Left Backs Working Prisons': Cross-partisan production of criminal 'nonpublics'

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DURING THE 2014 General Election campaign, reactions to a National Party announcement about 'working prisons' emphasised cross-partisan enthusiasm for incarceration. Press coverage made it clear that prisoners would be paid a tiny fraction of the minimum wage: 'Inmates can earn a small income—about 60 cents an hour—inside jails'.¹ Spokespeople for the Greens and Labour endorsed 'working prisons' in principle. A Green spokesperson supported the project 'as long as the cheaper labour did not undercut the private sector outside',² a concern premised only on the rights of free labourers. No party expressed

1 Isaac Davison, 'Left backs National's plan for "working prisons"', *The New Zealand Herald*, 11 September 2014, p. A014.

2 Ibid.

any concern about the employment rights of prison workers. A press release from New Zealand First asserted that ‘Working prisons are not a breakthrough innovation—it is simply *common sense*’.³ This would appear to match Gramsci’s notion of ‘common sense’ as the ‘average opinion of a particular society’.⁴ Not only was National’s policy supported by the ‘Left’, but parties further to the Right suggested it was too generous: ‘Two of the party’s potential coalition partners, Act and the Conservatives, want the Government to take a tougher approach to criminals’.⁵ To the degree that parties were in competition, this competition was less over divergent political programmes than over the degree of assurance that could be offered to the assumed public, of support for an expanded carceral state (although the Māori-led party MANA had a policy of abolishing prisons, this was missing from the coverage). No party wanted to be seen as ‘soft on crime’. Further, media coverage served to emphasise this political convergence, with the headline ‘Left backs National’s plan for “working prisons”’.⁶

This cross-partisan support extends not only across the parliamentary ‘Right’ and ‘Left’ but also to liberal NGOs and academics working in the area. John Pratt, a criminologist focusing on ‘penal populism’ in Aotearoa/New Zealand and internationally, endorses prison labour as a rehabilitative measure.⁷ JustSpeak, an NGO seeking prison reform, proudly announce that their pamphlets are ‘Printed by Rimutaka Prison printing

3 Asenati Lole-Taylor, ‘Working prisons not new’, New Zealand First Press Release, 12 September 2014.

4 Antonio Gramsci, *Prison Notebooks: Volume I*, New York 2011.

5 Davison, ‘Left backs National’s plan’.

6 Ibid.

7 John Pratt, *Penal Populism: Key Ideas in Criminology*. Abingdon 2007. Henceforth PP.

press'.⁸ Although JustSpeak's work on the racialised dimension of the carceral state is necessary and important, and the organisation has more recently hosted discussions of prison abolition, abolitionists criticised the use of prison labour as an endorsement of 'slave labour' by the NGO.⁹ While some liberal reformers sincerely consider prison labour to be a form of rehabilitation rather than punishment, there is no *a priori* reason why rehabilitation should involve the deprivation of citizenship rights, such as the right to a minimum wage. To understand how reform programmes, such as that of JustSpeak, so often involve complicity in practices that are tantamount to slavery, it is worth underlining the cultural context of 'prison reform'.

Prisons and the production of nonpublics

As Māori constitutional lawyer Moana Jackson contends in his examination of the Crimes Act (then, the Crimes Bill), the definition of crimes and criminals always reproduces a specific cultural context.¹⁰ In particular, the legal system in Aotearoa/ New Zealand serves a patriarchal, capitalist colonial culture.¹¹ While Māori justice focuses on collective responsibilities, the imposed European system punishes the individual.¹²

The deprivation of individuals of their citizenship rights, as a basis of punishment, is part of the 'common sense' of main-

8 JustSpeak, *Unlocking Prisons: How We Can Improve New Zealand's Penal System*, Wellington 2014.

9 Olive McRae, 'Prison Reform on the path to prison abolition', International Socialist Organisation Aotearoa, Wellington, 15 September 2014.

10 Moana Jackson, 'Criminality and the exclusion of Maori', *Victoria University of Wellington Law Review*, 23 1990.

11 *Ibid.*, pp. 25-6.

12 *Ibid.*, pp. 27-32.

stream politics. Angela Davis underlines how, paradoxically, the deprivation of citizenship rights (such as the right to a minimum wage) requires the elaboration of universal rights as a political principle, as had begun with the French and US Revolutions.¹³ The notion of depriving rights as a punishment stems from the elaboration of rights, where previously they were not assumed. Prisoners are designated as a ‘nonpublic’ in order to legally deny them the supposedly ‘universal’ rights shared by citizens.

My analysis hinges on *publics* and *nonpublics*, upon distinct ways of defining populations in the service of dominant ideology. This is an elaboration of Frankfurt School theorist Jürgen Habermas’ work on the *public sphere*. Habermas has understood the public sphere as a space, separate from the state, where private citizens communicate and deliberate.¹⁴ This notion largely originated in the European bourgeois revolutions from the 18th century onwards.¹⁵ The ‘liberal’ or ‘bourgeois’ *public sphere* requires that private citizens retain some freedom from state supervision, both in the cultural-political realm, and in the economic.¹⁶ However, many critics have noted that ‘the public’ required the operation of exclusionary boundaries, such that only propertied European men might participate as full citizens. The functioning of those boundaries constituted the public sphere. In this vein, Nancy Fraser argues that ‘subaltern counterpublics’ not only operated beyond any such assumed boundaries but also that their existence disrupted the false unity of ‘the public’.

The bourgeois public was never *the* public. On the contrary, virtu-

13 Angela Davis, *Are Prisons Obsolete?* New York 2003. Henceforward APO.

14 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Enquiry into a Category of Bourgeois Society*, trans. by Thomas Burger & Frederick Lawrence, Cambridge MA 1962, p. 49. Henceforward STPS.

15 *Ibid.*, pp. 50-2.

16 *Ibid.*, pp. 52-3.

ally contemporaneous with the bourgeois public there arose a host of competing counterpublics, including nationalist publics, popular peasant publics, elite women's publics, and working class publics.¹⁷

This was especially the case where constituencies sought the political resources that accompanied recognition within the public sphere as, for example, with working class publics.

In contrast to Fraser's notion of the 'counterpublic', my analysis hinges on the notion of the 'nonpublic', a disavowed population that doesn't *necessarily* emerge with an organised claim on recognition. Oskar Negt and Alexander Kluge employ this term when analysing relations within the capitalist factory, a dictatorship excluded from bourgeois democracy.¹⁸ My project uses 'nonpublic' more broadly than initially intended by Negt and Kluge, to include all human elements that might be excluded in order to produce a bourgeois-legitimated *public* of honest, hard-working, participating, respectable citizens of a capitalist state. This enlargement of the concept follows from Foucault's suggestion that a central (and perpetually enforced) contradiction exists within such states between 'the proletarianised common people and the non-proletarianised common people'.¹⁹ In other words, so long as workers obey the law and do not disrupt production, they can be considered legitimate bourgeois citizens. The nonpublic is thereby defined by criminality and active non-recognition, including prisoners, vagrants, and proletarians who resort to illegal methods for the achievement of political or other ends.

Alongside the direct control of potentially rebellious pop-

- 17 Nancy Fraser, 'Rethinking the public sphere: a contribution to the critique of actually existing democracy', *Social Text*, 25/26 1990, p. 60.
- 18 Oskar Negt & Alexander Kluge, *Public Sphere and Experience: Toward an Analysis of the Bourgeois and Proletarian Public Sphere*, Minneapolis 1972, p. 39.
- 19 Michel Foucault, 'On popular justice: a discussion with Maoists', in Colin Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, New York 1982, p. 14.

ulations, such as ethnic minorities, a prison system operating in this way also produces ‘lateral effects’, regulating the behaviour of the ‘lawful’ public.²⁰ The nonpublic thereby defines the legitimate public by negation, as a scapegoat or nightmare whose construction can be used to regulate the public sphere. Within modern societies, the prison system has become a key site for the production of nonpublics. Foucault observes that ‘the prisoner’ becomes the ‘common enemy’ of society.²¹ The prisoner is cast as outside society, or outside ‘the public’ in our terms.

Although incarceration has fostered this barrier since its inception, the neoliberal era has seen an intensified form of this dynamic, commonly now referred to as ‘mass incarceration’. The ideological basis of this intensification comes, as criminologist John Pratt notes, from ‘penal populism’ (whereby politicians court ‘lawful’ publics through intensified punishment of criminalised nonpublics).²² Public support for penal populism has grown, counterintuitively perhaps, during a period with a declining crime rate. Pratt suggests that penal populism offers a sense of ‘social cohesion’ in a period marked by increasing economic precarity and decreasing participation in public institutions.²³ Coercion and consent, key elements of hegemonic state power, work in tandem here: consent of the lawful public is sought through the application of coercion to the unlawful nonpublic.

This demarcation of prisoners as a nonpublic is universally accepted in dominant political discourse, whether explicitly punitive or reformist in kind. In explaining the broad support for such demarcation, Foucault contends that prison reform ‘is virtually contemporary with the prison itself:

20 Michel Foucault. *Discipline and Punish*, trans. by Alan Sheridan, New York 1977, p. 95. Henceforward *D&P*.

21 *Ibid.*, p 90.

22 *PP*.

23 *PP*, p. 37.

it constitutes, as it were, its programme'.²⁴ The very pursuit of reform can help to reproduce the prison system. Foucault outlines this disavowed purpose of prison reform—its 'programme'—which has been fairly continuous from the inception of the carceral state to this day, in the following manner:

[N]ot to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body.²⁵

In post-colonial societies like Aotearoa/New Zealand and the USA, moreover, criminalisation serves a racial caste system. Michelle Alexander contends that with the collapse of Jim Crow in the US, mass incarceration emerged as a new means by which a racial caste system could be sustained.²⁶ Like previous caste systems, mass incarceration sought to ensure poor white support for the ruling class, through a scapegoating of African Americans. However, in the wake of the Civil Rights movement, explicit racism was no longer considered publicly acceptable, so a form of 'colorblind' rhetoric was required. 'Law and order' served as a dog whistle whereby discrimination could be justified without explicit reference to race, both allowing punitive control of African Americans and perceived security for white workers.²⁷ Emblematic of the phenomenon is the manner in which the majority of drug offenders sent to prison in the USA are African American even though, according to self-reporting surveys, whites are just as likely to use illegal drugs.²⁸ Māori are similarly targeted

24 *D&P*, p. 40.

25 *Ibid.*, p. 82.

26 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colour-blindness*, New York 2010, p. 2.

27 *Ibid.*, pp. 42-8.

28 *Ibid.*, pp. 98-9.

in Aotearoa/New Zealand.²⁹

Reformers pose the production of a criminal nonpublic as being a necessary evil, meaning that carceral logic is only further embedded by reformist discourse. The prisoner is the ultimate nonpublic. The cross-partisan consensus hails a law-abiding citizen, who wishes to see criminals punished, or more charitably rehabilitated through sweated labour. The legitimate, law-abiding public has its position apparently secured through the creation of a growing class of unpersons. The idea that publics can be made safe from the criminality of others offers a patina of security in the ‘risk society’ engendered by the neoliberal project.³⁰ Conversely, the punishment also serves as a threat. Foucault notes the ‘lateral’ impacts of punishment: ‘punishment is directed above all at others, at all the potentially guilty’.³¹ The boundaries of the public are maintained through the threat of the nonpublic.

Criminalisation of populations in Aotearoa/New Zealand

Through the production of criminalised nonpublics, the prison system facilitates a super-exploitation of labour. Prisoners directed to work by the Department of Corrections are not considered employees.³² Prison workers are therefore deprived of the

29 Derwin Smith, *Criminal Injustice: Maori, Racism and Mass Incarceration*, International Socialist Organisation Aotearoa, Wellington 2014. Henceforward *CI*.

30 *PP*, p. 37.

31 *D&P*, p.108.

32 *Morgan v Attorney General*. New Zealand Law Report 134. *New Zealand Council of Law Reports*, 1965; cited in *No Pride In Prisons, Abolitionist Demands: Towards the End of Prisons in Aotearoa*, Auckland 2016, pp. 83-8. Henceforward *AD*.

basic rights ensured by the Employment Relations Act 2000 and Minimum Wage Act 1993, along with the deprivation of other fundamental rights of citizenship. In other words, the conditions of prison workers would merit the term ‘slavery’ if the workers were not already designated ‘criminals’. This production of a criminalised nonpublic also extends beyond the prison walls: on release, access to housing, employment and other basic rights is limited by having a criminal record.

Underlying the official discourse of biculturalism, the carceral system also facilitates the neo-colonial management of Māori populations. Fifty percent of those in prison are Māori, compared with thirteen percent of the general population.³³ Conversely, a selected layer of Māori – iwi leaders in particular – are ‘recognised’ as a legitimate public, as a concession to prior social movements for indigenous recognition. Constitutional lawyer Annette Sykes contends in this vein that the National Iwi Chairs Forum, established as ‘first in the queue to sit at the Masters table’,³⁴ is a self-elected body that has helped entrench ‘a new Māori hegemony’ implementing the logics of neoliberalism.³⁵ Rather than work towards a broader redistribution of political status and material wealth, major parties recognise indigenous leaders with bourgeois economic interests.

This limited form of recognition casts the majority of urban Māori as a ‘corrupted and inauthentic form of Indigeneity, a criminal population, in part because poor and working-class urban Māori represent more of a threat to capitalism.’³⁶ Fundamentally, Māori subjects can only be recognised so long as the terms

33 *CI*, p. 5.

34 Annette Sykes, ‘The politics of the brown table’. Originally presented as Bruce Jesson Foundation Lecture 2010, p 4.

35 *Ibid.*, pp. 8-17.

36 Brendon Hokowhitu, ‘Producing indigeneity’, in Evelyn Peters & Chris Andersen, eds., *Indigenous in the City: Contemporary Identities and Cultural Innovation*, Vancouver 2013, pp. 362-5.

of neoliberal capitalism remain unchallenged. This protection of the governing rationality functions through the recognition of a selected economic group as authentic indigenous subjects, while dispossessing and criminalising working class, unemployed, and underemployed Māori, who the selected group supposedly represents. As in Nancy Fraser's account of the 'tragic historical irony' of contemporary feminism (which she claims is also relevant to other social movements), redistribution is traded away for partial recognition.³⁷

As a consequence of this phenomenon, the demand by the state that Treaty-related grievances reach 'full and final settlement' has seen inequality increase within Māori communities.³⁸ As inequality grows, the National Party advocates skills training as an enabler of social mobility: during the 2014 election, for example, a press release indicated as a mark of progress that the Māori and Pacific Trades Training Initiative had expanded by 2000 places.³⁹ Over half of Māori and Pasifika workers are considered to work in 'lower skilled' occupations.⁴⁰ Many of these jobs are 'essential' as they meet core needs in capitalist society: manufacturing, cleaning, care work, and so on. While there is nothing wrong with upskilling in itself, it is inadequate when combined with poor wages and conditions for 'low skilled' work. This approach effectively assumes the low value of socially necessary work and only offers career advancement as an escape.

Within this context, Māori may find themselves split, di-

37 Nancy Fraser, 'Mapping the feminist imagination: from redistribution to recognition to representation', *Constellations: An International Journal of Critical and Democratic Theory*, 12/3 2005, p. 299.

38 Evan Poata-Smith, 'The veneer is radical, but the substance is not', *Pacific Journalism Review*, 11/1 2005, pp. 211-17.

39 Stephen Joyce, 'National targets more skills training for Maori', National Party Press Release, 12 September 2014.

40 Statistics New Zealand, 'Skill levels of Zealand Jobs', Statistics New Zealand, Wellington 2 May 2013.

vided between the categories of recognised and unrecognised, as with the categories of lawful and criminal, and of ‘productive’ and ‘unproductive’ (notwithstanding the fact that the exploitation of prisoners produces surplus value). This set of distinctions is, of course, the logic through which the ‘nonpublic’ forms and, once formed, is sustained within popular thought. Once established, moreover, it provides material support for the socio-politically regressive combination of (partial) cultural recognition with (upward) redistribution of wealth.

Implications for practice

Given the criminalisation and economic dispossession of most Māori, justice requires not only formal recognition of identity but, moreover, fundamental political-economic changes. The queer/abolitionist movement No Pride in Prisons (NPIP) argue, in this vein, that decolonisation requires the abolition of prisons, as part of a broader programme of socio-political justice.⁴¹ In explaining their programme, NPIP outline not only short-term and intermediate-term reforms that would alleviate the conditions experienced by prisoners, but also longer-term demands that require a ‘revolution in terms of Aotearoa’s social, political, and economic arrangements’, including the abolition of prisons as a key plank.⁴² Towards this same end, Moana Jackson contends that the Crimes Act is in breach of the Treaty of Waitangi,⁴³ and has recently argued that ‘prison abolition is a Treaty issue’. Jackson calls for recognition of a Māori justice system whose under-

41 *AD*. See also No Pride in Prisons, ‘Abolitionist Politics’, this issue.

42 *AD*, pp. 1-10.

43 Jackson, ‘Criminality and the exclusion of Maori’, p. 32.

pinning logic would be a collective, rather than private, responsibility for 'hara' (crimes).⁴⁴

NPIP's programme asserts the rights of prisoners as a public, a group with legitimate political claims. In the case of prison slavery, NPIP's intermediate demands include increased wages for prison workers, labour-related rights equal to those of non-incarcerated workers, and the right of prison workers to unionise.⁴⁵ These demands require that prisoners are recognised as a working-class public with the rights of any citizen. The right to unionise, in particular, would challenge the existing terms of imprisonment:

There is no more important a voice missing in the conversation about the future of the carceral system than a collective of incarcerated people themselves. Allowing for the unionisation of incarcerated workers would allow those workers to protect their most basic rights and interests.⁴⁶

Super-exploitation of (primarily Māori) prison labour can therefore be addressed by the prisoners themselves, as political protagonists. These reforms are only possible if incarcerated and non-incarcerated people work together, undermining the cross-partisan carceral consensus at every level. NPIP regularly communicates with prisoners, and is setting up broader correspondence between incarcerated and non-incarcerated people. Liberation requires cross-sectoral work with a common programme. We inherit the challenge of bicultural decolonising work, which ultimately requires the abolition of prisons and legal slavery.

44 *Ibid.*, pp. 27-32.

45 *AD*, pp. 83-8.

46 *Ibid.*, p. 88.

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