

THEMATIC ARTICLES: SIDES OF FORCED MIGRATION

(Cr)immigration, Race and Belonging: Why We Must Conceptualize Immigration Detention as Punishment?

Joel PLATT

Abstract. This paper firstly illustrates how immigration detention borrows legitimacy from the prison, as the primary structure of prevailing philosophical accounts of punishment, whilst eschewing its normative underpinnings. However, rather than then placing immigration detention outside the realm of punishment, this paper draws upon sociological endeavours, arguing that we are witnessing the evolving nature of punishment for non-nationals. Through the resurgence of nationalism, the reach of punishment is becoming global, transitioning away from liberal foundations of inclusion. The (cr)immigration complex (with immigration detention at its heart) outlines the parameters of belonging in contemporary society, symbolically and instrumentally excluding those deemed undesirable. Such is intertwined with longstanding issues of race and power (a relationship currently overlooked within the punishment literature) and should alarm us all.

Keywords: *immigration, race, belonging*

Introduction

Immigration detention is not a novel occurrence in Britain, though its use has expanded dramatically¹ in response to the ‘competing and reinforcing forces’ of globalisation and nationalism.² Whilst globalisation instigates the flow of people, the nation-state determines their fate because it confers the right to have rights. The volant pace of globalisation has further exposed the paradoxes of democracy: a system guaranteeing universal values for its citizens.³ Contemporaneously, the

¹ Michael Flynn, *How and why immigration detention crossed the globe* (GDP Working Paper No. 8) (Geneva, Switzerland: Global Detention Project, 2014).

² Mary Bosworth, Katja Franko and Sharon Pickering, ‘Punishment, globalization and migration control: ‘Get them the hell out of here’ [2017] 20(1) *Punishment & Society* 34, 35.

³ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).



'asymmetric'⁴ incorporation of the criminal law within immigration administration (dubbed 'cimmigration') acts as a 'gatekeeper of membership',⁵ not least through immigration detention.

This paper firstly illustrates how immigration detention borrows legitimacy from the prison (as the primary structure of prevailing philosophical accounts of punishment) whilst eschewing its normative underpinnings. However, rather than then placing immigration detention outside the realm of punishment, this paper draws upon sociological endeavours, arguing that we are witnessing the evolving nature of punishment for non-nationals. Through the resurgence of nationalism, the reach of punishment is becoming global, transitioning away from liberal foundations of inclusion. This paper will illustrate how such is intertwined with longstanding issues of race and power (a relationship currently overlooked within the punishment literature), asserting that the cimmigration phenomena must alarm us all.

The Purpose(s) of Punishment and 'Administrative' Immigration Detention

Notwithstanding the progressive convergence of the criminal law and immigration administration, immigration detention is 'not formally a punishment nor does it require a criminal conviction'.⁶ In fact, most detainees have not been criminally convicted; 'nobody is serving a sentence'.⁷ Thus, immigration detention has largely been neglected within punishment scholarship.⁸ However, for those subject to it, immigration detention feels intentionally punitive.⁹

The 'penal character' of immigration detention renders it difficult to

⁴ Stephen Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' [2007] 64(1) Wash & Lee L Rev 469.

⁵ Juliet Stumpf, 'The Cimmigration Crisis: Immigrants, Crime and Sovereign Power' (Bepress Legal Series, Working Paper 1635, 2006)

<<http://www.law.bepress.com/expresso/eps/1635>> accessed 2 February 2021.

⁶ Sarah Turnbull, "'Stuck in the middle": Waiting and uncertainty in immigration detention' [2016] 25(1) Time & Society 61, 63.

⁷ Mary Bosworth, 'Border criminology: How migration is changing criminal justice' in Mary Bosworth, Carolyn Hoyle and Lucia Zedner (eds.), *Changing Contours of Criminal Justice* (Oxford: Oxford University Press, 2016) 218.

⁸ Katja Franko Aas, 'Bordered penalty: Precarious membership and abnormal justice' [2014] 16(5) Punishment and Society 520.

⁹ Sarah Turnbull and Ines Hasselberg, 'From prison to detention: The carceral trajectories of foreign national prisoners in the United Kingdom' [2017] 19(2) Punishment & Society 135.

distinguish from the prison as the modern site of punishment.¹⁰ The majority have been erected in accordance with Category B prison designs, complete with razor wire and intense internal surveillance from uniformed guards.¹¹ As one detainee observes:¹²

It's not a room, it's a cell. Anything without a window and a ventilator, would you call that a room? Somebody has to check from the outside on you with light on, to see if you're still alive.

Indeed, separated from family and community,¹³ detainees suffer a 'mortification' similar to those confined within other 'total institutions'.¹⁴ Further, under the spectre of 'national security', detainees (including asylum seekers) can be held indefinitely without automatic judicial review, causing high levels of mental illness.¹⁵

While Zedner correctly cautions against conceptualising all modes of coercive detention as punishment,¹⁶ the 'penal subjectivities' of those subject to state power cannot be neglected.¹⁷ Therefore, the fact immigration detention is experienced as punishment means we ought to appreciate it as such, 'regardless of whether it is intended as punishment or acknowledged [by the state]'.¹⁸

Perhaps ironically then, whilst indeterminate detention is primary in informing detainees' punitive experiences, it also 'renders detention distinct from punishment'.¹⁹

Punishment, Duff argues, is a 'mode of moral communication' that should

¹⁰ Anna Pratt, *Securing borders: Detention and deportation in Canada* (Vancouver, BC: UBC Press, 2005) 39.

¹¹ Bosworth (*supra* note 7), 218.

¹² Mary Bosworth, 'Subjectivity and Identity in Detention: Punishment and Society in a Global Age' [2012] 16(2) *Theoretical Criminology* 123, 129.

¹³ Ian MacDonald and Ronan Toal, *MacDonald's Immigration Law and Practice* (London: LexisNexis, 2010) 1280.

¹⁴ Erving Goffman, *Asylums: Essays on the social situation of mental patients and other inmates* (Garden City, NY: Anchor Books, 1961).

¹⁵ Leanne Weber, 'The Detention of Asylum Seekers' [2002] 14(1) *Current Issues in Criminal Justice* 9.

¹⁶ Lucia Zedner, 'Penal subversions: When is a punishment not punishment, who decides, and on what grounds?' [2016] 20(1) *Theoretical Criminology* 3.

¹⁷ Lori Sexton, 'Penal subjectivities: Developing a theoretical framework for penal consciousness' [2015] 17(1) *Punishment & Society* 114.

¹⁸ Sexton (*ibid*), 118.

¹⁹ Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' [2019] 28(1) *Social and Legal Studies* 81, 87.



be deserved.²⁰ In this prevailing account, punishment ought to rehabilitate, deter or nullify.²¹ Significantly though, it is premised upon the offender (eventually) re-entering the social. However, indeterminate detention illustrates a lack of concern about reintegration. ‘The message seems clear: detainees are going to be deported; they are not coming back; and the UK state is not responsible for preparing them to return to their country of origin’.²² In a system ‘oriented towards exclusion’,²³ the individual’s past work, achievements and membership in community (whether legal or not) is denied, as are their future ambitions.²⁴

However, it is important to avoid social science presentism. Banishment of the undesirable is an age-old method of punishment in England which,²⁵ certainly since the 17th century,²⁶ was marked by the same long standing question of belonging and a ‘similar entrepreneurial spirit and embrace of market solutions that exists in many contemporary market-oriented criminal justice systems’.²⁷ Such history, while offering ‘an important reminder of the historic contingency of punishment, its flexibility and its reach’,²⁸ not least in regards to North-South colonial relations, has been largely neglected by criminologists. Indeed, the academy remains preoccupied with ‘the nation state and its penal institutional backbone (courts, prisons, etc.)’.²⁹

²⁰ RA Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2003). See also HLA Hart, ‘Prolegomenon to the principles of punishment’ [1959] 60(1) *Proceedings of the Aristotelian Society* 1, 5.

²¹ RA Duff and Stuart Green, *Philosophical Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011).

²² Mary Bosworth, ‘Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World’ in Katja Franko Aas, and Mary Bosworth (eds.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013) 150.

²³ Bosworth (*supra* note 19), 92.

²⁴ Mary Bosworth, ‘Penal humanitarianism? Punishment in an era of mass migration’ [2017] 20(1) *New Criminal Law Review* 39.

²⁵ Katherine Becket and Steve Herbert, ‘Penal boundaries: Banishment and the expansion of punishment’ [2010] 35(1) *Law and Social Inquiry* 1.

²⁶ Malcolm Feeley, ‘Entrepreneurs of punishment: The legacy of privatisation’ [2002] 4(3) *Punishment & Society* 321, 329.

²⁷ Bosworth et al (*supra* note 2), 36.

²⁸ Bosworth et al (*supra* note 2), 36.

²⁹ Bosworth et al (*supra* note 2), 35.

Such 'historical myopia'³⁰ was observable in the Court of Appeal where it was held that detention was not a criminal penalty but a measure taken in accordance with the law of aliens; it was of a preventative rather than punitive nature.³¹

However, this official purpose remains clouded - preventing what?

Section 3(1) of The Detention Centre Rules 2001 legislates:

the purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons.

Paradoxically, the formal purpose of immigration detention thus appears to be to detain. However, the administration guidance clarifies that detention of non-citizens is premised upon the facilitation of removal; identification; and managing a professed flight risk during asylum claims.³² Although, detaining foreign nationals, including children, as a matter of administrative convenience for facilitating border controls does not satisfy Duff's formulation of punishment. However, whilst scholarly attention has predominantly been centred upon analysing the (foramigious) parameters of punishment's normative underpinnings and legal apparatus; employing a sociological approach which seeks to excavate punishment's 'concrete and symbolic purposes' may be a more fruitful line of inquiry.³³ Sociological scholarship elucidates how punishment is a 'complex social function',³⁴ whose disciplinary nature is permeated by (and subsequently buttresses) racial, economic, and gender power relations.³⁵ It explores how, amidst a growing insecurity of national identity, such is underpinned by a desire to asservate the shared values of the polity.³⁶ However, such grounds are often veiled by legal formalism. As Zedner

³⁰ Nicole Rafter, 'Silence and memory in criminology – The American Society of Criminology 2009 Sutherland address' [2010] 48(2) Criminology 339.

³¹ *AT (Pakistan) v Secretary of State for the Home Department* [2010] EWCA Civ 567.

³² UKBA, 'Enforcement and Instruction Guidance' (2016) Chapter 55
<<https://www.gov.uk/government/collections/enforcement-instructions-and-guidance>>
accessed 2 February 2021.

³³ Bosworth (*supra note* 19), 90.

³⁴ Michel Foucault, *Discipline and Punish: The Birth of Prison* (New York: Vintage, 1979)

4.

³⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York: The New Press, 2010).

³⁶ David Garland, *Punishment and Modern Society* (Oxford: Oxford University Press, 1990).

articulates,³⁷

States have been quick to claim that if detention is for prevention or administrative convenience it is not, by definition, punishment. Yet this privileging of purpose does not mitigate the pains imposed by coercive measures, so to re-label measures as non-punitive is often nothing less than a cynical subversion of the criminal process and its human rights protections.

Thus, we may legitimately look beyond the official preventative label. By observing how immigration detention operates and employing a sociological perspective, the punitive nature of immigration detention becomes clear. As the remainder of this paper will outline, immigration detention is illustrative of a growing punitiveness embedded within postcolonial relations.³⁸

Exclusionary Democracy

Some scholars ideate immigration detention as a deterrence,³⁹ since politicians speak of creating a 'hostile environment' for undocumented migrants.⁴⁰ However, notwithstanding the anguish of indeterminate confinement, there exists no comprehensive evidence of a deterrence effect.⁴¹ The operation of immigration detention appears arbitrary and inefficient - the vast majority of undocumented migrants are never detained and the system facilitates the removal of just half of those confined.⁴²

Such draws in to question the purpose and legitimacy of detention which, as prison scholars contend, is discernible through the internal scene of the institution.⁴³ What purpose can be excavated from official guidance is not immanent within the

³⁷ Zedner (*supra note 16*), 4.

³⁸ Mary Bosworth and Sarah Turnbull, 'Immigration detention and the expansion of penal power in the United Kingdom' in Keramet Reiter and Alexa Koenig (eds.), *Extreme punishment: Comparative studies in detention, incarceration, and solitary confinement* (London: Palgrave Macmillan, 2015) 51.

³⁹ Daniel Kanstroom, 'Deportation, social control, and punishment: Some thoughts about why hard laws make bad cases' [2000] 113(8) *Harvard Law Review* 1890, 1893.

⁴⁰ David Cameron, The Queen's Speech, 21 May 2015.

⁴¹ Bosworth (*supra note 22*), 161.

⁴² Bosworth (*supra note 7*), 217.

⁴³ Richard Sparks, Anthony Bottoms and Will Hay, *Prisons and the Problem of Order* (Oxford: Oxford University Press, 1996). From such an institution we may also be able to discern happenings within society (or punishment) more broadly, Foucault (*supra note 34*).

institution where power is exercised from a considerable distance and the majority of undocumented migrants are not detained. The comparison with the prison (though recognising the absence of culpability) from inmates, staff and even senior civil-servants reveals a legitimacy deficit; in fact, such comparisons can be thought of as an 'attempt at legitimation'.⁴⁴

The legitimacy of state power, in its traditional liberal communitarian form, supposes a 'congruence between a given system of power and the beliefs, values, and expectations that provide it justification'.⁴⁵ However, its utility as a mechanism for understanding and evaluating punishment is questioned amidst an increasingly 'unbounded and mobile world'.⁴⁶ Scholars have long considered whether the liberal political project includes foreigners,⁴⁷ of which Arendt's seminal response is both convincing and damning.⁴⁸

Such concerns become localised within an institution whose implications transcend the nation-state, and whose population are not members of that state's political community.⁴⁹ Devoid of basic participation rights,⁵⁰ it becomes unclear how those subject to state power can express their interests and legitimately be bound by the law,⁵¹ which is central to conceptualising penalty as a 'negotiated settlement' between the detained and the state.⁵² Indeed, the state-detainee relationship is not negotiated; it is coercive.

Whilst Bosworth has expressed caution towards invoking Agamben's 'bare

⁴⁴ Bosworth (*supra note 22*), 161.

⁴⁵ David Beetham, *The Legitimation of Power* (London: Macmillan, 1991) 11.

⁴⁶ Bosworth (*supra note 22*), 151.

⁴⁷ Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006); Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006).

⁴⁸ Hannah Arendt, "The Rights of Man": What Are They?" [1949] 3(1) *Modern Review* 24, 33.

⁴⁹ Nancy Fraser, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World' [2007] 24(4) *Theory, Culture and Society* 7.

⁵⁰ Ruud Koopmans, Paul Statham, Marco Giugni and Florence Passy, *Contested Citizenship: Immigration and Cultural Diversity in Europe* (Minneapolis, MN: University of Minnesota Press, 2005).

⁵¹ RA Duff, 'Responsibility, Citizenship and Criminal Law' in RA Duff, and SP Green (eds.), *The Philosophical Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011) 141.

⁵² Bosworth (*supra note 22*), 158.

life⁵³ as an analytical framework for immigration detention, noting how power is subject to some legal oversight (just not the criminal law) and also staff efforts to assist the detained.⁵⁴ The recognition that ‘holding someone indefinitely in idleness fails to recognize them as fully human beings’⁵⁵ seems to support the notion of the border as a ‘frontier’, where the individual is subject to the law’s repressive power but not its protections.⁵⁶ Cast outside of political community, all that remains for bare life, or the undocumented migrant, is their ‘total subjection to sovereign power’,⁵⁷ whether hospitable or repressive. They have no reliable ‘human’ rights; they remain at the mercy of others.⁵⁸ Some immigration detention staff claim to be assisting vulnerable individuals, others assert that they are protecting society.⁵⁹ Both, however, signify an inferiority; that the detainee is not quite part of the community. Any hospitality or ‘rights’ they are afforded are not true individual human rights against the state, but another mode of oppression.⁶⁰ Like prisons, ‘humanitarian’ organisations are present; however, their focus is not rehabilitation but preparing for eventual removal.⁶¹ The system is governed by an inequality that is the antithesis of all doctrine of human rights; such does not escape those confined, nor is it offset by staff efforts to procure cultural foods.

In fact, amidst those refugees walking along Eastern Europe’s motorways in 2015 was a European flag with the message ‘We share your respect for justice,

⁵³ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998).

⁵⁴ Bosworth (*supra note 22*), 150.

⁵⁵ Bosworth (*supra note 22*), 160.

⁵⁶ Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (Basingstoke: Palgrave Macmillan, 2011).

⁵⁷ Vanessa Barker, ‘Democracy and Deportation: Why Membership Matters Most’ in Mary Bosworth and Katja Franko Aas (eds.), *Migration and Punishment: Citizenship, Crime Control and Social Exclusion* (Oxford: Oxford University Press, 2013) 241.

⁵⁸ Hannah Arendt, *The Origins of Totalitarianism* (London: Martin Secker & Warburg, 1951) 297.

⁵⁹ Bosworth (*supra note 7*), 219.

⁶⁰ Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (New York: Mondial, 1852) 307.

⁶¹ Bosworth (*supra note 19*), 91.

freedom and human rights and here we are! We belong!'.⁶² However, when outsiders invoke humanity it displays 'an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals...[asserting a] belonging to the human race in the same way that an animal belongs to animal species [encompassing the horrifying possibility] that they might end by being considered beasts'.⁶³

When one considers the immense mortality upon Europe's shores;⁶⁴ the degradation of indeterminate detention and deportation;⁶⁵ and the denial of access to a (penal) welfare system funded by the spoils of colonialism,⁶⁶ it may seem easy to assume that undocumented migrants have their human rights violated. However, like the plight of stateless Arendt witnessed post-world war,⁶⁷ these individuals do not have their human rights violated; rather, they have no human rights because they are not human equals.

Such exclusion is facilitated by the nation-state paradigm at the crux of international law which informs the bounded nature of national democracy, where it remains that only through naturalisation can an individual truly obtain 'intrinsic', 'inalienable' rights,⁶⁸ thus legitimising the differential treatment of those undeserving of the benefits of inclusion qua a 'non-citizen'.⁶⁹ It is through such foundational structural apparatus whereby 'racial dynamics are filtered and made meaningful'.⁷⁰

⁶² Bridget Anderson, 'Towards a New Politics of Migration?' [2017] 40(9) *Ethnic and Racial Studies* 1527, 1528.

⁶³ Arendt (*supra note* 58) 297.

⁶⁴ Charles Heller and Lorenzo Pezzani, 'Liquid Traces: Investigating the Deaths of Migrants at the EU's Maritime Frontier' in Nicholas De Genova (ed.), *The Borders of "Europe": Autonomy of Migration, Tactics of Bordering* (Durham, NC: Duke University Press, 2017).

⁶⁵ Bridget Anderson, Matthew Gibney and Emanuela Paoletti, 'Citizenship, Deportation, and the Boundaries of Belonging' [2011] 15(5) *Citizenship Studies* 547.

⁶⁶ Richard Drayton, 'Imperial History and the Human Future' [2012] 74(1) *History Workshop Journal* 156, 162.

⁶⁷ Arendt (*supra note* 48), 31.

⁶⁸ Jeremy Bentham, 'Anarchical Fallacies' in *The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring* (Edinburgh: William Tait, 1843).

⁶⁹ Galina Cornelisse, 'Immigration Detention and the Territoriality of Universal Rights' in Nicholas de Genova and Nathalie Peutz (eds.), *The Deportation Regime: Sovereignty, Space and the Freedom of Movement* (Durham, NC: Duke University Press, 2010).

⁷⁰ Barker (*supra note* 57), 239.



Democracies utilise the criminal law to outline the parameters of membership, justifying social inclusion and exclusion⁷¹ and fortifying political authority.⁷² Contemporaneously, crimmigration facilitates a more absolute exclusion. From this perspective, the similarities between the goals of punishment and immigration detention become clearer.

Immigration detention is justified as the state's sovereign right (and obligation) to uphold its borders and protect its citizenry.⁷³ The ECHR defers to the State's sovereign discretion on the basis of administrative convenience (rather than requiring the deprivation of liberty be justified in every case),⁷⁴ thus constructing the migrant as 'inherently detainable...an object rather than a subject of law'.⁷⁵ Such discretion has been filled with 'unintelligible' non-statutory guidance which would 'not meet the ECHR requirement of detention being in accordance with law'.⁷⁶ Such guidance diverts from immigration detention's 'official' purpose. As a parliamentary inquiry found: 'the [official position] that detention should be used sparingly and for the shortest possible period is rendered ineffective'.⁷⁷ This 'creeping expansion is symptomatic of the deficit in legality'.⁷⁸ Indeed, without international legal standards and proper judicial supervision, domestic 'discretion' can divert from the rule of law and 'other coercive powers may be masked'.⁷⁹ The forceful taking of fingerprints and blood sampling for identification purposes necessary for deportation, which is often done without clear legal authority (or judicial review),⁸⁰ is a damning illustration.

The lack of accountability arising from detainee's non-citizenship, placing

⁷¹ Kitty Calavita, *Immigration at the Margins: Law, Race, and Exclusion in Southern Europe* (New York: Cambridge University Press, 2005).

⁷² David Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' [1996] 36(1) *British Journal of Criminology* 445.

⁷³ Saskia Sassen, 'Beyond sovereignty: Immigration policy making today' [1996] 23(3) *Social Justice* 9.

⁷⁴ *Saadi v UK* (2008) 47 EHRR 17 ; *Chahal v United Kingdom* [GC] (1997) 23 EHRR 413.

⁷⁵ Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' [2015] 68(1) *Current Legal Problems* 143, 155.

⁷⁶ Costello (ibid), 161.

⁷⁷ HC Deb 26 March 2015, col 1574.

⁷⁸ Costello (*supra note 75*), 160.

⁷⁹ Costello (*supra note 75*), 169.

⁸⁰ Bosworth (*supra note 22*), 150.

them inside 'a wilful gap between national sovereignty and international law',⁸¹ reveals a 'two-tiered approach to punishment which is increasingly favoured in the global north in which foreigners face fundamental inequalities within the law, its justification and effect'.⁸² Such explains why immigration detention centres 'flourish even though they are unable to fulfil many of their basic tasks'.⁸³

The centrality of citizenship within legitimising and understanding punishment is intertwined with identity (and thus racialised power structures); though, this relationship has been somewhat neglected within the legitimacy literature. As Fraser contends, 'engrossed in disputing the 'how' of legitimacy, the contestants apparently felt no necessity to dispute the 'who''.⁸⁴ The crimmigration complex regulates globalisation's 'space of flows', immobilising and removing those who do not belong. Thus, to understand this phenomena we must realign our focus to engage with the interconnection between identity and the state; we may ask, 'legitimate for whom?'.⁸⁵

Such inquiry forces us to look beyond punishment's traditional parameters. Indeed, the intentional infliction of measures which look and feel punitive towards non-citizens, though which diverge from traditional justifications (and rule of law protections), elucidates the changing role of punishment for an increasingly insecure nation-state. The dominant political rhetoric about removing polluting enemies clarifies how immigration detention and deportation is not an insignificant corollary of a penal sentence; rather,⁸⁶

It is through territorial exclusion and the cancelation of membership that other punitive elements, such as deprivation of freedom and criminal sentence, receive their proper purpose.

As this next section will illustrate, immigration detention serves the Durkheimian function of punishment as a mechanism for solidifying the 'conscience collective'.⁸⁷

Making People Illegal

⁸¹ Barker (*supra note 57*), 241.

⁸² Bosworth (*supra note 19*), 92.

⁸³ Bosworth (*supra note 22*), 163.

⁸⁴ Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2008) 94.

⁸⁵ Bosworth (*supra note 22*), 160.

⁸⁶ Bosworth et al (*supra note 2*), 39.

⁸⁷ Émile Durkheim, *The Division of Labor* (New York: Macmillan, 1933) 5.

The territorialisation⁸⁸ of the modern nation-state has (perhaps paradoxically amidst progressive globalisation)⁸⁹ become increasingly characterised by harsh borders marking the 'inside and outside'.⁹⁰ However, at the border, what often looks like hyper-sovereignty in the shape of armed guards and razor wire fences is actually a state counterpoising its loss,⁹¹ perhaps denoting a return of the spectacle.⁹²

The 'nationalization of the state-people relationship'⁹³ concomitantly elicits a notion of belonging; yet, one that is increasingly difficult to define amidst the deterritorialisation of culture⁹⁴ and the ontological instability of modernity.⁹⁵ What actually distinguishes 'us' from 'them'?

Notwithstanding, the intercourse between the global and the local⁹⁶ has engendered what Robertson has termed glocalization - a process of reflexivity between the strange and the familiar.⁹⁷ 'Humans are therefore active agents in adapting to and, even more importantly, resisting global change'.⁹⁸ Whilst the permeation of goods and capital are generally welcomed reverberations of

⁸⁸ Jost Halfmann, 'Welfare State and Territory' in Michael Bommes and Andrew Geddes (eds.), *Immigration and Welfare: Challenging the Borders of the Welfare State* (London: Routledge, 2000) 39.

⁸⁹ Stuart Hall, 'New Cultures For Old' in Doreen Massey and Pat Jess (eds.), *A place in the world?: places, cultures and globalization* (Oxford: Oxford University Press, 1995).

⁹⁰ Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse' [2004] 6(1) *European Journal of Migration and Law* 93, 107.

⁹¹ Wendy Brown, *Walled States, Waning Sovereignty* (Boston: MIT Press, 2010) 67.

⁹² Foucault (*supra note* 34), 12.

⁹³ Halfmann (*supra note* 88), 42.

⁹⁴ Arjun Appadurai, *Modernity at Large* (Minneapolis, MN: University of Minnesota Press, 1996).

⁹⁵ Akhil Gupta and James Ferguson, 'Beyond 'Culture': Space, Identity, and the Politics of Difference' in Jonathan Inda, and Renato Rosaldo, (eds.), *The Anthropology of Globalisation* (Oxford: Blackwell, 2002) 66.

⁹⁶ David Morley, *Home Territories* (London: Routledge, 2000) 10.

⁹⁷ Roland Robertson, 'Glocalization: Time-Space and Homogeneity-Heterogeneity' in Mike Featherstone, Scott Lash and Roland Robertson (eds.), *Global Modernities* (London: Sage, 1995).

⁹⁸ Katja Franko Aas, *Globalization and Crime*. 2nd edn. (London: Sage, 2013) 96.

neoliberal globalisation; the movement of people and ideas has provoked an insecurity of identity and roused fears of a waning welfare system and dwindling state sovereignty.⁹⁹ Such trepidation is ‘projected onto a manufactured anxiety about undesirable migrants’,¹⁰⁰ who offer the ‘fullest and most tangible embodiment of ‘otherness’’.¹⁰¹ As Hall notes, we are witnessing a resurgence of ethnicity in an ‘attempt to restore strong, closed definitions of what constitutes a culture’.¹⁰² Indeed, nationality is a key factor in distinguishing ‘trustworthy and untrustworthy travel’,¹⁰³ which despite its professed race-neutrality, ‘is tied up with visible difference’.¹⁰⁴

Whilst the visually familiar western foreigner can easily navigate the ‘space of flows’¹⁰⁵ by providing the requisite travel documents, ‘demonstrating economic viability and moral worthiness’;¹⁰⁶ the ‘moving humanity’¹⁰⁷ desperately fleeing Middle Eastern wars (where the ‘legacy of British formal and informal empire’ remain embroiled)¹⁰⁸ cannot readily produce such documents. Under the ‘global hierarchy of mobility’,¹⁰⁹ global North states rarely issue visas to citizens of states in conflict, ‘effectively blocking their legal entry’.¹¹⁰ Entering the UK without documents is now a strict liability offence.¹¹¹ Therefore, individuals fleeing war are ‘compelled

⁹⁹ Sharon Pickering, Mary Bosworth and Katja Franko Aas, ‘The Criminology of Mobility’ in Sharon Pickering and Julie Ham (eds.), *The Routledge Handbook on Crime and International Migration* (London: Routledge, 2014) 388.

¹⁰⁰ Ben Bowling, ‘“A really hostile environment”: Adiaphorization, Global Policing and the Crimmigration Control System’ [2020] 24(2) *Theoretical Criminology* 163, 165.

¹⁰¹ Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity Press, 2000) 108.

¹⁰² Hall (*supra note* 89), 200.

¹⁰³ Pickering et al (*supra note* 99), 387.

¹⁰⁴ Bowling (*supra note* 100), 165.

¹⁰⁵ Manuel Castells, *The Rise of the Network Society* (Oxford: Blackwell Publishers, 1996).

¹⁰⁶ Barker (*supra note* 57), 239.

¹⁰⁷ Costas Douzinas, ‘Human Rights for Martians’ (*Critical Legal Thinking*, 2016) <<https://criticallegalthinking.com/2016/05/03/human-rights-for-martians/>> accessed 1 February 2021.

¹⁰⁸ Bosworth (*supra note* 22), 153.

¹⁰⁹ Zygmunt Bauman, *Globalization* (Oxford: Polity Press, 1998) 69.

¹¹⁰ Bosworth (*supra note* 19), 83.

¹¹¹ Ana Aliverti, ‘Making people criminal: The role of the criminal law in immigration enforcement’ [2012] 16(4) *Theoretical Criminology* 417.

to first arrive as 'illegal migrants', who only thereafter may petition for asylum'.¹¹²

Furthermore, notwithstanding that 7/7 was perpetrated by (racialised minority) citizens who could not have been halted at the border; 'the spectre of Europe's 'homegrown' 'Muslim extremist' citizens [is] routinely racialized as being 'of migrant background''.¹¹³ This is crudely observable within media hysteria¹¹⁴ and has contributed to the resurgence of neo-nationalism.¹¹⁵ Through this fallacious (but stubborn) conflation of migration, Islam and terrorism, the undocumented migrant is constructed as possessing a criminality that is both intrinsic and insidious, threatening 'our way of life'.¹¹⁶ Asserting that undocumented migrants do not just lack the right to be here, but that they threaten Britishness,¹¹⁷ justifies 'ideas and justifications of control' in detention centres, which 'represent the symbolic heart of the border control system'.¹¹⁸

Panopticon to Ban-opticon

Responding to populist pressures to maintain cultural and territorial borders (which have become central to contemporary penalty),¹¹⁹ undocumented migrants are 'quickly categorized as objects of distrust by the state',¹²⁰ followed by promises of effective control and removal.¹²¹ Indeed, amidst a growing disconnect between politicians and electorate,

¹¹² Nicholas De Genova, 'The "migrant crisis" as racial crisis: do Black Lives Matter in Europe?' [2018] 41(10) *Ethnic and Racial Studies* 1765, 1766.

¹¹³ De Genova (ibid), 1773.

¹¹⁴ Gabe Mythen and Sandra Walkate, 'Communicating the Terrorist Risk: Harnessing a Culture of Fear' [2006] 2(2) *Crime, Media, Culture* 123, 131.

¹¹⁵ Tore Bjorgo and Rob Witte, *Racist Violence in Europe* (Basingstoke: Macmillan, 1993).

¹¹⁶ As per Tony Blair in William Walters, 'Secure Borders, Safe Haven, Domopolitics' [2004] 8(3) *Citizenship Studies* 237.

¹¹⁷ Chris Allen, 'Fear and loathing: The political discourse in relation to Muslims and Islam in the British contemporary setting' [2010] 2(4) *Politics and Religion* 221, 223.

¹¹⁸ Bosworth (*supra note 7*), 217.

¹¹⁹ Katja Franko Aas, *Globalization and Crime* (London: Sage, 2007) 82.

¹²⁰ Lucia Zedner, 'Is the Criminal Law only for Citizens?' in Mary Bosworth and Katja Franko Aas (eds.), *The Borders of Punishment* (Oxford: Oxford University Press, 2013) 49.

¹²¹ Anderson (*supra note 62*), 1532.

A united front among 'immigrants' promises to come as near as conceivable to patching the diffuse assortment of fearful and disoriented individuals together into something vaguely reminiscent of a 'national community'; and this is one of the few jobs governments can do and be seen doing (my emphasis).¹²²

Restricting the entry of Commonwealth citizens (who previously had practically identical rights to British citizens to access the UK)¹²³ following the 1958 race riots illustrates this.¹²⁴ Such continues to inform the 'heavily racialized sites of [immigration] confinement, populated almost entirely by [males] from the global south [observable today]'.¹²⁵

The trend of criminalising immigration offences is increasing exponentially,¹²⁶ expanding the routes to confinement for non-citizens whilst increasingly encompassing immigration consequences. The 2007 UK Borders Act mandates mandatory deportation for non-EU nationals who are sentenced to one year imprisonment. As such, by foisting an additional burden upon non-citizens, it 'hollow[s] out the rationale of their original criminal punishment, raising [further] questions about its legitimacy'¹²⁷ and purpose. By occurring within immigration detention facilities, the ambit of penal power is extended beyond the temporal, structural, and territorial parameters of the conventional criminal justice system, 'enveloping others who have not been convicted of a criminal offence'.¹²⁸

Indeed, at the end of their prison sentence, foreign nationals can find themselves confined within immigration detention alongside other non-citizens who have not been criminally convicted, but are subject to administrative deportation.

Recently, the COVID-19 pandemic reduced the UK's immigration detention

¹²² Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity Press, 2000) 108.

¹²³ Ian Spencer, *British Immigration Policy since 1939: The Making of Multi-Racial Britain* (London: Routledge, 1997).

¹²⁴ Hindpal Singh Bhui, 'The Place of 'Race' in Understanding Immigration Control and the Detention of Foreign Nationals' [2016] 16(3) *Criminology and Criminal Justice* 267, 271.

¹²⁵ Bosworth (*supra note 7*), 221.

¹²⁶ Home Office, *Protecting our border, protecting the public. The UK Border Agency's five year strategy for enforcing our immigration rules and addressing immigration and cross border crime* (London: Home Office, 2010) 26.

¹²⁷ Bosworth (*supra note 19*), 89.

¹²⁸ Bosworth (*supra note 19*), 90.

system to just 300 foreign criminals.¹²⁹ However, this increased towards the end of summer as migrants fleeing conflict, daring to seek a better life for their family by crossing the channel, were incarcerated. Though homogenous in possessing a precarious sub-citizenship legal identity, confining these two populations together is curious. On one hand we see a clear connection with criminality (though one disregarding its constraining norms of harm,¹³⁰ equality, proportionality and that no one should be punished twice), yet on the other the purpose is less clear. Indeed, the fact so many (mainly non-criminals) were released prior speaks to the lack of threat posed, therefore questioning the broader purpose and necessity of these facilities. Such leads one to suggest a political motive. Within the context of its pure numerical intake and processing capability, the immigration detention facility is more symbolic than real (though of course engendering very real consequences for those entrapped within its ambit nonetheless). Incarcerating these individuals projects an image of strong government in increasingly trying times. Indeed, the migrants' journey provided a charged spectacle for many Brits, perhaps offering a welcomed distraction tool (an alternate to the always available Shamima Begum) for the current government.

Whether capitalising upon 'colonial amnesia'¹³¹ or a more proactive concern about 'contamination',¹³² the government's actions elucidate the post-colonial ties of detention.¹³³ Such is also seen in the grossly disproportionate number of racial minorities from former-colonies serving long (one might say exclusionary within the social) sentences in UK (and global North) prisons.¹³⁴ Additionally, the global North forcibly returns citizens from the global South, often to prisons constructed during

¹²⁹ Migration Observatory, 'Immigration Detention in the UK' (2020) <<https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>> accessed 1 February 2021.

¹³⁰ J.S. Mill, *On Liberty* [1859] (Harmondsworth, Middlesex: Penguin, 1979) 68.

¹³¹ Stuart Hall, 'The multicultural question' in Barnor Hesse (ed.), *Unsettled Multiculturalisms: Diasporas, Entanglements, 'Transruptions'* (London: Zed, 2000) 218.

¹³² Hindpal Singh Bhui, 'Humanising immigration control and detention' in Katja Franko Aas and Mary Bosworth (eds.), *Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013).

¹³³ Robert Winder, *Bloody Foreigners: The Story of Immigration to Britain* (London: Abacus, 2004) 222.

¹³⁴ Loïc Wacquant, 'Class, race, and hyperincarceration in revanchist America' [2010] 139(3) *Daedalus* 74.

the colonial era.¹³⁵ The systematic nature and charged rhetoric of such policies would suggest more than amnesia, but an illustration of Garland's 'criminology of the other',¹³⁶ which notes the developing 'culture of control' towards minority ethnic populations within late modern societies. Such reveals the exclusionary and global nature of penal power.

Whilst early liberals accepted exclusion for those who contravened the Hobbesian social contract;¹³⁷ early social criminologists sought to place the incorrigible malefactor in 'protective custody'; before welfare criminologists looked to replace this with societal reintegration.¹³⁸ However, we are witnessing a post-social criminology whereby populist security apprehensions have seen the revitalisation of an 'eliminative ideal',¹³⁹ though one distinct from early liberal philosophy and her focus upon conscious malfeasance. It thus does not seem inappropriate to posit that the target of punishment, which we are told transitioned from the body to the soul, has took a step back towards the body, though in the shape of exclusion and incapacitation rather than the chaotic violence of the Scaffold.¹⁴⁰ In the crimmigration context, the 'body' typology may in fact offer a more valuable analytical framework than the soul, given that it is likely to be more malleable and capable of encompassing issues of race, gender, etc. Indeed, within the extension of the 'eliminative ideal' label towards (undesirable) non-members, distrust operates through the prism of identity.

This is reflective of the broader transition to actuarial 'justice' across global North societies which necessarily encompasses identifying a 'suspect' community.¹⁴¹ Immigrants are sorted through the binary logic of risk. The formulation of 'risk' does not rest upon a perusal of individual pathologies or, indeed, a palpable, defined

¹³⁵ Mary Bosworth, 'Border Criminology and the Changing Nature of Penal Power' in Robert Reiner and Mike Maguire (eds.), *Oxford Handbook of Criminology*. 7th ed. (Oxford: Oxford University Press, 2017).

¹³⁶ David Garland, *The culture of control: Crime and social order in contemporary society* (Chicago, IL: University of Chicago Press, 2001) 142.

¹³⁷ Jean Jacques Rousseau, *The Social Contract* [1762] (London: Penguin, 2004).

¹³⁸ Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State' [2007] 9(3) *Punishment & Society* 301, 311.

¹³⁹ Andrew Rutherford, 'Criminal policy and the eliminative ideal' [1997] 31(5) *Social Policy & Administration* 116.

¹⁴⁰ Foucault (*supra note* 34), 130.

¹⁴¹ Zedner (*supra note* 120), 167.

threat - thus diverting from traditional conceptions of preventative mechanisms. Conversely, risk derives from 'an artificial entity of calculation, [a] probabilistic operation [based upon] a statistical collectivity, a subpopulation'.¹⁴² Untrustworthy mobility is passionately posited as possessing a scientifically objectified proclivity on the basis of arbitrary factors like race and nationality, though one notably absent of any scientific verification.¹⁴³ The individual is reduced to a number, a constituent of a disposable collectivity that must be managed through a system judged according to its raw processing capacity,¹⁴⁴ as opposed to its adherence to human rights. Illogically then, it could be said that through their identity, the immigrant loses their humanity.

As seen across the global North, the undocumented migrant is posited as a 'monstrous other [whose] grievance warrants no explanation; [they are] presumed immune to normal human emotions...so different that they really do seem to be beyond inclusion in the liberal community'.¹⁴⁵ Such a 'suitable enemy' in the popular imagination,¹⁴⁶ justifies the state's transition from traditional modes of panoptic punishment (premised upon the 'training of souls'¹⁴⁷ which facilitates the malefactor's eventual reintegration into the social, or indeed the migrants integration to modernity) to a 'ban-optic' rationale.¹⁴⁸

The immigration detention facility could perhaps be thought of as a buffer - the inmate remains subject to the state's panoptic gaze and its disciplinary regiment, yet separate from its inclusionary rationale. The inmate is already excluded from society, though awaiting territorial banishment. Such is discernible through the

¹⁴² Krasmann (*supra note* 138), 306.

¹⁴³ Jonathan Simon, 'Managing the monstrous: Sex offenders and the new penology' [1998] 4(1) *Psychology, Public Policy, and Law* 452, 460.

¹⁴⁴ Ben Bowling and Sophie Westenra, 'Racism, immigration and policing' in Mary Bosworth, Alpa Parmar A and Yolanda Vázquez, (eds.), *Race, Criminal Justice and Migration Control: Enforcing the Boundaries of Belonging* (Oxford: Oxford University Press, 2018).

¹⁴⁵ Barbara Hudson, *Justice in the Risk Society* (London: Sage, 2003) 204.

¹⁴⁶ Nils Christie, 'Suitable enemy' in H Bianchi and Rene von Swaaningen (eds.), *Abolitionism: toward a non-repressive approach to crime*. (Amsterdam: Free University Press, 1986).

¹⁴⁷ Foucault (*supra note* 34).

¹⁴⁸ Katja Franko Aas, 'Crimigrant' bodies and bona fide travelers: Surveillance, citizenship and global governance' [2011] 15(3) *Theoretical Criminology* 331.

socially-distanced, bureaucratic instrumentalism of (cr)immigration control.¹⁴⁹

The private companies responsible for the daily running of detention facilities are (distanced) conduits, illustrating how punishment is increasingly 'unhinged from the state',¹⁵⁰ removing transparency and accountability.¹⁵¹ The actual decision-making capacity is 'increasingly located with those who design the algorithms'.¹⁵² An administrative document completed by someone who has never met the detained is decisive. Whilst the citizen has a right to be judged by their peers, the absence of face-to-face engagement between detainee and decision-maker speaks to a lack of equality.¹⁵³ Even when individuals are released back into the community (as many are), they 'carry the border with them'.¹⁵⁴ Indeed, punishment as a political technology cannot be circumscribed within any particular institution; power is diffuse. The constant threat of future confinement, commonly compounded by the requirement to regularly report to the police or (more subtly, and reflective of Foucault's 'micro-physics of power')¹⁵⁵ to self-certify immigration status within other, non-penal institutions, reminds the individual (consciously and subconsciously) of their perennially precarious standing. As one detainee observes:¹⁵⁶

There is no way out of it. A criminal may improve and become a decent member of society. A foreigner cannot.

Classification is dehumanising. Inevitably, innocent 'non-citizens' are viewed through a perceived dangerousness and subjected to intrusive measures on account

¹⁴⁹ Ana Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Immigration* (Abingdon: Routledge, 2013) 101.

¹⁵⁰ Bosworth et al (*supra note 2*), 40.

¹⁵¹ Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford: Oxford University Press, 2015).

¹⁵² Dennis Broeders and James Hampshire, 'Dreaming of seamless borders: ICTs and the pre-emptive governance of mobility in Europe' [2013] 39(8) *Journal of Ethnic and Migration Studies* 1201, 1213.

¹⁵³ Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989) 215.

¹⁵⁴ Bosworth (*supra note 7*), 217.

¹⁵⁵ Foucault (*supra note 34*) 38.

¹⁵⁶ Zedner (*supra note 120*), 140.

of possessing ‘typical terrorist’ features.¹⁵⁷ Yet, through this depersonalisation and pursuit of efficiency, the undocumented migrant’s morality is obnubilated; they are cast outside the ‘universe of obligations’.¹⁵⁸ Such creates a diminution in sensitivity and responsibility, facilitating the largely uncontested removal of migrants from community and the insouciance towards the, seemingly quotidian, macabre spectacles of parents desperately acting within the best interests of their family¹⁵⁹ - a cause which engenders political succour when espoused by an old school chum of the Prime Minister.¹⁶⁰

Indeed, the crimmigration complex captures the dichotomy at the crux of Foucault’s genealogy of punishment, where the concept is posited between the poles of the public and the private. Whilst power occasionally manifests itself loudly at the border, clearly mapping the parameters of belonging (though notably absent the outrage and sense of injustice which occasionally agitated the early modern sovereigns); the heart of the process lies in the detention facility, hidden from accountability. Here, punishment ‘leaves the domain of more or less everyday perception and enters that of abstract consciousness...justice is relieved of responsibility by a bureaucratic concealment of the penalty itself’.¹⁶¹

Such ‘negative modernity’¹⁶² is localised within courts administering automatic deportation,¹⁶³ but also within detention centres themselves where staff members’ experiences are guided by dominant racial tropes, ‘assist[ing] in the process of estrangement that permits and justifies detention as well as the politics

¹⁵⁷ Gabe Mythen and Sandra Walkate, ‘Criminology and Terrorism: Which Thesis?’ [2006] 46(3) *British Journal of Criminology* 379.

¹⁵⁸ Bauman (*supra note* 153), 191.

¹⁵⁹ Joel Platt, ‘Is the Criminalisation of Migration Racist?’ (LSE Human Rights Blog, 28 January 2021) <<https://blogs.lse.ac.uk/humanrights/2021/01/28/is-the-criminalisation-of-migration-racist/>> accessed 2 February 2021.

¹⁶⁰ Paul MacInnes, ‘Cummings and cabinet cheerleaders feel heat from social media fury’ (*Guardian*, 23 May 2020) <<https://www.theguardian.com/politics/2020/may/23/cummings-and-cabinet-cheerleaders-feel-heat-from-social-media-fury>> accessed 2 February 2021.

¹⁶¹ Foucault (*supra note* 34), 34.

¹⁶² Bauman (*supra note* 153), 191.

¹⁶³ Vanessa Barker, ‘On Bauman’s moral duty: Population registries, REVA and eviction from the Nordic realm’ in Anna Eriksson (eds.), *Punishing the Other: The Social Production of Immorality Revisited* (London: Routledge, 2015) 279.

and practices of [race-related] expulsion that these institutions enable'.¹⁶⁴

In the systematic exclusion of predominantly non-white, undocumented migrants, Gilmore's definition of 'racism' as 'the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death'¹⁶⁵ becomes salient and damning.

Rehumanisation

However, the extending reach of pre-emptive penal power without proper oversight should alarm us all.¹⁶⁶ Indeed, the history of security crises elucidate how aggressive, unchecked powers are eased in upon the basis that they are reserved for outsiders, before being utilised against the citizenry without meeting usual constitutional protections.¹⁶⁷ The Windrush scandal is a damning example in the (cr)immigration context.¹⁶⁸

Today, the 'strange' live amongst us, though we often know them as friends. They seek the relationships and securities we all desire. Recognition is key. In Bosworth and Kellezi's study, women detainees mainly feared 'the loss of subjecthood itself, and with it, the capacity of experiencing and shaping life in their own terms'.¹⁶⁹ When the UK profess human rights on the global stage it remains as big a fraud as when they helped polish the concept's post-war universalist facade whilst maintaining colonial structures. It seems we must always ask, legitimate for whom?

The 'human' rights of undocumented migrants are meant to be enforced by the very state seeking to banish them from the political community. International

¹⁶⁴ Mary Bosworth, 'Working in this place turns you racist': Staff, race, and power in detention' in Mary Bosworth, Alpa Parmar and Yolanda Vazquez (eds.), *Race, Criminal Justice and Migration Control* (Oxford: Oxford University Press, 2018) 227.

¹⁶⁵ Ruth Gilmore, 'Race and Globalization' in Ron Johnston, Peter Taylor & Michael Watts (eds.), *Geographies of Global Change: Remapping the World* (Malden, MA: Blackwell, 2002) 261.

¹⁶⁶ John Fiske, 'Surveilling the City: Whiteness, the Black Man and Democratic Totalitarianism' [1998] 15(2) *Theory, Culture & Society* 67, 86.

¹⁶⁷ David Cole, *Enemy Aliens* (New York: New Press, 2003).

¹⁶⁸ Bowling (*supra note* 100), 166.

¹⁶⁹ Mary Bosworth and Blerina Kellezi, 'Citizenship and Belonging in a Women's Immigration Detention Centre' in Corretta Phillips and Colin Webster (eds.), *New Directions in Race, Ethnicity and Crime* (Abingdon: Routledge, 2013) 92.



law entities have unsurprisingly been ineffective within a system where state sovereignty reigns supreme.¹⁷⁰ It is clear that any change must come from within; the rights of all require constant defence in the public space.¹⁷¹ We must thus (re)discover a concept of humanity and agency beyond the nation-state paradigm and look to revitalise the public space¹⁷² into an avenue whereby narratives of fear are challenged, not intensified. Doing so would allow us to look beyond the administrative cloak of immigration detention which appears paramount for the survival of such an institution where basic rights are so lacking.

Conclusion

In conclusion, immigration detention must be conceptualised as punishment. Punishment has long been premised upon the relationship between the state and its subjects. The crimmigration process elucidates the development of penal power into an instrument which the state can utilise to end this relationship. Immigration detention facilities are sites of severance whereby foreigners deemed (racially) undesirable are symbolically and (often) instrumentally uncoupled from the community, postulating a collective identity from which they are debarred.

As immigration detention increasingly employs penal logics, rationales and structures, while clearly and deliberately imposing pains akin to punishment, the denial of criminal law protections is unjustifiable. It serves to repudiate the past, present and future lived experiences of those confined, constituting an insidious situation for us all.

References

- Aas, K. (2011). 'Crimmigrant' bodies and bona fide travelers: Surveillance, citizenship and global governance. *Theoretical Criminology*, 15(3), 331.
Aas, KF. (2007). *Globalization and Crime*. London: Sage.

¹⁷⁰ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

¹⁷¹ Michel Foucault, *Foucault and the Politics of Rights* (edited by Ben Golder) (Stanford: Stanford University Press, 2015) 80.

¹⁷² Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: MIT Press, 1991).

- Aas, KF. (2013). *Globalization and Crime*. 2nd edn. London: Sage.
- Aas, KF. (2014). Bordered penalty: Precarious membership and abnormal justice. *Punishment and Society*, 16(5), 520.
- Agamben, G. (1998). *Homo Sacer: Sovereign Power and Bare Life*. Stanford, CA: Stanford University Press.
- Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in an Age of Colorblindness*. New York: The New Press.
- Aliverti, A. (2012). Making people criminal: The role of the criminal law in immigration enforcement. *Theoretical Criminology*, 16(4), 417.
- Aliverti, A. (2013). *Crimes of Mobility: Criminal Law and the Regulation of Immigration*. Abingdon: Routledge.
- Allen, C. (2010). Fear and loathing: The political discourse in relation to Muslims and Islam in the British contemporary setting. *Politics and Religion*, 2(4), 221.
- Anderson, B. (2013). *Us and Them: The Dangerous Politics of Immigration*. Oxford: Oxford University Press.
- Anderson, B. (2017). Towards a New Politics of Migration? *Ethnic and Racial Studies*, 40(9), 1527.
- Appadurai, A. (1996). *Modernity at Large*. Minneapolis, MN: University of Minnesota Press.
- Arendt, H. (1949). 'The Rights of Man': What Are They? *Modern Review*, 3(1), 24.
- Arendt, H. (1951). *The Origins of Totalitarianism*. London: Martin Secker & Warburg.
- AT (Pakistan) v Secretary of State for the Home Department* [2010] EWCA Civ 567
- Barker, V. (2013). Democracy and Deportation: Why Membership Matters Most. In: M Bosworth & K Aas, eds., *Migration and Punishment: Citizenship, Crime Control and Social Exclusion*, Oxford: Oxford University Press.
- Barker, V. (2015). On Bauman's moral duty: Population registries, REVA and eviction from the Nordic realm. In: A Eriksson, eds., *Punishing the Other: The Social Production of Immorality Revisited*, London: Routledge.
- Bauman, Z. (1989). *Modernity and the Holocaust*. Cambridge: Polity Press.
- Bauman, Z. (1998). *Globalization*. Oxford: Polity Press.
- Bauman, Z. (2000). *Liquid Modernity*. Cambridge: Polity Press.
- Becket, K., and Herbert, S. (2010). Penal boundaries: Banishment and the expansion of punishment. *Law and Social Inquiry*, 35(1), 1.
- Beetham, D. (1991). *The Legitimation of Power*. London: Macmillan.
- Benhabib, S. (2004). *The Rights of Others: Aliens, Residents and Citizens*. Cambridge: Cambridge University Press.
- Benhabib, S. (2006). *Another Cosmopolitanism*. Oxford: Oxford University Press.
- Bentham, J. (1843). 'Anarchical Fallacies' in *The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring*. Edinburgh: William Tait.
- Bhui, HS. (2013). Humanising immigration control and detention. In: Aas KF and Bosworth M, eds., *Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford: Oxford University Press.
- Bhui, HS. (2016). The Place of 'Race' in Understanding Immigration Control and the Detention of Foreign Nationals. *Criminology and Criminal Justice*, 16(3), 267.
- Bjorgo, T & White, R. (1993). *Racist Violence in Europe*. Basingstoke: Macmillan.
- Bosniak, L. (2006). *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton, NJ: Princeton University Press.
- Bosworth, M. (2012). Subjectivity and Identity in Detention: Punishment and Society in a Global Age. *Theoretical Criminology*, 16(2), 123.

- Bosworth, M. (2013). Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World. In: K Aas, and M Bosworth, eds., *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*. Oxford: Oxford University Press.
- Bosworth, M. (2016). Border criminology: How migration is changing criminal justice. In: M Bosworth, C Hoyle, and L Zedner, eds., *Changing Contours of Criminal Justice*. Oxford: Oxford University Press.
- Bosworth, M. (2017). Penal humanitarianism? Punishment in an era of mass migration. *New Criminal Law Review*, 20(1), 39.
- Bosworth, M. (2017). Border Criminology and the Changing Nature of Penal Power. In: A Liebling, S Maruna, and L McAra, eds., *Oxford Handbook of Criminology*. 7th ed. Oxford: Oxford University Press.
- Bosworth, M. (2018). 'Working in this place turns you racist': Staff, race, and power in detention. In: M Bosworth, A Parmar, and Y Vazquez, eds., *Race, Criminal Justice and Migration Control*. Oxford: Oxford University Press.
- Bosworth, M. (2019). Immigration Detention, Punishment and the Transformation of Justice. *Social and Legal Studies*, 28(1), 81.
- Bosworth, M. and Kellezi, B. (2013). Citizenship and Belonging in a Women's Immigration Detention Centre. In: C Phillips, and C Webster, eds., *New Directions in Race, Ethnicity and Crime*. Abingdon: Routledge.
- Bosworth, M., & Turnbull, S. (2015). Immigration detention and the expansion of penal power in the United Kingdom. In: K. Reiter & A. Koenig, eds., *Extreme punishment: Comparative studies in detention, incarceration, and solitary confinement*, London: Palgrave Macmillan.
- Bosworth, M., and Kaufman, E. (2011). Foreigners in a Carceral Age: Immigration and Imprisonment in the U.S. *Stanford Law and Policy Review*, 22(1), 101.
- Bosworth, M., Franko, K., and Pickering, S. (2017). Punishment, globalization and migration control: 'Get them the hell out of here'. *Punishment & Society*, 20(1), 34.
- Bowling B and Westrenra S (2018) Racism, immigration and policing. In: Bosworth M, Parmar A, and Vázquez Y, eds., *Race, Criminal Justice and Migration Control: Enforcing the Boundaries of Belonging*. Oxford: Oxford University Press.
- Bowling, B. (2020). 'A really hostile environment': Adiaphorization, Global Policing and the Crimmigration Control System. *Theoretical Criminology*, 24(2), 163.
- Broeders, D., and Hampshire, J. (2013). Dreaming of seamless borders: ICTs and the pre-emptive governance of mobility in Europe. *Journal of Ethnic and Migration Studies*, 39(8), 1201.
- Brown, W. (2010). *Walled States, Waning Sovereignty*. Boston: MIT Press.
- Calavita, K. (2005). *Immigration at the Margins: Law, Race, and Exclusion in Southern Europe*. New York: Cambridge University Press.
- Cameron, D. (2015). The Queen's Speech, 21 May 2015.
- Castells, M. (1996). *The Rise of the Network Society*. Oxford: Blackwell Publishers.
- Chahal v United Kingdom* [GC] (1997) 23 EHRR 413.
- Christie, N. (1986). Suitable enemy. In: H Bianchi, and R von Swaaningen, eds., *Abolitionism: toward a non-repressive approach to crime*. Amsterdam: Free University Press.
- Cole, D. (2003). *Enemy Aliens*. New York: New Press.
- Cornelisse, G. (2004). Human Rights for Immigration Detainees in Starsbourg: Limited Sovereignty or a Limited Discourse. *European Journal of Migration and Law*, 6(1), 93.
- Cornelisse, G. (2010). Immigration Detention and the Territoriality of Universal Rights. In: N de Genova & N Peutz, eds., *The Deportation Regime: Sovereignty, Space and the Freedom of Movement*, Durham, NC: Duke University Press.

- Costello, C. (2015). Immigration Detention: The Grounds Beneath Our Feet. *Current Legal Problems*, 68(1), 143.
- Dauvergne, C. (2008). *Making People Illegal: What Globalization Means for Migration and Law*. Cambridge: Cambridge University Press.
- De Genova, N. (2018). The “migrant crisis” as racial crisis: do Black Lives Matter in Europe? *Ethnic and Racial Studies*, 41(10), 1765.
- Douzinas, C. (2016). Human Rights for Martians. *Critical Legal Thinking*.
<<https://criticallegalthinking.com/2016/05/03/human-rights-for-martians/>> accessed 28 December 2020.
- Drayton, R. (2012). Imperial History and the Human Future. *History Workshop Journal*, 74(1), 156.
- Duff, R.A. (2011). Responsibility, Citizenship and Criminal Law. In: R.A. Duff, and S.P. Green, eds., *The Philosophical Foundations of the Criminal Law*. Oxford: Oxford University Press.
- Duff, RA and Green, S. (2011). *Philosophical Foundations of the Criminal Law*. Oxford: Oxford University Press.
- Duff, RA. (2003). *Punishment, Communication and Community*. Oxford: Oxford University Press.
- Durkheim, E. (1933). *The Division of Labor*. New York: Macmillan.
- Feeley, M. (2002). Entrepreneurs of punishment: The legacy of privatisation. *Punishment & Society*, 4(3), 321.
- Fiske, J. (1998). Surveilling the City: Whiteness, the Black Man and Democratic Totalitarianism. *Theory, Culture & Society*, 15(2), 67.
- Flynn, M. (2014). How and why immigration detention crossed the globe (GDP Working Paper No. 8). Geneva, Switzerland: Global Detention Project.
- Foucault, M. (1979). *Discipline and Punish: The Birth of the Prison*. Harmondsworth: Penguin.
- Foucault, M. (2015) *Foucault and the Politics of Rights (edited by Ben Golder)*. Stanford: Stanford University Press.
- Fraser, N. (2007). Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World. *Theory, Culture and Society*, 24(4), 7.
- Fraser, N. (2008). *Scales of Justice: Reimagining Political Space in a Globalizing World*. New York: Columbia University Press.
- Garland, D. (1990). *Punishment and Modern Society*. Oxford: Oxford University Press.
- Garland, D. (1996). The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society. *British Journal of Criminology*, 36(1), 445.
- Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. Chicago, IL: University of Chicago Press
- Gilmore, RW. (2002). Race and Globalization. In: R Johnston, P Taylor & M Watts, eds., *Geographies of Global Change: Remapping the World*, Malden, MA: Blackwell.
- Goffman, E. (1961). *Asylums: Essays on the social situation of mental patients and other inmates*. Garden City, NY: Anchor Books.;
- Guild, E. (2009). *Security and Migration in the 21st Century*. Cambridge: Polity Press.
- Gupta, A., and Ferguson, J. (2002). Beyond ‘Culture’: Space, Identity, and the Politics of Difference. In: J Inda, and R Rosaldo, eds., *The Anthropology of Globalisation*. Oxford: Blackwell.
- Gündoğdu, A. (2015). *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants*. Oxford: Oxford University Press.
- Habermas, J. (1991). *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Cambridge, MA: MIT Press.



- Halfmann, J. (2000). Welfare State and Territory. In: M Bommers & A Geddes, eds., *Immigration and Welfare: Challenging the Borders of the Welfare State*, London: Routledge.
- Hall, S. (1995). New Cultures For Old. In: D Massey and P Jess, eds., *A place in the world?: places, cultures and globalization*. Oxford: Oxford University Press.
- Hall, S. (2000). The multicultural question. In: B Hesse ed., *Un/settled Multiculturalisms: Diasporas, Entanglements, 'Transruptions'*, London: Zed.
- Hart, HLA. (1959). Prolegomenon to the principles of punishment. *Proceedings of the Aristotelian Society*, 60(1), 1.
- HC Deb 26 March 2015, col 1574.
- Heller, C & Pezzani, L. (2017). Liquid Traces: Investigating the Deaths of Migrants at the EU's Maritime Frontier. In: N De Genova, ed., *The Borders of "Europe": Autonomy of Migration, Tactics of Bordering*, Durham, NC: Duke University Press.
- Hernandez, CG. (2014). Immigration Detention as Punishment. *UCLA Law Review*, 61(5), 1346.
- Home Office. (2010). *Protecting our border, protecting the public. The UK Border Agency's five year strategy for enforcing our immigration rules and addressing immigration and cross border crime*. London: Home Office.
- Hudson, B. (2003). *Justice in the Risk Society*. London: Sage.
- Kanstroom, D. (2000). Deportation, social control, and punishment: Some thoughts about why hard laws make bad cases. *Harvard Law Review*, 113(8), 1890.
- Koopmans, R., Statham, P., Giugni, M., and Passy, F. (2005). *Contested Citizenship: Immigration and Cultural Diversity in Europe*. Minneapolis, MN: University of Minnesota Press.
- Krasmann, S. (2007). The Enemy on the Border: Critique of a Programme in Favour of a Preventive State. *Punishment & Society*, 9(3), 301.
- Legomsky, S. (2007). The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms. *Wash & Lee L Rev*, 64(1), 469.
- MacDonald, I., and Toal, R. (2010). *MacDonald's Immigration Law and Practice*. London: LexisNexis.
- MacInnes P, 'Cumings and cabinet cheerleaders feel heat from social media fury' (*Guardian*, 23 May 2020) <<https://www.theguardian.com/politics/2020/may/23/cummings-and-cabinet-cheerleaders-feel-heat-from-social-media-fury>> accessed 2 February 2021.
- Marx, K. (1852). *The Eighteenth Brumaire of Louis Bonaparte*. New York: Mondial.
- Migration Observatory. (2020). Immigration Detention in the UK <<https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>> accessed 28 December 2020.
- Mill, J.S. (1859/1979). *On Liberty*. Harmondsworth, Middlesex: Penguin.
- Morley, D. (2000). *Home Territories*. London: Routledge.
- Mythen, G. & Walkate, S. (2006). Communicating the Terrorist Risk: Harnessing a Culture of Fear. *Crime, Media, Culture*, 2(2), 123.
- Mythen, G. & Walkate, S. (2006). Criminology and Terrorism: Which Thesis? *British Journal of Criminology*, 46(3), 379.
- Pickering, S., Bosworth, M., and Aas, KF. (2014). The Criminology of Mobility. In: S Pickering, and J Ham, eds., *The Routledge Handbook on Crime and International Migration*. London: Routledge.
- Pratt, A. (2005). *Securing borders: Detention and deportation in Canada*. Vancouver, BC: UBC Press.
- Rafter, N. (2010). Silence and memory in criminology – The American Society of Criminology 2009 Sutherland address. *Criminology*, 48(2), 339.
- Robertson, R. (1995). Glocalization: Time-Space and Homogeneity-Heterogeneity. In: M Featherstone, S Lash, and R Robertson, eds., *Global Modernities*. London: Sage.

- Rousseau, Jean Jacques. (1762/2004). *The Social Contract*. London: Penguin.
- Rutherford, Andrew. (1997). Criminal policy and the eliminative ideal. *Social Policy & Administration*, 31(5), 116.
- Saadi v UK* (2008) 47 EHRR 17
- Sasseen, S. (1996). Beyond sovereignty: Immigration policy making today. *Social Justice*, 23(3), 9.
- Sexton, L. (2015). Penal subjectivities: Developing a theoretical framework for penal consciousness. *Punishment & Society*, 17(1), 114.
- Simon, J (1998). Managing the monstrous: Sex offenders and the new penology. *Psychology, Public Policy, and Law*, 4(1/2), 452.
- Sparks, R., Bottoms, A.E., and Hay, W. (1996). *Prisons and the Problem of Order*. Oxford: Oxford University Press.
- Spencer, RG. (1997). *British Immigration Policy since 1939: The Making of Multi-Racial Britain*. London: Routledge.
- Stumpf J (2012) The justice of crimmigration law and the security of home. In: B Hudson and S Ugelvik, eds., *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law*. London: Routledge.
- Stumpf, J. (2006). The Crimmigration Crisis: Immigrants, Crime and Sovereign Power. Bepress Legal Series, Working Paper 1635 <<http://www.law.bepress.com/expresso/eps/1635>> accessed 28 December 2020.
- Turnbull, S. (2016). "Stuck in the middle": Waiting and uncertainty in immigration detention. *Time & Society*, 25(1), 61.
- Turnbull, S., and Hasselberg, I. (2017). From prison to detention: The carceral trajectories of foreign national prisoners in the United Kingdom. *Punishment & Society*, 19(2), 135.
- UKBA. (2016). Enforcement and Instruction Guidance <<https://www.gov.uk/government/collections/enforcement-instructions-and-guidance>> accessed 28 December 2020.
- Wacquant, L. (2010). Class, race, and hyperincarceration in revanchist America. *Daedalus*, 139(3), 74.
- Walters, W. (2004). Secure Borders, Safe Haven, Domopolitics. *Citizenship Studies*, 8(3), 237.
- Weber, L. (2002). The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care. *Current Issues in Criminal Justice*, 14(1), 9.
- Weber, L. and Pickering, S. (2011). *Globalization and Borders: Death at the Global Frontier*. Basingstoke: Palgrave Macmillan.
- Winder, R. (2004). *Bloody Foreigners: The Story of Immigration to Britain*. London: Abacus.
- Zedner, L. (2013). Is the Criminal Law only for Citizens? In: M Bosworth, and K Aas, eds., *The Borders of Punishment*. Oxford: Oxford University Press.
- Zedner, L. (2016). Penal subversions: When is a punishment not punishment, who decides, and on what grounds? *Theoretical Criminology*, 20(1), 3.