

INTRODUCTION: CRIMINAL JUSTICE ADJUDICATION IN AN AGE OF MIGRATION

Ana Aliverti* and Mary Bosworth**

As unprecedented levels of human mobility continue to define our era, criminal justice institutions in countries around the world are increasingly shaped by mass migration and its control. This collection brings together legal scholars from Europe and the United States to consider the implications of the attendant changes on the exercise of state penal power and those subject to it. The contributions in this special issue are united by a shared set of questions about the salience of citizenship for contemporary criminal justice policies and practices. They are specifically concerned with questions of fair and equal treatment, the changing configurations of state sovereignty, and the significance of migration on criminal justice policies and practices. Collectively, the articles show how, in grappling with mass mobility and diversity, states are devising novel forms of control, many of which erode basic criminal justice principles and reinforce existing social hierarchies.

*Ana Aliverti is Associate Professor at the School of Law, University of Warwick. She received her doctorate in law at the University of Oxford. She has conducted research on the criminal courts and the police in Britain. Her major research interests are in criminal law and criminology, and on the intersections between criminal and immigration law enforcement.

**Mary Bosworth is Professor of Criminology at the University of Oxford and, concurrently, Professor of Criminology at Monash University, Australia. She is Assistant Director of the Centre for Criminology and Director of Border Criminologies (<http://bordercriminologies.law.ox.ac.uk>). She conducts research into the ways in which prisons and immigration detention centers uphold notions of race, gender, and citizenship, and how those who are confined negotiate their daily lives. Her research is international and comparative, and is currently supported by a five-year European Research Council Starter Grant, 313362.

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This special issue examines the impact of mass migration on criminal adjudication in a variety of jurisdictions. Drawing together articles from legal scholars and criminologists working in the United States, the United Kingdom, and Europe, it explores both how the criminal justice system is put to work in managing migration and the effects this new role has on many of the principles and practices of criminal law. The contributions, which were first presented at a two-day symposium in Oxford funded by Ana Aliverti's British Academic Rising Star Engagement Award (BARSEA), represent a cross-section of criminal justice scholarship emerging around questions of citizenship. Although legal scholars and criminologists have not, historically, been all that interested in such matters, as more and more people are on the move worldwide, legal and philosophical questions about belonging have come to define our era.

Between 2000 and 2015, international migration worldwide rose by 71 million, or 41 percent, to a sum of 244 million people currently on the move (United Nations, 2016). Over this period, immigration and its control have become highly contentious public and political topics across Western societies. Often underappreciated in these conversations, however, is the dramatic impact of migration and border enforcement on the criminal justice systems of these jurisdictions. As a number of scholars have shown, mass migration and migration controls are expanding and reconfiguring the exercise of state punitive powers around the world (Aas & Bosworth, 2013; Aas, 2013; Eagly, 2013; Weber, 2013; Kaufman, 2015; Bosworth, 2012, 2013, 2014). In the United States, for example, federal immigration prosecutions in recent years have outpaced all other federal criminal cases, and noncitizens now make up 1 out of every 4 federal prisoners (Chacón, 2012; Eagly, 2010; Light, Massoglia, & King, 2014). Throughout Europe, on average 20 percent of all prisoners are foreign nationals. In some places, like Austria, Switzerland, Greece, and Luxemburg, the count is far higher with foreign nationals accounting for between half and three-quarters of those in prison (Aas & Bosworth, 2013).¹ In most places, too, the practice of immigration detention has grown exponentially in the last two decades. In Britain, for instance, more than 32,000 individuals were confined for immigration matters over the course of 2015 (Home Office, 2016). The police in many countries are increasingly called upon to enforce

1. See also Institute for Criminal Policy Research, World Prison Studies, <http://www.prisonstudies.org/info/worldbrief/>.

border controls inland and at the border, while prison officers are routinely required to single out and monitor foreigners who will be deported rather than integrated into society at the end of their prison term (Aliverty, 2015; Eagly, 2013; Weber, 2013; Weber & Bowling, 2004; Kaufman, 2015; Ugelvik, 2013). Increasingly, criminal justice proceedings involve defendants who have no right to abode or who are foreign nationals. In some cases, little is known about their criminal records and background. Some of them do not speak English, and their ties to the local community may be weak (Aliverty, 2016; Ugelvik, 2014). Finally, deportation has become an almost automatic consequence of a criminal conviction, shaping the type and length of criminal punishment and the conditions under which offenders serve their prison term (Bosworth, 2011; Stumpf, 2009).

In response to such developments, legal and criminological scholarship on border controls is growing, evident in special collections and issues in journals, conferences, and university courses.² Organized under various terms including “cimmigration” (Stumpf, 2007), “border criminology” (Bosworth, 2016), and the “criminology of mobility” (Pickering, Bosworth, & Aas, 2014), such literature has focused on the drastic and rapid changes in the configurations of criminal justice institutions, and the importance of these changes for the theorization of contemporary penal power. Yet, mainstream research on policing, crime control, punishment, law, and the courts continues to overlook them.

As an initial step toward addressing this gap and bridging unhelpful disciplinary divides in this area of research, we convened a two-day research conference at the University of Oxford.³ By design, the invited authors and participants spanned career stages and academic disciplines. Their roots can be found in criminology, sociology, criminal justice, and immigration law. Methodologically, too, participants addressed the overall theme of the issue using a range of qualitative approaches in socio-legal research, including

2. For examples of all of these, see Border Criminologies, www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies.

3. The articles in this collection benefitted from discussions and comments by specially selected discussants. We are grateful to Lucia Zedner, Julian Roberts, Jackie Hodgson, David Sklansky, Dallal Stevens, Ines Hasselberg, Ben Bowling, and Alpa Palmar for acting as respondents. Special thanks are due to Michael Light for providing extensive comments to authors. We are also grateful to the British Academy for generously funding the Oxford workshop through its Rising Star Engagement Award scheme.

observations and interviews as well as analysis of legal instruments and policy documents.

Although presented as a series of case studies, these chapters are united by a shared set of questions about the salience of citizenship in contemporary criminal justice policies and practices. As such, they offer important empirical and theoretical evidence of the shifting global terrain. In particular, the articles in this collection address three distinct, yet interconnected, matters: migration control and state sovereignty, fairness and equality, and politics and policy.

In relation to the first cross-cutting theme, *migration control and state sovereignty*, authors raise a series of questions: How do migration controls expand penal power beyond the nation state? In which ways is the exercise of state power connected to geopolitical hierarchies on the global scale? How do these hierarchies enable that power? To what extent does the exercise of state power contribute to reinforce global hierarchies? The second cluster of questions addressed relate to *equality of treatment and fairness*: What are the unique challenges encountered by foreign nationals in criminal courts? How do their established or alleged identity as “foreign nationals” or “migrants” shape criminal justice dynamics and outcomes? In which ways does “foreignness” entice and reinforce more familiar gendered and racialized stereotypes in criminal justice practices? How do these and other markers of difference, such as language proficiency and cultural difference, contribute to bolster existing social hierarchies? Finally, authors explore the relationship between *migration and criminal justice politics and policies*; specifically: Under which circumstances, and why, does border control legitimize crime control and criminal justice measures? How do concerns about migration work to reorient the aims, practices, and sites of criminal law enforcement? What are the consequences of the conflation of crime and migration control powers? In which ways and to what extent are the politics of immigration related to the politics of crime control?

This special issue starts with Ingrid Eagly’s contribution. In a thoughtful analysis of contemporary U.S. politics and policies on crime control and border controls, she juxtaposes two seemingly contradictory trends. On the one hand, there is growing consensus that the heavy reliance on incarceration needs to be substantially curtailed with bipartisan support for parsimonious penal policies aimed at reducing prison rates. On the other hand, however, the concern for mass incarceration and for harsh and disproportionate punishment has largely overlooked immigration enforcement,

where non-U.S. nationals—particularly Hispanics—are subject to ever tougher control policies and measures stemming from both immigration and criminal laws. Can these apparently contradictory trends be reconciled, Eagly demands, and how can we ensure that the decriminalization drive benefit *also* noncitizens?

Eagly suggests that recent policy enactments from California offer a promising path forward. Specifically, she points to policies that require prosecutors to consider immigration consequences in plea bargaining, the redefinition of misdemeanors to 364 days' imprisonment to avoid triggering federal deportation processes, and the refusal to cooperate with federal immigration enforcement by prohibiting local cooperation in transferring inmates to immigration detention. Taken together, such policies may help address some of the unique criminal justice issues facing foreign nationals, such as prolonged pretrial detention and lifetime banishment, while making sure that the appetite for more parsimonious criminal justice policies leads to a reassessment of the impact of immigration status in criminal justice adjudication. Her article deals with broader scholarly debates about collateral sanctions and which role, if any, they should have in prosecutorial decisions and sentencing. Considering the high concentration of non-U.S. citizens and the social and political capital of migrant communities in California, it also raises questions about the influence of the demographic composition of certain constituencies for pursuing progressive policies on migration and crime.

In keeping with the focus on sovereignty and criminal justice policies, Mary Bosworth's article offers an illuminating discussion on recent initiatives to deal with the increasing population of foreign nationals in British prison and detention states. Over the past decade the British government has funded several initiatives around the world geared toward "managing migration." For example, the United Kingdom spent millions of dollars in recent years to build a new prison wing and train prison officers in Nigeria, and has promised millions more for a new prison in Jamaica in return for a mandatory prisoner transfer agreement to return criminal Jamaican nationals. Whereas criminologists have highlighted penal power as a reflection of state sovereignty *within* the nation-state (Garland, 1996, 2001; Simon, 2007; O'Malley, 1999), Bosworth shows how migration control initiatives *extend* the geographical reach of penal power, often by revitalizing previous colonial pathways. In doing so, her analysis demonstrates that in an age of mass migration, criminal justice practices not only are used to

fortify the external borders, but can also operate beyond those borders in ways that are detached from the nation state, thus expanding state sovereignty. She further explores how the rhetoric of what she calls “penal humanitarianism” legitimizes the increased intervention of British interests and priorities in the internal affairs of foreign states, while highlighting the tensions arising from the disparate and contradictory goals that these programs aimed to achieve.

Criminal justice adjudication in the context of mass mobility brings to the fore novel forms of penal power, while exposing the limitations of the state to exercise its power. Much has been written about how governments have increasingly resorted to territorial exclusion to rid their countries of criminal offenders. Yet, Emma Kaufman shows how prison bureaucrats often oppose the extraterritorial execution of punishment. She notes that while policymakers have been busy expanding deportation provisions to ensure foreign national offenders are thrown out of the country soon after serving their sentence, and signing treaties with other countries to allow their citizens to serve their U.S. sentences abroad, prison officials are often reluctant to relinquish the sovereign power to punish.

Like Bosworth, Kaufman argues that repatriation agreements rarely run smoothly. However, she focuses on the internal opposition to them, asserting that the low number of prisoners sent home to serve their sentences reveals the unease among U.S. administrative officials about delegating the authority to punish abroad. Low repatriation rates also expose the wide discretionary power wielded by these officials. In reasserting the power to punish, Kaufman argues, prison bureaucrats ultimately lay bare one of the pathologies of punishment: its dislocation from the site where it begins.

Turning away from the prison, Jennifer Chacón demonstrates how international norms on human trafficking have been unevenly incorporated into state-level legislation with dissimilar results in various U.S. states. She offers a convincing case study for how policies ostensibly aimed at fighting human trafficking have been justified and used for different purposes according to the political and ideological environment prevalent in each state in relation to immigration. While in states like Arizona, Texas, and Georgia, antitrafficking laws are largely intended as a criminal law tool to prosecute migrants and “stem the tide” of undocumented immigration, in New York legislators explicitly acknowledge the vulnerabilities of immigrants in the United States and have sought to use antitrafficking legislation to protect victims of trafficking for sexual and labor exploitation.

Overall, Chacón notes that these laws have been scarcely used, and such under-enforcement remains constant despite significant variations across the states under study. In New York, which is home to over 4 million foreign-born residents, Chacón finds that antitrafficking laws have only been utilized eleven times between 2007 and 2013. In Tennessee, there have been no reported antitrafficking prosecutions, despite antitrafficking statutes on the books since 2007.

Against expectations, she finds that the primary targets of these laws are not foreign nationals; rather, those caught up by them were predominantly African American men, pointing to the continuities in the policing of racialized groups in the implementation of crime policies, from the war on drugs to the war on migration. Chacón's article also considers some of the issues raised by Bosworth, as she questioned the humanitarian reasons underpinning antitrafficking legislation in more progressive states, such as New York, California, and Illinois. Notwithstanding the laudable goal of protecting vulnerable victims, Chacón argues that in the name of protection, trafficking victims are often subject to intensive controls and surveillance, which can heighten instead of reduce their vulnerability.

Inside the courtroom, criminal justice dynamics and actors have been substantially altered by the presence of the “foreign national.” In their contribution, Ana Aliverti and Rachel Seoighe explore one such aspect of criminal justice adjudication under conditions of mass mobility, shedding light on a wholly under-researched feature of criminal case processing—the role of court interpreters. The ability to comprehend and effectively communicate within criminal courts is fundamental for ensuring fairness, and it has largely been taken for granted within criminal justice research. As nonnative defendants engross the clientele of the criminal courts, court interpreters have become a familiar figure in the courtroom.

The increased reliance on court interpreters brings home debates about the burdens of migration on the public purse, which in turn have repercussions on the quality of language service provisions. Drawing on court observations in Birmingham, United Kingdom, the results presented by Aliverti and Seoighe highlight the critical relationships between interpreters and defendants, as well as those between interpreters, counsels, and judges. Although the right to an interpreter is crucial for guaranteeing the participation of nonnative defendants on an equal footing with native English speakers, they found that the presence of interpreters often exacerbates difference along race, class, and national origin, reinforces the subordinate

status of non-English speakers in court proceedings, and leaves them disadvantaged.

The utilization of immigration law enforcement powers for a broader range of immigration control and crime prevention purposes is the central theme of the final paper, by Maartje van der Woude and Jelmer Brouwer. They examine the exercise of street-level discretionary decision-making by officials of the Royal Netherlands Marechaussee, the Dutch border control force, in the enforcement of the Schengen Border Code, by looking at a specific operation: the Mobile Security Monitor (MSM) in the Netherlands. Although under Dutch law border enforcement officers are only authorized to combat illegal stay, identify fraud, and human smuggling in the context of MSM operations, the authors show that, in practice, officials have significant discretion in enforcing MSM protocols.

Using data from semistructured interviews, on-site analyses, and focus group interviews to understand the motives for stopping vehicles by MSM officials, van der Woude and Brouwer show that the exercise of discretion in stop-and-search at border crossing areas often blurs the lines between immigration enforcement and crime control among immigration enforcement staff. As a consequence, officers often “switch hats” during traffic stops, from border control to crime control, resulting in the “creative” use of their discretion to simultaneously blend immigration and criminal law enforcement. As the authors note, enforcement officials exploit loopholes and vagueness in the law about the use of their power while often resorting to “noble causes” to justify this misuse of power. They also exercise discretion on deciding whom to stop. Unsurprisingly, the vast majority of the individuals stopped and searched at the border are racialized groups, a finding that lays bare familiar imageries about “foreignness” and “European-ness.” Their work illustrates in concrete ways the continuities in the use of discretion in the exercise of policing powers to control “suspicious populations” (Bowling & Sheptycki, 2014; Weber, 2011).

CONCLUSION

Our hope for this volume is that these articles open new avenues of inquiry in the emerging field of border criminology and crimmigration law while contributing to broader debates on the new configurations of state penalty. As mass mobility reshapes so many aspects of our societies, it should not

surprise us to see that it is affecting criminal justice as well. On the face of these changes, questions remain about the implications of the convergence between different legal systems for making unequal treatment within the criminal justice system more apparent and less amenable to legal challenge.

As nations grapple with mass mobility, questions of sovereignty rise to top. Mass migration makes plain sheer global hierarchies and geopolitical inequalities in the exercise of power. In managing new arrivals, as well as their descendants, rich, prosperous states resort to new border control strategies even as they take advantage of global relations of domination linked to their colonial past. Mass migration and its control thus bring home long-standing racialized and gendered questions about fairness and equality of treatment, while forging novel vectors of stratification in the exercise of punitive powers at the domestic level (Bosworth, 2012; Aliverti, 2016; Bosworth, Bowling, & Lee, 2008). Underpinning these sweeping conceptual matters, we see how the politics of crime control and migration underpins and generates particular policies. While the articles raised timely and disturbing questions about the implications of these developments for the national criminal justice system, they also suggest ways to undo the damaging effect of the conflation of crime and immigration policies and practices for those subject to them.

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