Immigration control, post-Fordism, and less eligibility

A materialist critique of the criminalization of immigration across Europe

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Abstract

The apparent de-bordering of the western world under the impulse of economic globalization has been paralleled by a simultaneous process of re-bordering of late-capitalist societies against global migrations. This re-bordering is part of a broader punitive turn in the regulation of migration which has emerged, particularly in the European context, since the mid-1970s. On the one hand, non-western immigrants are targeted by prohibitionist immigration policies which in fact contribute to the reproduction of their status of illegality; on the other hand, the systematic use of incarceration (together with administrative detention and deportation) as the main strategy in the ongoing war against unauthorized immigration configures a dynamic of hyper-criminalization of immigrants, whose result is the intensification of their socioeconomic and political marginality across Europe. Following the materialist criminological approach known as the political economy of punishment, this article suggests that these punitive strategies should be analyzed against the background of an increasingly flexible and de-regulated neoliberal economy: in this context, the hyper-criminalization of migrations contributes to the reproduction of a vulnerable labor force whose insecurity makes it suitable for the segmented labor markets of post-Fordist economies.

Key Words
borders • criminalization • illegalization • less eligibility • post-Fordism

MIGRATIONS, BORDERS, AND THE POLITICAL ECONOMY OF PUNISHMENT

In this article I propose a materialist critique of the ‘punitive turn’ against global migrations that have been taking place across western democracies since the late 1970s.¹
To this purpose, I will make use of some concepts and ideas forged within the neo-Marxist criminological perspective known as the 'political economy of punishment' (see Garland, 1990; Howe, 1994; De Giorgi, 2006). Although originally developed with reference to the functioning of national penal systems and to their role in the regulation of the domestic labor force, this critical approach offers powerful theoretical tools to deconstruct the punitive strategies that have shaped the politics of immigration control across Europe and the USA in the last quarter of the 20th century: increasingly restrictive immigration laws, militarized borders, growing resort to administrative detention, systematic deportations, and (specifically in the European context) the hyper-incarceration of immigrants.

The foundations of the political economy of punishment were laid down by Georg Rusche and Otto Kirchheimer (1939: 5) in the early pages of their classic *Punishment and Social Structure*:

> Every system of production tends to discover punishments which correspond to its productive relationships. It is thus necessary to investigate the origin and fate of penal systems, the use or avoidance of specific punishments, and the intensity of penal practices as they are determined by social forces, above all by economic and then fiscal forces.

Paving the way to a neo-Marxist critique of punishment whose theoretical maturity would be reached between the late 1970s and early 1980s (see, for example, Melossi and Pavarini, 1977/1981; Quinney, 1977; Greenberg, 1981; Platt and Takagi, 1981), Rusche and Kirchheimer argued that a sociological understanding of the historical and contemporary trajectories of penal systems and of punitive practices in general should be informed by a structural analysis of the connections between penal technologies and the transformations of the economy – in particular, the transition of modern societies from a pre-capitalist to a capitalist mode of production.

In this perspective, the emergence of what Michel Foucault would define as 'disciplinary' practices and institutions of confinement replacing the torturous 'spectacles of suffering' staged in the main squares of European cities until the 18th century (see Spierenburg, 1984), should be reinterpreted in light of the emergence of a capitalist system of production whose political economy conceived the human body as a resource to be exploited in the process of production (rather than being wasted in the symbolic rituals of corporal punishment):

> In fact the two processes – the accumulation of men and the accumulation of capital – cannot be separated; it would not have been possible to solve the problem of the accumulation of men without the growth of an apparatus of production capable of both sustaining them and using them; conversely, the techniques that made the cumulative multiplicity of men useful accelerated the accumulation of capital. (Foucault, 1975/1991: 221)

Thus, modern penal institutions would play a decisive role in the consolidation of a mode of production based on the factory and grounded in the scientifically managed exploitation of waged labor (Taylor, 1911/1967). At the outset of the bourgeois revolution, the 'great confinement' of beggars, criminals, prostitutes, and the 'idle poor' in workhouses, poorhouses, and houses of correction across Europe (Foucault, 1961/1965) offered a crucial contribution to the transformation of the 'free and
rightless proletariat’ (Marx, 1867/1976: 896) generated by the crisis of the feudal economy into a docile labor-force which ‘by virtue of its moral attitude, physical health, intellectual capacity, orderliness, obedience, etc., would readily adapt to the whole regime of factory life, and produce the maximum amount of surplus value’ (Melossi and Pavarini, 1977/1981: 42).

More generally, the political economy of punishment argues that the historical emergence, the consolidation, and the ongoing transformations of modern penal practices reflect the capitalist need to carve a docile and laborious workforce out of the unruly, undisciplined, and sometimes riotous ‘dangerous classes’ constantly generated by capital itself as a by-product of its movement of creative destruction (Schumpeter, 1942). Along the lines of a historically contingent relationship with the evolving structures of capitalist accumulation, ideologies, practices, and institutions of punishment would thus contribute to the reproduction of a disciplined labor force.

Within this broad materialist framework, the actual configuration of the relationship between penal technologies and the economic structure of society would be shaped by the logic of less eligibility. This concept was first developed in England in the 19th century, and provided the main rationale for the Poor Laws of 1834. In its early formulation, the principle holds that public assistance should never improve the conditions of the destitute above the standards of life available to the poorest among the working poor; otherwise public relief would become ‘more eligible’ [more desirable] than waged work.3 Georg Rusche applied the principle of less eligibility to the universe of punishment, arguing that since the goal of any penal system is to deter the most marginalized classes of society from committing ‘crimes of desperation’ (Rusche, 1933/1978: 4), thus rejecting the capitalist injunction to survive on their legitimate work, it follows that standards of life generally available among the lowest regions of the class structure will invariably set the standards of life for those who are caught in the net of the penal system. In Rusche’s (1933/1978: 3) own words:

Now experience teaches us that most crimes are committed by members of those strata who are burdened by strong social pressures and who are relatively disadvantaged in satisfying their needs when compared to other classes. Therefore, a penal sanction, if it is not to be counterproductive, must be constituted in such a way that the classes which are most criminally inclined prefer to abstain from the forbidden acts than become victims of criminal punishment.

However, in Rusche’s view the rationality of penal practices is not limited to the purely negative logic of deterrence just described. Indeed, the function of less eligibility is not only to deter the most disadvantaged classes from resorting to crime (or public assistance), but also – and most importantly – to force the poor to ‘prefer’ any available condition of legal work rather than incur in the sanctions attached to criminal behavior and to the refusal of work. In other words, by setting the standards of living for those punished ‘below the situation of the lowest socially significant proletarian class’ (Rusche, 1933/1978: 4), the principle of less eligibility would ensure that the most marginalized fractions of the proletarian class will accept any level of exploitation in the capitalist labor market, as this will be in most cases preferable to being punished for refusing to work at the given conditions.

Along these lines, in the 1970s and 1980s the new ‘revisionist’ histories of punishment (Melossi and Pavarini, 1977/1981; Ignatieff, 1978) will illustrate how,
throughout the bloody process of formation of the modern industrial labor force, one of the most recurring symptoms of the perceived ‘criminal inclination’ and unruliness of the proletarian class would be represented by its unauthorized mobility. Historically, the forced immobilization (or mobilization) of the poor, the unemployed, the vagrants, and the beggars, constituted a crucial element in the disciplinary regulation of the Marxian ‘rightless proletariat’, thus contributing to the reproduction of a constant supply of labor (Chambliss, 1964; Weber and Bowling, 2008). In this context, penal laws, civil statutes, border enforcement policies, local ordinances, and the whole disciplinary apparatus described by Michel Foucault and others, have historically converged toward the task of regulating (in more or less punitive forms, depending on the existing socioeconomic structure) the mobility of labor. Dario Melossi (2003b: 372–3) summarizes well these historical dynamics when he argues that:

The particular role historically played by ‘vagrancy’, and vagrancy laws, in the very constitution of modern penal law, becomes then clearer. Vagrancy – that ‘chrysalis of every species of criminal’ as it was called at the end of the 19th century – was, together with the ‘crime’ of refusing to work at given conditions, the original crime for which imprisonment, the modern form of punishment, was to be meted out.

The genealogy of western capitalism is indeed inscribed in an ongoing struggle between capital and labor over the control of mobility. Across each phase of capitalist development – from the violent stages of primitive accumulation, which ‘entailed taking land . . ., enclosing it and expelling a resident population to create a landless proletariat’ (Harvey, 2005a: 149), to the consolidation of a global economy based on de-territorialized fluxes of production and consumption – labor mobility has been alternatively imposed and prohibited, forced and forbidden, promoted and criminalized (see Moulier-Boutang, 1998).

It is well known, for example, that the main coordinates of the current model of prohibitionist governance of migratory movements started to emerge (particularly in Europe) in the mid-1970s, when the most industrialized European countries like Germany, the United Kingdom, France, and Belgium – which since the 1950s had been importing huge numbers of unskilled workers needed for the heaviest and most dangerous productions of their expanding Fordist/industrial economies – imposed a virtual stop on labor immigration as a consequence of rising unemployment rates, economic stagnation, and the unfolding of a broad crisis of the industrial economy (Castles and Kosack, 1973; Castles, 2006). On the other hand, less than two decades later, Southern European countries like Spain, Portugal, Italy, and Greece – which had traditionally been major exporters of unskilled labor to Northern Europe and to the United States, but were now becoming importers of immigrant labor – would also embrace the prohibitionist approach against the new immigrants crossing the borders of Europe from the global South (Calavita, 1998). In each case, the struggle has concerned the extension, the intensity, the direction, and of course the control of this labor mobility (Sassen, 1988; Castles and Miller, 1998).

In the global economy of our times, these conflicts re-emerge in what has been described as the new ‘regime of frontier’ (Anderson, 2000): a complex assemblage of discourses, practices, and strategies that appear to be redefining the political, economic and cultural meanings of transnational borders. In the last quarter of the 20th century,
just as financial capitals and global fluxes of production became increasingly immune to the territorial dimension of state sovereignty, and nation-states increasingly abdicated to their regulatory powers in the name of economic de-regulation and labor flexibility, advanced capitalist economies witnessed a dramatic resurgence of the struggle over the control of labor mobility. As a result, the partial de-bordering of the western world under the impulse of economic and financial globalization has been complemented by a simultaneous process of re-bordering of western democracies against global migrations (Pickering and Weber, 2006).

Although virtually no longer in existence for financial capitals and for a restricted global élite of cosmopolitan ‘tourists’ (Bauman, 1998: 77), borders have thus resumed all their symbolic and material violence against specific categories of people (underprivileged, non-western, ‘Third-World’ migrants) who, as a consequence of the marginal position they occupy in the transnational circuits of production, are locked in the lowest regions of what Zygmunt Bauman (1998: 69–76) has called the ‘global hierarchy of mobility’. The unauthorized mobility of this ever more globalized proletariat, its actual or potential trespassing of the many ‘walls around the West’ (Andreas and Snyder, 2000), are once again the target of punitive strategies of criminalization and illegalization. Not unlike earlier stages in the history of capitalism, ‘these forces, these energies, these people, that the movement of capitalism has so dangerously literally set in motion, are to be harnessed, disciplined, governed, controlled, detained, stopped’ (Melossi, 2003b: 372).

In contemporary neoliberal economies, access to the freedom of movement and circulation represents a vital source of individual advancement and social emancipation, but the human right to mobility is not universally recognized, and the ongoing process of re-bordering aggravates those same global inequalities which constitute the main catalyst for contemporary migrations. At the same time, the new borders project those inequalities inside the global cities of the West (Sassen, 1993), where vulnerable immigrants are forced once again to fill the ranks of Rusche’s ‘lowest socially significant proletarian class’ (Rusche, 1933/1978: 4).

However, in the context of the increasingly globalized processes of capitalist production and consumption, borders can no longer function as fixed barriers to the unchecked circulation of ‘alien’ bodies. Rather, they operate more like the fences protecting the gated communities of contemporary post-industrial cities against the perceived threats posed by undesirable others – the homeless, the poor, the addicts, the ‘wretched of the metropolis’, to paraphrase Fanon (1961/1963). Indeed, just as these urban gates are periodically lifted to let in a useful army of ‘service labor, from landscapers, gardeners, housekeepers, and nannies to home health care aides, companions, dog walkers, and pool cleaners’ which ‘often comprises non-white, working-class immigrants, arguably the types of people whom gates are meant to keep out’ (Hill-Maher, 2003: 751–2), similarly transnational borders seem to operate as flexible gateways in charge of differentiating and channeling desirable and undesirable others (Weber and Bowling, 2008: 359).

In other words, within the contemporary global hierarchies of work, the functioning of borders has less to do with the geopolitical delimitation of sovereign prerogatives (i.e. the power to exclude non-citizens from access to a state’s territory), and more with the attempt to control, select, and govern at a distance specific categories of people. Thus, borders become themselves as mobile and flexible as the unauthorized crossers...
they are supposed to keep out, and project their power-effects inside the boundaries of
the nation-state, where they shape the insecure legal status of immigrants and help
define their subordinate position in the flexible economy.

In Europe, as well as in the USA, immigrant workers concentrate in the lowest and
least protected sectors of the economy. There they provide those unskilled services on
which the post-Fordist economy increasingly relies, but which cannot be delocalized
(i.e. exported to regions of the world where the cost of labor is lower and labor pro-
tections are virtually nonexistent), although the local labor force is ever less willing to
perform them: domestic work, labor-intensive agriculture, constructions, and other low-
skill occupations. Hyper-exploitation has been documented in all these sectors, as has
been the determination of most immigrants (particularly if undocumented) to tolerate
these conditions in the name of a migratory project whose stakes are often very high,
particularly in times of intense immigration and border controls.

It is important to emphasize here that this re-bordering of late-capitalist democracies
against global migrations does not represent ‘the most compelling exception to liberal-
ism in the operation of the world economy’, as one commentator has argued (Bhagwati,
1984: 680). Instead, a materialist critique of immigration control suggests that the new
borders constitute a functional complement to economic deregulation and to the
construction of a flexible system of accumulation. As has already been the case in history,
the mobility of capital can fully express its profitability only in conjunction with a
limited and controlled mobility of labor. Here we begin to unveil the apparent paradox
for which late capitalist societies, whose citizens are governed through the neoliberal
imperatives of flexibility, individual freedom, economic initiative, social mobility, and
so on, resort to any available technology of control and confinement as soon as non-
western migrants appear to embrace those same principles and resolve to move in search
of a better life.

The fact is, as Marx and Engels (1845/1970: 64) famously wrote about the role of
ideology in preserving specific structures of class-power, that:

the ruling ideas are nothing more than the ideal expression of the dominant material relation-
ships, the dominant material relationships grasped as ideas; hence of the relationships which
make the one class the ruling one, therefore, the ideas of its dominance.

And this seems to apply also to the neoliberal ideology of freedom and mobility in the
age of global immigration control.

THE HYPER-CRIMINALIZATION OF IMMIGRANTS: TOWARD A
EUROPEAN PENAL STATE?
Recent literature in the sociology of punishment has concentrated on the ‘punitive turn’
that has characterized the United States since the last quarter of the 20th century, leading
to draconian penal policies, skyrocketing incarceration rates, an almost exclusive
emphasis on the incapacitation of offenders, and the demise of rehabilitation as the
driving principle of penal practices (see Garland, 2001; Simon, 2007). Some authors,
writing broadly from the perspective of materialist criminology, emphasize the relation-
ship between this ‘new punitiveness’ (see Pratt et al., 2005) and the transition of late
capitalist societies from a Fordist/industrial model of production based on stable labor
markets, potentially inclusive welfare systems, and extensive regulatory practices (i.e. Keynesianism), toward a post-industrial and post-Fordist paradigm of capitalist accumulation characterized by rigidly segmented labor markets, pervasive work insecurity, the downsizing of welfare, and the extensive deregulation of the economy in the name of labor flexibility (Piore and Sabel, 1986; Amin, 1995; Harvey, 2005b).

In this direction, in his latest book Loïc Wacquant (2009) emphasizes the structural connection between these socioeconomic developments and the advent of a hegemonic ‘penal state’ in which the consolidation of a neoliberal paradigm of economic governance is reinforced by the punitive regimentation of the lowest regions of society:

‘Thus the ‘invisible hand’ of the unskilled labor market, strengthened by the shift from welfare to workfare, finds its ideological extension and institutional complement in the ‘iron fist’ of the penal state . . .. The regulation of the working classes through what Pierre Bourdieu calls the ‘Left hand’ of the state, that which protects and expands life chances, represented by labor law, education, health, social assistance, and public housing, is supplanted (in the United States) or supplemented (in the European Union) by regulation through its ‘Right hand’, that of the police, justice, and correctional administrations, increasingly active and intrusive in the subaltern zones of social and urban space. (Wacquant, 2009: 6, emphases in original)

Consistently with the theoretical arguments developed so far, in the next few pages I offer an illustration of the extent to which the ‘Right hand’ of the State has indeed become hegemonic across Europe in the field of immigration control; I also suggest that this punitive shift is part of an emerging framework of penal and extra-penal regulation of migrations in which the illegalization and the hyper-criminalization of immigrants work symbiotically toward the reproduction of a vulnerable labor force, suitable for the most exploitative sectors of the post-Fordist economy.5

At first sight it would be difficult to argue that contemporary European penal systems are experiencing anything quantitatively comparable to the penal experiment that has taken place in the USA since the late 1970s, leading to the current condition of ‘mass imprisonment’ (Garland, 2001). As is well known, today the USA has the largest prison population in the world, with more than 2.3 million people behind bars, and an incarceration rate of 762/100,000 (that is, between four and 10 times that of any European country: see Table 1). In this respect, statistical data would seem to support the arguments of scholars working from the perspective of comparative penality, who insist that the punitive turn in the USA is somehow unique to the American experience, since it reflects its specific geographies of social, economic and racial inequality, its legal traditions, and its political system (see Whitman, 2003; Tonry, 2007). In this vein, in her sharp critique of recent ‘grand narratives’ of penal change and of what she considers an unwarranted tendency toward global ‘dystopianism’ at the expense of grounded comparative analysis, Nicola Lacey (2008: 137) argues that:

[I]t is too soon to conclude that the US model is the shape of the future in all affluent democracies. The apocalyptic visions which crowd the pages of progressive criminology books and journals of the last decade are, in my view, significantly wide of the mark. [W]e must bear in mind the scale of the existing differences in penal practices between the USA and all European countries, with the imprisonment rates of even the most punitive of the latter looking much more like each other than like that of the USA.
As the data in Table 1 illustrate, the US incarceration rate is indeed almost eight times higher than the average European rate (not including here the countries recently admitted to the EU). However, one important question that could be raised is whether, besides the total extension of a prison system, the selectivity of penal practices should not be also taken into account as a significant indicator of penal severity. In other words, it could be the case that although the total extension of the penal arm of the State remains comparatively limited, pointing to a general climate of penal moderation across Europe, when it comes to the criminalization of immigrants what emerges is an unusual intensity of penal practices.

Unlike the United States, where (with the partial exception of border regions facing periodic moral panics about cross-border drug smuggling, human trafficking, global terrorism, etc.) the anti-immigration rhetoric has been constructed mainly around issues like ‘welfare abuse’ (Calavita, 1996), unfair competition in the national labor market (see Borjas, 1999), overpopulation, and the preservation of a supposed cultural homogeneity (see Brimelow, 1995), in Europe in the last two decades the populist rhetoric of the war against immigration has been hegemonized by the myth of immigrant crime and of immigrants as a dangerous class (see Marshall, 1997; McDonald, 2009). Often framed in a racialized language that postulates self-evident links between some nationalities or ethnicities and specific types of criminal activity (e.g. Eastern Europeans and violent crime, Northern Africans and drug trafficking, sub-Saharan women and prostitution, Roma people and property crimes), fear of immigrant crime and deviance has been constantly amplified by political parties and mainstream media eager to exploit public insecurities in the construction of a populist consent.6

### TABLE 1 Imprisonment rate in selected European countries (2007) and in the USA (2008)

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>Imprisonment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>99.7</td>
</tr>
<tr>
<td>Belgium</td>
<td>90.4</td>
</tr>
<tr>
<td>Denmark</td>
<td>66.3</td>
</tr>
<tr>
<td>Finland</td>
<td>69.2</td>
</tr>
<tr>
<td>France</td>
<td>96.5</td>
</tr>
<tr>
<td>Germany</td>
<td>83.7</td>
</tr>
<tr>
<td>Greece</td>
<td>99.9</td>
</tr>
<tr>
<td>Ireland</td>
<td>78.6</td>
</tr>
<tr>
<td>Italy</td>
<td>75.9</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>148.5</td>
</tr>
<tr>
<td>Netherlands</td>
<td>72.2</td>
</tr>
<tr>
<td>Portugal</td>
<td>104.2</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>139.6</td>
</tr>
<tr>
<td>Spain</td>
<td>120.1</td>
</tr>
<tr>
<td>Sweden</td>
<td>74.0</td>
</tr>
<tr>
<td>Average EU (15)</td>
<td>94.5</td>
</tr>
<tr>
<td>USA</td>
<td>762.0</td>
</tr>
</tbody>
</table>

In turn, these public discourses have become powerful catalysts for the consolidation of a punitive governance of migrations revolving around a process of ‘categorical criminalization’ of immigrants (see De Giorgi, 2006) which is clearly reflected in the dramatic over-representation of non-European immigrants in the prisons of Europe (see Table 2).

The average immigrant incarceration rate of 443/100,000 across Europe (again not considering countries of recent admission) means that foreigners are imprisoned on average 6.2 times more often than EU citizens, with some countries (e.g. Italy, the Netherlands, Portugal, and Greece) incarcerating immigrants up to 10 times more often than nationals: an over-representation even higher than that of African Americans in the US prison system.

It should be noted that these data do not include the form of extra-penal incarceration to which only immigrants can be subjected: administrative detention. In 2007 there were 218 immigration detention centers across Europe, and according to recent estimates (since no reliable data are available on this subject), around 100,000 immigrants are detained each year (see Jesuit Refugee Service Europe, 2004). In June 2008 the European Parliament approved a controversial legislative resolution (which has prompted diplomatic reactions by several countries of emigration) on the return of ‘illegal’ immigrants (COM(2005)0391), which confers the official mark of legitimacy to administrative detention across the EU. Among other things, the directive establishes a maximum period of detention of 18 months, and authorizes member states to detain also unaccompanied children, if this is necessary for their identification and removal.  

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>IMP. RATE NATIONALS</th>
<th>IMP. RATE FOREIGNERS</th>
<th>HYPER-INCARCERATION FACTOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>66.5</td>
<td>463.0</td>
<td>6.9</td>
</tr>
<tr>
<td>Belgium</td>
<td>58.4</td>
<td>461.0</td>
<td>4.8</td>
</tr>
<tr>
<td>Denmark</td>
<td>57.4</td>
<td>263.0</td>
<td>4.5</td>
</tr>
<tr>
<td>Finland</td>
<td>64.4</td>
<td>263.0</td>
<td>4.0</td>
</tr>
<tr>
<td>France</td>
<td>85.6</td>
<td>326.0</td>
<td>3.8</td>
</tr>
<tr>
<td>Germany</td>
<td>76.4</td>
<td>292.0</td>
<td>3.8</td>
</tr>
<tr>
<td>Greece</td>
<td>67.0</td>
<td>668.0</td>
<td>9.9</td>
</tr>
<tr>
<td>Ireland</td>
<td>73.3</td>
<td>96.6</td>
<td>1.3</td>
</tr>
<tr>
<td>Italy</td>
<td>51.5</td>
<td>743.0</td>
<td>14.4</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>71.4</td>
<td>264.3</td>
<td>3.7</td>
</tr>
<tr>
<td>Netherlands</td>
<td>66.0</td>
<td>772.0</td>
<td>11.6</td>
</tr>
<tr>
<td>Portugal</td>
<td>90.6</td>
<td>925.0</td>
<td>10.2</td>
</tr>
<tr>
<td>Spain</td>
<td>96.8</td>
<td>500.0</td>
<td>5.1</td>
</tr>
<tr>
<td>Sweden</td>
<td>62.0</td>
<td>290.0</td>
<td>4.6</td>
</tr>
<tr>
<td>UK</td>
<td>119.0</td>
<td>318.0</td>
<td>2.6</td>
</tr>
<tr>
<td>Average EU (15)</td>
<td>73.7</td>
<td>443.0</td>
<td>6.2</td>
</tr>
</tbody>
</table>

But perhaps even more revelatory of the normalization of confinement as an ordinary tool for the punitive regulation of immigrants are the data concerning the use of pre-trial detention. As Table 3 illustrates, immigrants awaiting trial are incarcerated much more often than nationals in the same condition, with countries like Italy keeping almost three out of four immigrant prisoners in preventive custody, and other countries (e.g. Denmark, Finland, Germany, Luxembourg, Spain) exhibiting percentages of pre-trial detention among foreigner prisoners double than those found among nationals. This is the consequence of several circumstances, not all of them resulting from intentional discrimination by law enforcement and the criminal justice system, but all invariably associated with immigrants’ condition of legal, economic, and social vulnerability: given their often insecure working, housing, and family arrangements (particularly if undocumented), foreigners are unable to offer those guarantees to which access to alternatives to imprisonment (e.g. house arrest, suspended sentence, parole) is often subordinated at any stage of the penal process. In many cases, the types of criminal activity in which migrants tend to be involved, such as drug dealing, street prostitution, and property crime lead to multiple arrests, which in turn prevent the concession of pre-trial release or other non-custodial measures. Finally, broad inequalities in the access to legal defense have been documented (see van Kalmthout et al., 2007: 78–88).

In other words, when observed from the perspective of those who cannot claim full membership in the EU but only some form of subordinate inclusion in its flexible labor markets, the picture of European societies as strongholds of penal tolerance and moderation becomes increasingly blurred, leaving room to a reality of selective criminalization. In this regard, it is also worth observing the recent evolution of this picture. If

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>% OF NATIONAL PRISONERS IN PRETRIAL</th>
<th>% OF FOREIGN PRISONERS IN PRETRIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>18.6</td>
<td>32.0</td>
</tr>
<tr>
<td>Belgium</td>
<td>30.6</td>
<td>40.4</td>
</tr>
<tr>
<td>Denmark</td>
<td>24.6</td>
<td>49.2</td>
</tr>
<tr>
<td>Finland</td>
<td>11.5</td>
<td>32.7</td>
</tr>
<tr>
<td>France</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Germany</td>
<td>14.2</td>
<td>30.5</td>
</tr>
<tr>
<td>Greece</td>
<td>39.2</td>
<td>24.0</td>
</tr>
<tr>
<td>Ireland</td>
<td>15.2</td>
<td>34.2</td>
</tr>
<tr>
<td>Italy</td>
<td>48.6</td>
<td>73.4</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>16.6</td>
<td>51.1</td>
</tr>
<tr>
<td>Netherlands</td>
<td>53.3</td>
<td>25.0</td>
</tr>
<tr>
<td>Portugal</td>
<td>18.3</td>
<td>42.0</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>17.6</td>
<td>14.1</td>
</tr>
<tr>
<td>Spain</td>
<td>16.7</td>
<td>38.9</td>
</tr>
<tr>
<td>Sweden</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Average EU (15)</td>
<td>25.0</td>
<td>37.5</td>
</tr>
</tbody>
</table>

Sources: Council of Europe SPACE I (2009); International Centre for Prison Studies (2009).
on the one hand in the last few years (2000–7) prison populations have been rising in several European countries, with increases as high as 30.4 percent in Austria, 32.3 percent in Finland, 25.6 percent in the Netherlands, and 24.7 percent in France, on the other hand these increases appear almost insignificant when compared to the rise of incarceration among the immigrant population, with a 79.1 percent increase in Finland, 88 percent in Austria, 118 percent in Spain, and an astonishing 313 percent in the Netherlands: all this, it should be noted, in a period of stable if not declining crime rates across most European countries.8

But why are immigrants hyper-incarcerated in Europe? Do they commit more crimes than nationals? Are the crimes they commit more serious? Although historically the link between foreigners and crime has been a recurring element in cyclical moral panics about immigration and its control (see, for example, the debates about Irish and Italian immigrants in the USA between the late 19th and early 20th centuries, or those concerning immigrants from Southern Europe in Germany, France, and Belgium in the 1960s and 1970s), a significant sociological literature on the argument has disconfirmed this connection (see, for example, Marshall, 1997; Tonry, 1997). One of the most promising chapters in this long sociological tradition is represented by Robert Sampson’s (2008) recent research on the USA, which suggests that not only do immigrants not appear to commit more crimes than nationals, but their presence may actually exert a stabilizing effect on the economically deprived and socially disorganized neighborhoods in which they often concentrate, thus contributing to reducing crime in those urban areas.

Of course, any generalization about the criminal involvement of migrants across European countries would be quite problematic (since the latter are characterized by different illegal economies, different structures of legal and illegal opportunity, and different historical patterns of immigration), nor is it my intention here to elaborate a comparative analysis of immigrant crime (see Lynch and Simon, 2003: 227–39). It is possible, however, to sketch a few notes about those structural conditions (some of which, I argue, are produced or at least amplified by the current prohibitionist immigration regime) which expose immigrants to the process of hyper-criminalization described so far, thus reinforcing the symbiosis between illegalization and criminalization mentioned earlier.

A first observation concerns the positions usually occupied by immigrants (particularly if recent) in the illegal economies of the societies of destination. Mirroring what happens in the legal economy, immigrants tend to concentrate in the lower tiers of criminal enterprises, performing high-risk activities such as street-level drug dealing and street prostitution. In other words, also in these contexts immigrants tend to take the jobs national criminals are no longer willing to do.9 These activities tend to be not only less profitable for those who perform them (particularly when they are inserted in hierarchically organized criminal enterprises), but also very risky as a consequence of their high-visibility. In turn, this higher visibility leads to repeated arrests and roundups (which also contribute to artificially inflated immigrant crime statistics), as well as to intolerant attitudes by fearful citizens. To the extent that the ‘quality of life’ rhetoric takes hold, equating the mere presence of immigrants on the streets to urban decay, the public’s propensity to call the police for any minor sign of disorder increases, thus contributing to expose immigrants to the arbitrary (and often discriminatory) practices
of ‘zero tolerance’ policing (on the Italian case, see, for example, Angel-Ajani, 2003; Palidda, 2009).10

A further consideration concerns the so-called ‘crimes of immigration’. Besides the unauthorized entry or stay (in those rare instances in which they are treated by European legal systems as crimes rather than as administrative infractions), these include not only all those violations that tend to be committed almost exclusively by immigrants – further violations of the immigration law, re-entry into a country from which the migrant has been banned, the forging of visas, driving licenses and other documents, giving assistance or shelter to undocumented relatives or friends, and so on – but also those crimes whose punishments are significantly enhanced when they involve foreigners: for example, the refusal to give one’s documents to a law enforcement officer, in those countries in which not carrying an ID is unlawful.11

In conclusion, and without indulging in any ‘deterministic’ approach to the etiology of criminal behavior, it is possible to argue that to the extent that immigrants are involved in criminal activities across Europe, this involvement is substantially oriented to those ‘crimes of desperation’ mentioned by Georg Rusche (1933/1978: 4) in his 1933 article: patterns of deviance that are either directly generated by the immigrants’ status of actual or potential ‘illegality’, or indirectly prompted by the conditions of structural marginality which usually descend from that vulnerable status. Thus, in the punitive reaction of European societies to these crimes of survival, we see unfolding the ‘double punishment’ of migrants so vividly described by Algerian sociologist Abdelmalek Sayad (1999/2004: 282–3, emphases in original):

Any trial involving a delinquent immigrant puts the very process of immigration on trial, first as a form of delinquency in itself, and second as a source of delinquency. Before we can even speak of racism or xenophobia, the notion of double punishment is therefore present within any judgment passed on the immigrant . . .. Double punishment exists inside our ‘national’ heads, because the very fact of immigration is tainted with the idea of being at fault, with the idea of anomaly and anomie.

Finally it is here, as suggested by the principle of less eligibility, that the processes of criminalization and illegalization described so far converge toward an emerging European model of punitive regulation of migrations, in which restrictive immigration laws and selective penal policies, prisons and detention centers, arrests and deportations work symbiotically to reproduce immigrants’ vulnerability and exploitability (see Calavita, 2003).

CONCLUSION: TOWARD A GLOBAL LESS ELIGIBILITY?
As I have tried to illustrate in these pages, the emerging regime of punitive regulation of labor migrations articulates itself around two main levels. The first level unfolds at the border, and witnesses the deployment of prohibitionist strategies aimed at narrowing the channels of legal access to the societies of destination, with the result of creating a population of individuals whose illegality is in fact defined by the selective functioning of the borders. In this respect, it is crucial to consider on the one hand that immigrant ‘legality’ and ‘illegality’ are institutionally constructed conditions, and on the other hand that these conditions are not as clearly distinguishable and mutually exclusive as
the widespread anti-immigration rhetoric (with its essentialist separation between ‘good legal immigrants’ and ‘bad illegal aliens’) would have them. The constant threat of drifting into illegality (sometimes following a penal conviction, but much more often as a consequence of something perfectly ‘legal’ like losing one’s job in a recession) operates as a powerful reminder to immigrants of their subordinate and uncertain position in the societies of destination.12

The second level materializes once the border has been crossed, and contributes to the subordinate inclusion of migrants whose illegalized status invites further policies of selective control and criminalization. Here, limited access to civil, social, and political rights, hyper-incarceration, and the constant threat of deportation contribute to the creation of a grey area of legal vulnerability – or ‘eternal probation’, as Daniel Kanstroom (2000: 1907) has defined it – which in turn constrains the socioeconomic opportunities of migrant workers and contributes to their insertion in the most precarious and insecure sectors of the post-Fordist economy, as well as in the lower regions of the illegal economies.

As I have tried to illustrate, the EU offers a paradigmatic example of the simultaneous processes of de-bordering/re-bordering described in the first section of this article, as well as of the connection between these dynamics and the punitive regulation of illegalized immigrants. While inside the EU national borders have been abolished in favor of a unified economic and financial area of free circulation, the external borders of the EU (beginning with the Schengen Agreement of 1985, but with increased intensity after 9/11 and the terrorist attacks of 2004 in Madrid and 2005 in London) operate as militarized gateways to the circulation of specific categories of non-western citizens. This ambivalence of the European borders is clearly reflected in the fragmented legal status of the residents of Europe, whose rights, economic opportunities, life chances, and – most importantly for our analysis – levels of criminalization are determined by the position they occupy in relation to those borders. Even a cursory glance at recent developments in the construction of European security policies reveals the extent to which these measures are targeted almost exclusively against Europe’s ‘outsiders’. The very concept of ‘security’ – now a constitutive element in the statutory definition of European citizenship itself (Huysmans, 2000) – is articulated around the protection of European citizens against waves of poor immigrants ready to ‘invade’ the continent (Waever, 1995).

In her recent book on the politics of immigration control in Southern Europe, Kitty Calavita (2005: 11–12) offers a powerful description of the implications of the growing symbiosis between the legal and discursive production of immigrants as undeserving ‘others’ whose dangerousness would threaten the quality of life in the societies of destination, and the hyper-exploitation of these ‘others’ in the post-Fordist labor markets of Italy and Spain:

[1]Immigrants are useful as ‘Others’ who are willing to work, or are compelled to work, under conditions and for wages that locals now largely shun. The advantage of immigrants for these economies resides precisely in their Otherness. At the same time, that Otherness is the pivot on which backlashes against immigrants turn. For, if marginalized immigrant workers are useful in part because they are marked by illegality, poverty, and exclusion, this very marking, this highlighting of their difference, contributes to their distinction as a suspect population.

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As we have seen, a whole arsenal of punitive discourses and practices has been deployed particularly in the last two decades against these ‘useful invaders’ (Calavita, 2005: 48–74), whose economic utility is indeed magnified by their social construction and institutional treatment as undeserving others: from the militarization of the external borders of the EU to hyper-incarceration, administrative detention, and collective deportations, to the elaboration of restrictive policies on asylum and the stipulation of readmission agreements with countries whose regimes perpetrate systematic human rights violations. Once again, however, a consistent pattern can be identified among these multiple layers of immigration control: despite the ongoing rhetoric of the ‘war against illegal immigration’ – so powerful in Europe as well as in the USA – the criminalization and illegalization of unauthorized immigrants relates to a wider strategy of regulation whose aim is not to keep unwanted immigrants out, but to let some in and keep them under conditions of institutionally sanctioned subordination (Calavita, 2003; Schuster, 2005). As Nicholas de Genova (2005: 215) has recently argued about the illegalization of Mexican immigrants in the USA, at stake here is migrants’ permanent condition of deportability and detainability, more than their actual detention and deportation:

Deportability is decisive in the legal production of Mexican/migrant ‘illegality’ and the militarized policing of the U.S.-Mexico border, however, only insofar as some are deported in order that most may ultimately remain (un-deported) – as workers, whose particular migrant status has been rendered ‘illegal’.

This process of subordinate economic inclusion through legal exclusion has become even more intense in the aftermath of 9/11, as illegal immigration has become the target of deviance amplification processes which readily assimilate ‘illegal’ immigrants and asylum seekers not only to ordinary criminals but also to potential terrorists. However, as the political economy of punishment suggests, hostile social representations – and the punitive practices they help to consolidate – do not materialize in a vacuum: rather, these are always grounded in historically determined configurations of power and subordination which in turn they help to preserve and consolidate.

Finally, if we observe these dynamics from the perspective of a global economy whose processes of accumulation and valorization depend increasingly on the possibility of governing and controlling the mobility of a labor force which is also undergoing a process of globalization, we can draw some conclusions that bring us back to the political economy of punishment and the principle of less eligibility. On the one hand the widespread punitive regulation of ‘Third-World’ labor migrations – in Europe as well as in other advanced-capitalist areas of the world – contributes to the reproduction of a global reserve army of labor whose forced localization is instrumental to its insertion in the hyper-exploitative and labor-intensive production systems based in the poorest regions of the global economy (e.g. potential areas of emigration). On the other hand, the illegalization and hyper-criminalization of those who trespass the fences around the West contribute to the reproduction of a vulnerable labor force, forced by its ontological insecurity to accept virtually any degree of exploitation in the flexible labor markets of advanced post-Fordist economies (areas of immigration), since this will in most cases still be preferable to criminalization, detention, and deportation to the country of origin.
We need to consider here that the meaning of this threat involves more than the simple fear of being deported to a poor, unsafe, or war-ridden area of the world: instead, it is the threat of failure for migratory projects in which immigrants often literally invest their own lives. Quite paradoxically, in the age of human mobility and ‘time–space compression’ (Harvey, 1990), migrants must pay enormous economic and human costs and must face unceivable risks, in order to leave the global South and embark in long journeys through seas and deserts, only to reach the militarized borders of the global North.16 In the end, what we may be witnessing at the intersection of these processes is the consolidation of a regime of global less eligibility in which the Right-hand of the State extends its hold on Rusche’s ‘lowest socially significant proletarian class’ beyond the permeable borders of the nation.

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I would like to thank Leti Volpp, Richard W. Perry, Nicola Lacey, and Doris Provine for their insightful comments on earlier drafts of this article. Thanks also to the Punish-ment & Society editors, staff, and reviewers for their support. My infinite gratitude to Stefania, for always being there.

Notes
1 My analysis will concentrate here particularly on the European case. However, the hypothesis of a global convergence toward a more restrictive regime of immigration control is emerging among critical scholars (see, for example, Meyers, 2002; Weber and Bowling, 2004).
2 In fact, Georg Rusche had already elaborated these ideas a few years earlier, in a path-breaking article entitled ‘Labor market and penal sanction: Thoughts on the sociology of criminal justice’ (originally published in 1933, and republished in Crime and Social Justice in 1978). This article defined the main ideas to be later developed more systematically in Punishment and Social Structure. On the intricate history of the book (and on the controversial role played in its publication by Otto Kirchheimer), see Melossi (2003a).
3 The following is one of the original formulations of this principle:

The first and most essential of all conditions, a principle which we find universally admitted, even by those whose practice is at variance with it, is, that his [the relief recipient's] situation on the whole shall not be made really or apparently so eligible [i.e. desirable] as the situation of the independent laborer of the lowest class. (Quoted in Fox Piven and Cloward, 1993: 35)

4 As legal scholars have pointed out (see Kleven, 2002), international law recognizes the human right to emigrate but (except in case of persecutions which may justify the granting of asylum), it does not recognize any right to immigrate to a different country: ‘Everyone has the right to leave any country, including his own, and to return to his country’ (Universal Declaration of Human Rights, 1948, art. 13, II).
5 Besides the growing body of ethnographic and qualitative research documenting immigrant exploitation in all sectors of the economy (see Calavita, 2005; de Genova, 2005; Orner, 2008), perhaps one of the most significant quantitative indicators of the subordinate position occupied by immigrant workers in the labor markets of...
the societies of destination is offered by data measuring the ‘professional downgrading’ of workers (i.e. the frequency with which individuals work at jobs for which they are overqualified from the point of view of their previous working experience and/or education). This indicator is significant because it documents the extent to which workers ‘accept’ some level of occupational degradation for lack of alternatives (in the case of immigrants, often in itself a consequence of their vulnerable legal status) or because some alternatives – such as involvement in the illegal economy – might be too risky (for example because they could result in deportation). OECD data show that across Europe professional downgrading among immigrants is between 1.5 and three times higher than among EU citizens, with percentages of professionally downgraded immigrant workers ranging between 15 percent in Ireland and 33 percent in Greece (OECD, 2008: 139). What I argue here is that, consistently with the principle of less eligibility, the hyper-criminalization of migrations contributes to shape immigrants’ acceptance of these over-exploitative conditions.

6 With the significant electoral success of nationalist and xenophobic parties in countries like Italy (Northern League), the Netherlands (PVV), Finland (PS-KD), the United Kingdom (BNP), and Hungary (Jobbik), recent European elections (June 2009) offer further evidence of the diffusion of anti-immigrant sentiments across the EU.

7 Recently, in a move that brings back memories of Europe’s colonial past, detention camps are being built and operated also outside the geographical borders of the EU (e.g. in Libya and Morocco), in order to prevent potential unauthorized migrants from entering the European territory in the first place. In the last few months, several scandals have erupted around the inhumane treatment to which migrants (and especially women) are subjected in these camps (see www.fortress europe.blogspot.com). As is well known, Libya is not a signatory of the 1951 Geneva Convention on refugees.

8 For updated databases on crime and criminal justice across Europe, see the EUROSTAT website http://epp.eurostat.ec.europa.eu.

9 For an interesting analysis of the transition of criminal enterprises from a Fordist to a post-Fordist organizational model and of its consequences on the division of labor within the illegal economy, see Ruggiero (2000).

10 A good example here is street prostitution. Vigilante-style mobilizations against immigrant sex workers abounded in a country like Italy (particularly during the 1990s), and the common refrain was that unlike the harmless and even romanticized image of the Italian ‘streetwalkers’ of the past, the sight of immigrant (and often nonwhite) prostitutes ‘flooding’ the city streets was disturbing, worrisome, and dangerous.

11 An extreme example is given by the anti-crime legislation approved by the Italian parliament on 2 July 2009 (Law 733/2009). Among other things, the law: (1) turns ‘illegal’ immigration into a crime (currently, in virtually all European countries it is considered an administrative infraction); (2) sets a penalty of three years in prison for renting an apartment to undocumented immigrants, and mandates the permanent seizure of the property; (3) encourages citizens to form vigilante groups in charge of maintaining public order; (4) authorizes doctors to report to the authorities undocumented immigrants who seek health services; (5) establishes a
mandatory increase of one-third to the punishment for any crime committed by an undocumented immigrant.

12 Data show that, at least in Europe, a great number of ‘legal’ immigrants have been ‘illegal’ at some point during their migratory history – with percentages as high as 75 percent in Italy, 50 percent in Spain, and 30 percent in Portugal (see Reyneri, 2003). As Kitty Calavita (2005: 101) argues in her work on immigrants in Italy and Spain: ‘These statuses do not distinguish populations so much as moments in time.’

13 See, for example, the many agreements between Italy and countries like Tunisia, Libya, Morocco, Algeria, and Albania, whose democratic deficits are well known in the international community. At the time of this writing (June 2009), the right-wing Italian government is under international scrutiny for its resolution to engage in ‘dissuasion maneuvers’ against boats carrying immigrants from Africa in the Mediterranean sea, in order to push them back to Libya, in blatant violation of the principle of ‘non refoulement’ established by Art. 33 of the 1951 Geneva Convention relating to the Status of Refugees.

14 Again Nicholas de Genova (2009) illustrates this process with reference to the rhetoric of the ‘war on terrorism’ and the connection between the processes of stigmatization of foreigners generated by this rhetoric and the subordinated position occupied by the immigrant labor force in the US labor market:

Migrant labor is plainly the irrepressible ghost in the machine of Homeland Security . . . . The more profitable it is to exploit undocumented labor, the more bellicose and fanatical must be the sanctimonious political denigration of ‘illegal aliens’. Hence, undocumented migration must be perennially produced as a ‘problem’: as an invasive and incorrigibly ‘foreign’ menace to national sovereignty, as a racialized contagion that undermines the presumed national ‘culture’, as a recalcitrant ‘criminal’ affront to national security. (emphasis in original)

15 According to recent statistics from the International Labor Organization (2007), in the year 2006 44.1 percent of the world’s labor force (a total of 1.3 billion individuals) worked for less than $2 a day, with percentages as high as 86.2 percent in Sub-Saharan Africa and 80.5 percent in South Asia. Again, see Marx (1867/1976: 784):

It forms a disposable industrial reserve army, which belongs to capital just as absolutely as if the latter had bred it at its own cost. Independently of the limits of the actual increase of population, it creates a mass of human material always ready for exploitation by capital in the interest of capital’s own changing valorization requirements.

16 Due to natural obstacles, as is the case with Sub-Saharan countries separated from the Mediterranean coast by a desert, or to political circumstances, as is the case with totalitarian regimes which prohibit and punish emigration, often in application of previous agreements with western governments. Despite the often ambiguous humanitarian rhetoric surrounding global migrations, these risks are not generated in the first place by ruthless ‘human traffickers’ (themselves a by-product of a prohibitionist immigration regime), but rather by the militarization of the borders in the context of an ongoing war against unauthorized immigration. Available data indicate that at least 13,500 immigrants died at the borders of Europe between 1988
and 2008 (www.fortresseurope.blogspot.com/), whereas it is estimated that between 1998 and 2006 alone, almost 3500 people died at the US–Mexico border.

References


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