

Introduction

*Sharryn Aiken, David Lyon & Malcolm Thorburn**

Criminal law and immigration law were once quite separate, or so it seemed. How could they be confused? In principle they appear to work on different logics. But today they are increasingly seen together; hence the handy neologism, coined by Juliet Stumpf, that marks their marriage: “cimmigration”—the overlap, rising almost to the level of a merger, between criminal law and immigration law.¹ A few facts illustrate this expanding phenomenon. In Canada, just under 150,000 people were deported between January 2004 and the end of June 2014, more than 70% of whom were failed asylum seekers.² Last year the Canada Border Services Agency detained almost 10,000 people—including refugee claimants, permanent residents and other non-citizens.³ In the United States, 438,000 people were removed by the Department of Homeland Security in 2013—ten times the number removed in 1991 and more than in all of the 1980s.⁴ In both countries, non-citizens designated as “security threats” face the prospect of indefinite detention on the basis of secret evidence and limited rights of appeal or due process.

* Sharryn Aiken, Associate Professor, Faculty of Law, Queen’s University. David Lyon, Professor, Department of Sociology, Queen’s University and Director of the Surveillance Studies Centre at Queen’s University. Malcolm Thorburn, Associate Professor, Faculty of Law, University of Toronto.

1. See Juliet Stumpf, “The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power” (2006) 56:2 Am U L Rev 367.

2. Marco Chown Oved, “Canada Deports People to Wars, Repressive Regimes”, *Toronto Star* (20 August 2014), online: <thestar.com>.

3. *Ibid.* See also “Canada Detention Profile” at “Facts & Figures” (July 2012), online: Global Detention Project <www.globaldetentionproject.org/countries/americas/canada/introduction.html#c3905>.

4. US, Department of Homeland Security, “Immigration Enforcement Actions: 2013” by John F Simanski, Annual Report (September 2014) at 1. See also Suzy McElrath, Raahsaan Mahadeo & Stephen Suh, “Cimmigration”, *The Society Pages* (24 February 2014), online: Roundtables <thesocietypages.org/roundtables/cimmigration>.

The connection between immigration and crime is not a new one. In 1925, for instance, the *American Journal of Sociology* published a disturbing article on the “scum from the melting-pot”.⁵ The article proposed strengthening deportation laws for some “Mediterraneans” for “no sooner do they sail past the Statue of Liberty than they mistake liberty for license—and embark on their lives of crime”.⁶ Even better, opined the author, would be a test of the moral code of would-be immigrants, administered by a United States Immigration Commission before they ever set sail. This would prevent the “scum from the melting-pot” from forming in the first place.

The trigger issues have changed since the 1920s and the scale is clearly growing in the post-9/11 era, which makes crimmigration an issue worthy of close examination and scholarly debate. Today, trigger issues include human smuggling and trafficking, which are frequently conflated in popular discourse, and are increasingly identified by governments as among the most dangerous of crimes, with offenders facing the prospect of life imprisonment. Equally, immigration enforcement measures—particularly detention and deportation—are used much more commonly in response to suspected criminal activity than ever before. Hence the concept of crimmigration that draws together several disciplinary fields to examine these interwoven trends.

In the Global North, immigration and citizenship issues have become increasingly prominent in debates about the expansion of the criminal law and surveillance. Criminal sanctions—whether or not they are formally deemed to be “criminal”—are increasingly invoked to deal with matters that once were matters of ordinary administrative action. Intelligence agencies have intensified their surveillance activities of “foreign” persons and organizations within their own borders and beyond. Some basic questions are raised by crimmigration: Is unauthorized presence in a country a proper object for criminalization, and criminal or quasi-criminal investigative techniques? Do American and European surveillance systems aimed at legal and “illegal” migrants—based on quite different conceptions of privacy and data protection, or of citizenship and human rights—have something to learn from each other? How does social sorting occur at the border? What surveillance strategies are being used to deal with

5. Edwin E Grant, “Scum from the Melting-Pot” (1925) 30:6 *American J Sociology* 641.

6. *Ibid* at 642.

“perimeter security”? What new legal regimes are being put in place to criminalize various categories of migrants? What constitutional or human rights challenges have been launched in response? Such varied questions were addressed—in varied ways—in a workshop jointly convened by the Faculty of Law and the Surveillance Studies Centre at Queen’s University in November 2013. This special issue of the *Queen’s Law Journal* includes a selection of papers from this workshop. Our brief introduction will highlight their contributions. Before doing so, however, we turn to crimmigration’s historical context to set the stage.

Crimmigration: Historical Antecedents?

Over the past three decades, immigration law has lost its character as an area of purely regulatory law, concerned with only the conditions of lawful entry and residency. Instead, many immigration regulations have been cast as serious *criminal* prohibitions, the violation of which may result in very significant *criminal* penalties. Coupled with the moralizing, penal, populist tone of much criminal law rhetoric over the past thirty years, this suggests that the violation of fairly technical immigration regulations is now treated as a serious form of moral turpitude to be dealt with by some of the most severe measures in the state’s arsenal. The criminal law has also changed, making deportation available as a response to criminal conviction in a much broader range of cases than ever before. As a result, it is no great exaggeration to say that there are now two criminal laws at work: one for non-citizens (which includes a host of immigration offences that do not apply to citizens, as well as deportation as a further response to crime to which citizens are not liable) and another for citizens (who are subject neither to these additional offences nor these additional responses to crime).

Seen in one way, these developments are quite recent and without precedent; seen in another way, however, they look like a return to old ways of doing things after a brief hiatus during the high modern period in the twentieth century. The criminologist and historian Lucia Zedner made a similar observation about the private police. In her seminal article

“Policing Before and After the Police”, Zedner points out that the recent movement toward the privatization of security services is not a historical outlier.⁷ Rather, the historical exception is the relatively short high modern period (from roughly the mid-nineteenth to the mid-twentieth century), during which it was assumed that police officers would all be public officials. It is more accurate to say that we are *returning to* the private provision of security services (rather than to say that we are *moving toward* it), as it is a situation from which we only quite briefly departed. Although we should take careful note of the many differences between our present situation and that which existed two hundred years ago (for there are many differences between the night watchmen of yesteryear and the Blackwater or G4S agents of today), we ought also to keep in mind that there are significant continuities, as well.

In the case of crimmigration, the parallels with the eighteenth century are somewhat more difficult to draw. Indeed, one might think that it is impossible to draw any such parallels because immigration law simply did not exist in anything like the form in which we know it today. There was no concept of UK⁸ citizenship in the eighteenth century; there were no government agencies dealing with immigration law at the time. Indeed, there was virtually no immigration law to administer in the first place, and there was virtually no administrative state apparatus to administer much of anything! So we do not mean to suggest that the eighteenth century had a working concept of crimmigration.

But if we look closely at how the UK in the eighteenth century regulated the movements of its own nationals within the country, the parallels begin to emerge. Although most migration scholars pay scant attention to this earlier form of “immigration”⁹ law, it was a

7. Lucia Zedner, “Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control” (2006) 46:1 *Brit J Crim* 78.

8. For reasons of simplicity, we refer to the lands now known as the United Kingdom in this way.

9. For example, this is how the term is used by eighteenth century historian Norma Landau. See Norma Landau, “The Regulation of Immigration, Economic Structures and Definitions of the Poor in Eighteenth-Century England” (1990) 33:3 *Historical J* 541 [Landau, “Regulation of Immigration”]. See also John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge, UK: Cambridge University Press, 1999).

long-standing¹⁰ internal immigration regime that gave rise to a significant infrastructure of surveillance¹¹ on the movements and activities of UK nationals while outside their home parish. This regime was also intimately tied up with some of the very first statutory criminal laws in England, which concerned vagrancy. In short, the criminal laws of vagrancy—which made it a crime to wander the country freely (whether in search of work or for other reasons)¹²—were crucial components of the eighteenth century system of internal immigration control.

By the late eighteenth century, criminal measures controlling the movement of labourers and the poor within the UK had already been in place for centuries. Indeed, it is no exaggeration to say that the control of migration within the UK was among the very first statutory extensions of the criminal law in the common law world. More important than the form that such crimes took (by statute, rather than by common law) is their normative status in the legal order. Markus Dubber has pointed out that there is a sharp divide within the criminal law itself between traditional crimes (which are concerned with holding individuals accountable for the wrongs they commit against others) and police offences (which are concerned with ensuring that people do not get in the way of governmental objectives).¹³ The law of vagrancy is paradigmatic of the police offence: It is the criminal aspect of a larger regulatory regime. As James F. Stephen asserted, “[v]agrancy may be regarded to a great extent as forming the

10. Dating back to the *Statute of Labourers 1351*, and including (*inter alia*) the *Statute of Cambridge 1388* and the *Settlement Act 1662*. *Statute of Labourers 1351*, 25 Edw III, c 1; *Statute of Cambridge 1388*, 12 Rich II, c 7; *Settlement Act 1662*, 14 Car II, c 12.

11. See Norma Landau, “The Laws of Settlement and the Surveillance of Immigration in Eighteenth-Century Kent” (1988) 3:3 *Continuity & Change* 391.

12. Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London, UK: Macmillan, 1883) vol 3. Stephen wrote: “[T]he *Statute of Labourers* [of 1351 and 1603] . . . practically confined the labouring population to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime.” *Ibid* at 267.

13. Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005). See also Stephen, *supra* note 12 (“[m]ost of the [police] offences . . . consist in the breach of regulations laid down by act of parliament . . . to enforce the execution of administrative measures of public importance” at 263–64).

criminal aspect of the poor laws.”¹⁴ It was, Stephen wrote, “a kind of substitute for the system of villainage and serfdom”.¹⁵

Dating back to the fourteenth century,¹⁶ there were severe restrictions on the movements of servants outside of their “hundred”.¹⁷ Movement outside the hundred was permissible only with a letter patent from the King stating the cause of the servant’s going and the time of his return. Violations of the statute’s terms were to be treated as police infractions punishable on summary conviction. Subsequent acts imposed other, similar restrictions on the movement of labourers and the poor. Under the *Settlement Act 1662*, labourers and the poor were permitted to leave their home parish (their “settlement”) only if their parish would be willing to give an assurance to the parish to which they were travelling that it would take responsibility for their poor relief and the costs of return transport.¹⁸

These extensive and complex proto-regulatory schemes were designed to control the flow of poor people—either indigent or labourers—within the territory of the UK. And, familiarly, these regulatory schemes were backed up by criminal vagrancy laws for the violation of their terms. In Stephen’s treatment of the history of vagrancy laws, he argues that it proceeded in three stages. In the first stage, vagrancy was concerned entirely with location: A poor person who was outside his parish without permission was *ipso facto* a vagrant. In the second stage, vagrancy was concerned with status: idle and disorderly persons, rogues, vagabonds and incorrigible rogues. In the third stage, it took on the structure of an ordinary criminal offence, with a putative conduct element.¹⁹

14. Stephen, *supra* note 12 at 266.

15. *Ibid* at 204.

16. Most prominently, the *Statute of Labourers 1351* and the *Statute of Cambridge 1388*. *Supra* note 10.

17. The hundred was a central administrative unit of feudal law, originally made up of roughly one hundred households. Robert Bartlett, *England Under the Norman and Angevin Kings, 1075–1225* (Oxford: Oxford University Press, 2000) at 165–67. Torpey documents similar strictures in pre-revolutionary France, pre-World War I Italy, as well as in Germany and the United States. Torpey, *supra* note 9.

18. Landau, “The Regulation of Immigration”, *supra* note 9 at 560–61.

19. Stephen, *supra* note 12 at 266–75.

Crimmigration in Multidisciplinary Perspective

If a historical perspective yields the antecedents to crimmigration, then considering crimmigration as the nexus of more than one multidisciplinary field also offers an opportunity to explore some of its overarching features. A vital aspect of this is to consider crimmigration in relation to surveillance, which is significant in at least two ways. First, it is the very means of maintaining crimmigration practices at borders. Second, as a field of study, it draws together disparate disciplines to inform our understanding of this complex phenomenon. In an increasingly transnational world, crimmigration strategies serve both to exclude unwanted others and to shore up the boundaries that contain groups considered insiders to citizenship and global privilege.

As a product of a globalizing world, crimmigration sits at the hub of a wheel whose spokes may be named as socio-legal studies, criminology, international relations, sociology and geography, each of which is implicated in trans-disciplinary fields such as migration, citizenship and surveillance studies. Concepts such as crimmigration, that neatly—and poignantly—encapsulate a key moment in history, also invite trans-disciplinary scholarship *beyond* what is often found in any one discipline or disciplinary field. Crimmigration may thus serve as a reality check for scholars who are all-too-often blinkered by the vision-limiting constraints of their own domain.

Scholarly debates over crimmigration have surfaced in international relations and law²⁰ and in surveillance studies,²¹ but a landmark treatment of the theme was provided by Katja Franko Aas in 2011 in “‘Crimmigrant’ Bodies and Bona Fide Travellers: Surveillance, Citizenship and Global Governance”.²² Franko Aas demonstrates how transnational surveillance and crime control play their part in constructing particular sorts of global polity. She highlights how the category of “global citizens” on the one hand, and “crimmigrant others” on the other, raise radical questions for

20. See e.g. Didier Bigo & Elspeth Guild, eds, *Controlling Frontiers: Free Movement into and Within Europe* (Aldershot, UK: Ashgate, 2005).

21. See e.g. Elia Zureik & Mark B Salter, eds, *Global Surveillance and Policing: Borders, Security, Identity* (Cullompton, UK: Willan, 2005).

22. Katja Franko Aas, “‘Crimmigrant’ Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance” (2011) 15:3 *Theoretical Criminology* 331.

the liberal concept of citizenship and its adequacy for a critical discourse of rights. Citizenship is shown not to be unambiguously the realm of universal rights, but rather something that is bifurcated along particular lines, often invisible to those who are considered global citizens, while being not only visible but visceral for those who are its excluded “crimmigrant bodies”. The surveillance practices of border control and crime control express these same inclusionary and exclusionary motifs. Surveillance is thus seen in relation to citizenship and global privilege, and productive of the crimmigrant bodies that may be characterized as an *illegalized* global underclass. These are the animating threads and the context for the “Crime, Immigration and Surveillance Workshop” that unfolded over a day and a half at the Donald Gordon Conference Centre in Kingston in November 2013.

A genuinely multidisciplinary workshop, a diverse range of scholars working in Canada, the United States and Europe shared perspectives on electronic large-scale surveillance and watch lists (Didier Bigo), the “No Borders” challenge to neo-liberal immigration policies (Nandita Sharma), the gendered dimensions of precarious status and the ways in which deportability shapes access to settlement and support services (Anna Korteweg), immigration law as social control (Carmen K. Cheung), vulnerability and state security in the case of the MV *Sun Sea* (Janet Cleveland), the criminalization of asylum seekers (Delphine Nakache), pre-emptive justice and the loss of privacy rights across borders (Benjamin Goad), exceptionality at the border (Mark B. Salter), crimmigration in historical context (Malcolm Thorburn), border agreements and the shrinking rule of law (Ciara Bracken-Roche, David Lyon, Alana Saulnier and Özgün Topak), and the contradictions embedded in efforts to criminalize human smuggling (Sharryn Aiken). Papers presented at the workshop on citizenship revocation (Audrey Macklin), immigration detention in the American context (Juliet P. Stumpf), terrorism prosecutions (Kent Roach) and the case of Roma refugees in Europe (Elsbeth Guild and Karin Zwaan) made important contributions to the multidisciplinary conversations at the workshop itself and are featured in this special issue of the *Queen’s Law Journal*. We summarize below the central themes of each article.

Audrey Macklin’s article, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien” foregrounds the

intersecting themes of crimmigration, securitization and citizenship. Macklin begins by noting that “securitization of migration has crossed the border into citizenship” (at 2). Citizenship revocation is situated against the related practices of deportation, the historical practices of banishment and exile, and the death penalty. As Macklin demonstrates, the phenomenon of crimmigration is recent but the use of citizenship revocation as punishment has a long pedigree. Her analysis sheds light on the extent to which recent reforms to Canada’s *Citizenship Act* seriously undermine, rather than strengthen, the value of citizenship. Despite the existence of international and regional legal norms circumscribing the arbitrary deprivation of nationality, these norms are being flouted in both the UK and Canada. The balance of Macklin’s article surveys the range of potential violations of the *Canadian Charter of Rights and Freedoms*, offering a road map and at least some hope for challenging the regressive politics that inform the securitization of citizenship law.

In her article “Civil Detention and Other Oxymorons”, Juliet P. Stumpf questions the constitutional justification of US immigration detention and examines how this justification has been undermined by the historical evolution of immigration detention law. Stumpf points to the broad overlap between immigration detention and the criminal justice system, including the methods of entry into the systems (through warrants and arrests), the similarities of the state actors involved, and the fact that immigrants are often detained in the same facilities as criminally-detained individuals, or in facilities that at least mimic criminal justice facilities. In this way, “the detention experience becomes indistinguishable from that of criminal punishment” (at 87). The use of detention in the war on drugs introduced new purposes for detention—incapacitation, deterrence, social opprobrium, and the supplementation of criminal and deportation sanctions for non-citizens—that “construct the current detention scheme as a form of punishment” (at 94). Ultimately, Stumpf urges those responsible for detention policy to rethink the current scheme of immigration detention, which “operates in the chasm between the criminal and civil legal systems” (at 86). This scheme thus allows the government to exercise the power to detain with a “lower threshold for justifying the restriction of liberty than [in] the criminal justice system” (at 86), and to instead seek to minimize the restraints on liberty imposed in the context of deportation.

In “Be Careful What You Wish For? Terrorism Prosecutions in Post-9/11 Canada”, Kent Roach considers the suggestion, recently advanced by Conor Gearty²³ and others, that some of the problems associated with the recent rise of crimmigration practices in response to 9/11 might be solved by a return to the criminal law principles of “charge and release”. While Roach agrees that the criminal law is preferable to less-principled and less-restrained alternatives, he suggests that proponents of charge and release have “overestimated and romanticized criminal law’s contemporary restraints” (at 101). Focusing on the Canadian context, Roach examines the features of the criminal law that seem to promise strong protections for the accused, but that in practice may not necessarily provide robust protection in terrorism cases. In particular, he demonstrates how preventive detention of terrorism suspects, the limited availability of remedies for investigative misconduct and fair trials, legislative overbreadth in the definition of terrorism offences, and the restraints on sentencing discretion all serve to underscore the “under appreciated dangers” inherent in recourse to the criminal justice system instead of immigration law. Roach emphasizes that the criminal law solution does offer greater protections than immigration law. However, he strongly cautions against complacency regarding how the criminal law may be used against suspected terrorists.

Finally, Elspeth Guild and Karin Zwaan offer a trenchant critique of the treatment of Roma in the European Union in their article “Does Europe Still Create Refugees? Examining the Situation of the Roma”. The Roma—EU citizens, largely concentrated in Romania, Turkey, Bulgaria, Spain, Hungary, Slovakia and the Czech Republic—are Europe’s largest ethnic minority. Guild and Zwaan document the continuities between centuries-old societal prejudice and the conditions facing Romani communities today. Roma fail to enjoy equal access to many of the benefits bestowed upon other EU citizens, especially free movement rights. Even more disturbingly, Roma continue to experience grave human rights violations ranging from racially motivated homicide, pogroms against their communities, forced sterilization, as well as generalized discrimination, racism and social exclusion. Nevertheless, as citizens of EU Member States they are precluded from claiming asylum in another Member State. The rationale for excluding them, as Guild and Zwaan

23. Conor Gearty, *Liberty and Security* (Cambridge, UK: Polity Press, 2013) at 45, 115.

point out, is that EU Member States are considered to be democracies that comply with the international standards of human rights protection and non-discrimination. Even in the limited circumstances where it may be possible to rebut this presumption, Roma asylum seekers face doctrinal hurdles. The threshold for establishing the requisite standard of proof for persecution on “cumulative” grounds is high and typically results in the rejection of Roma asylum claims. In Guild and Zwaan’s article we see, in the form of a case study, how a web of laws, administrative regulations and treaty norms can serve as a mutually reinforcing system of mobility control and containment.

In sum, we would like to emphasize Nandita Sharma’s contention, offered in the first plenary session of the workshop, that the only effective response to the contemporary peril of crimmigration is a radical reorientation of our thinking about nation states, territorialized borders and the related system of global capitalism.²⁴ In this regard, the articles published in this special issue of the *Queen’s Law Journal* lend credence to Sharma’s plea for a No Borders politics, one that offers both a theory and a practice that are refreshingly distinct from neo-liberal constructions of citizenship, sovereignty and territoriality. Only when the rights to move and to stay can be understood as a necessary part of a contemporary system of *common* rights and global justice, can we confront and resist the challenges of crimmigration.

24. Nandita Sharma, “The ‘No Borders’ Challenge to the Nationalization of States, Societies and Subjectivities” (Paper delivered at the Crime, Immigration and Surveillance Workshop, Queen’s University, 7 November 2013) [unpublished]. See also Bridget Anderson, Nandita Sharma & Cynthia Wright, “Editorial: Why No Borders?” (2010) 26:2 *Refuge* 5.

