

Special Issue Editorial

Current debates on immigration, crime, and penalty

An introduction

Debates actuales sobre inmigración, delincuencia y penalidad

Una introducción

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1. Presentation

This special issue brings together a selection of the papers presented in the framework of the International Conference ‘Immigration, crime and citizenship in troubled times’, which was held on May 9-10, 2019, at the Law School of the University of Malaga, Spain.² This conference was organised by the OCSPI Team of the University of Malaga’s Institute of Criminology, together with the European Society of Criminology (ESC) Working Group on Immigration, Crime and Citizenship. Aiming to contribute to the academic debate on migration, crime and penalty, the meeting gathered almost one hundred scholars from some

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² See <https://ocspi.wordpress.com/immigration-crime-and-citizenship-in-troubled-times/>

fifteen European and American countries, who engaged in a multi-situated conversation on recent changes in crime and punishment, as well as on bordering processes and migration enforcement policies. In addition, the Malaga Conference further cemented the ESC Working Group on Immigration, Crime and Citizenship as a collaboration network for criminologists, socio-legal scholars and social scientists conducting research in this field.

In presenting the Malaga conference's papers forming this special issue, this introduction aims to briefly reflect on the current state of the art of academic research on migration, crime, and penalty.

2. Exploring immigration and crime

A wide number of international scholars conclude that border control policies significantly influence penal measures against noncitizen offending (Eagly 2010; García España 2018a; Vázquez 2017; see also Scomparin and Torrente this issue). Those biased penal practices are fuelled by widespread beliefs, which portray immigrants as high-risk individuals (Caldwell 2016) and equate rising human mobility with increasing crime threats. This misleading assumption legitimises crime prevention policies that create social exclusion, to borrow a notion elaborated by Díez-Ripollés (2011). Those policies are aimed at incapacitating criminal suspects, offenders, and former offenders, in stark contrast to inclusive penal policies seeking to reintegrate offenders into society and turn them into law abiding individuals.

Paradoxically, these exclusive penal practices cannot be based on the alleged dangerousness of noncitizen communities because that assumption is empirically untenable. When determinist criminology theories took for granted the association between immigration and crime in the early twentieth century, the legal creation of differentiated penal measures for noncitizen offenders was understandable – albeit unjustified. Back then, that assumption seemed to be unquestionable, since noncitizen populations are usually characterised by socio-demographic traits commonly associated with high offending groups, such as the significant percentage of young males, the high rates of noncitizens living in disorganised

neighbourhoods and the distress caused in these communities by compulsory processes of social adaptation. However, a wide number of empirical studies currently challenge the correlation between human mobility and crime (see e.g., the meta-analysis carried out by Ousey and Kubrin 2018; see also Bucerius and Tonry 2014; Miles and Cox 2014). These studies adopted both longitudinal and cross-sectional methodologies, used various sample sizes – from a specific neighbourhood to a whole nation -, and explored both traditional and emerging countries of destination. What is more, critical authors in this field such as Sampson (2008) and – more recently – Han and Piquero (2021) demonstrate that human mobility flows actually contribute to reduce crime rates in communities of destination (see also Ousey and Kubrin 2009; Wortley 2009). The Spanish case corroborates this general trend. Spain has recently been a pivotal country of destination of migration flows, especially in the first years of this century. In fact, the noncitizen population residing in Spain soared from 2 per cent of the total number of residents to 10 per cent in less than one decade. In short, back then Spain received the highest number of international immigrants of all European countries (Moffette 2018). Despite the social turmoil allegedly created by this wide-ranging human mobility phenomenon, Spain witnessed a decline in crime rates over the same period, which actually led Spain to be one of the three EU15 countries with the lowest crime rate (García-España 2017). The US is no exception to this general trend, either. By drawing on a range of official US data from 1980 to 2016, Rumbaut (2016) shows that legal and undocumented migration flows peaked at the very same time that crime was declining, both at the national level and in cities and areas with high noncitizen population rates, such as Los Angeles, New York, Chicago, and Miami, as well as border cities such as San Diego and El Paso. This negative correlation has also been verified in various European jurisdictions which are countries of destination of mobility flows, and in South American nations that are receiving significant contingents of newcomers such as Chile (Leiva, Vásquez-Lavin and Ponce Oliva 2020).

Having said that, further research is needed to elucidate the precise factors mediating the inverse correlation between migration and crime. This is a major shortcoming of current research in this field, since the extant literature has yet to reach a widely shared conclusion on the processes causing large foreign population rates to have a pivotal impact on crime

(Desmond and Kubrin 2009). In this regard, an effort to empirically test causal hypotheses that associate immigration with (declining) crime at a macro level should take centre stage in the research agenda of this academic field in the coming future (Ousey and Kubrin 2018)

3. Exploring immigration and penalty

The penal dimension of the management of emerging human mobility phenomena has also called the attention of a variety of academic communities. This is unsurprising, since immigration flows have had a particularly significant impact on the penal field, at least since the turn of the century. In many countries, noncitizen groups are grossly overrepresented within the criminal justice system. This overcriminalisation (Chacón 2012) is especially noteworthy in the European case. In 2020, foreign inmates accounted for more than 20 per cent of the general prison population in 18 of the 32 European Union (hereinafter, EU) and European Free Trade Association (hereinafter, EFTA) countries, and in some of them (Austria, Greece, Luxembourg, Malta and Switzerland) this share was above 50 per cent (Aebi and Tiago 2021).³ In addition, in 2018 noncitizens accounted for over one quarter of the arrested and cautioned individuals in a number of EU and EFTA jurisdictions such as Austria, Belgium, Denmark, Germany, Greece, Italy, Luxembourg, Spain, and Switzerland.⁴

This emerging scenario, which is markedly different from the penal landscape of the late twentieth century (Brandariz 2021), has been increasingly scrutinised from various theoretical perspectives. Two of them, the crimmigration thesis and border criminology studies have gained traction over the last fifteen years. In fact, they are notably influencing current international debates on migration and penalty.

³ Tiny sovereign states aside (i.e., Andorra, Monaco, Liechtenstein, and San Marino), only Gambia, Qatar, and the UAE join these European jurisdictions in this selected list of high foreign prison population countries (source: World Prison Population List; www.prisonstudies.org/highest-to-lowest/foreign-prisoners?field_region_taxonomy_tid=All; accessed 1 February 2021).

⁴ Source: Eurostat. Crime and Criminal Justice database; ec.europa.eu/eurostat/web/crime/data/database; accessed 13 May 2021.

The crimmigration thesis (Stumpf 2006, 2015; García Hernández 2013, 2018) has significantly impacted academic debates on immigration enforcement and criminal law enforcement since the late 2000s. In constructing its assumptions, this thesis has partly built on a wider body of scholarship examining the so-called ‘criminalisation’ of immigration law and migration enforcement (Chacón 2012; Sklansky 2012). Originally focused on the US mobility control landscape, crimmigration theses have subsequently been used to explore law enforcement practices elsewhere, namely in European countries (van der Woude et al. 2014, 2017).

Crimmigration scholars have brought to the fore a fresh perspective in examining changes in the field of immigration enforcement. Initially, this theory managed to unveil the significance and impact of several legal and policy reforms implemented in the US in the 1990s and 2000s. In addressing this shift, the crimmigration literature claims that although immigration law and criminal law were traditionally two distinct and largely unrelated legal branches, they have been recently merged into a new legal order (Stumpf 2006, 2020; see also Legomsky 2007; Sklansky 2012), which differs from its two components (Stumpf 2015; Vázquez 2017). Therefore, the crimmigration merger appears to be the outcome of two processes, the criminalisation of immigration law and the ‘immigrationization’ of criminal law (Legomsky 2007; Miller 2003; van der Woude and van Berlo 2015). Thus, crimmigration strategies apparently pursue both border control and crime prevention agendas. In other words, it could be claimed that both crime is being governed through migration and human mobility is being governed through crime (Bosworth and Guild 2008; Weber and McCulloch 2019). Nonetheless, some authors have persuasively pointed out that in practical terms what is relevant is not the merging of two distinct legal realms into a new crimmigration order, but the permanent differentiation of immigration enforcement and criminal law enforcement procedures and practices (Moffette 2020; see also Chacón 2015; Stanley 2018; van der Woude 2020). This insightful perspective unveils the actual texture of the crimmigration turn, which leads criminal justice actors to mobilise various legal instruments depending on the specific needs of the corresponding case (Chacón 2015; Aas 2014; Gundhus 2020; Moffette

2020), in a manifestation of what David Sklansky (2012: 161) has called ‘ad-hoc instrumentalism’.

There is no consensual description of the crimmigration order, since scholars offer different catalogues of crimmigration measures and policies. However, some legal and penal policy changes are widely mentioned (see Bowling and Westenra 2020; García Hernández 2018; Kubal 2014; Stumpf 2006, 2020; Wonders 2017). First, the crimmigration turn has criminalised, both in statute and in practice, former immigration law breaches. Second, traditional migration enforcement measures such as deportations are now being added to sentencing patterns in criminal cases involving noncitizens. Third, crime control and border control procedures have also been merged, sharing similar law enforcement instruments and agencies. Amongst other aspects, this merger has resulted in the incorporation of criminal law-like practices such as immigration detention into the field of migration enforcement (Bosworth 2014; Campesi 2013; Fernández-Bessa 2021), and in the gradual integration of migration policing and crime-focused policing schemes.

In the 2010s, several criminology and socio-legal scholars began to develop a novel theoretical framework, which may be called border criminology (or, criminology of mobility) (Bosworth 2016, 2017; Bosworth et al. 2018; Pickering et al. 2015). This strand of literature adopts a perspective which is broader than that of crimmigration theorists (Bosworth 2019; see also Stumpf 2020), since it aims to explore not only crimmigration legal arrangements, but also the political, cultural, and social forces fostering the convergence of crime control and border control practices.

Border criminology authors have elaborated several theses on the immigration-penalty nexus. They encourage scholars to scrutinise the global and centrifugal nature of securitisation processes and crime control agendas (Bosworth et al. 2018; Bowling and Sheptycki 2015; Bowling and Westenra 2020; Franko 2017, 2020). In contrast to centuries-old punitive devices such as the prison apparatus, the so-called ‘bordered penalty’ (Aas 2014, Franko 2020) inherently involves various national jurisdictions, since deportations are dependent not only on the immigration enforcement system of the returning country, but also on the legal and political structures of the country of destination (Bosworth 2016; Weber

2015). In developing this global penalty, national criminal justice systems are called upon to perform gatekeeping tasks and to serve nation building purposes (Stumpf 2006). Consequently, crime control policies are increasingly aimed at strengthening national sovereignty and policing membership, identity, and ultimately race (Barker 2013; Bosworth and Guild 2008; Bosworth 2019; Gibney 2013; Gundhus and Jansen 2020).

Border criminology scholars have also stressed the exclusive tenets of current penal practices targeting noncitizens, in the framework of what Katja Franko (Aas 2014: 521) has termed a model of ‘abnormal justice’. The penal sub-system crafted for foreign national groups is developing exclusive arrangements to treat these populations by giving preference to banishment measures such as deportations (Aas 2014; Barker 2017; Bosworth et al. 2018; Bowling and Westenra 2020; Franko 2020). This shift is having an impact on the operation of every criminal justice agency and on every phase of criminal adjudication and sentencing procedures (Eagly 2010; García-España 2018b). This new punitive model stands in stark contrast to the long consolidated penal-welfarism schemes still operating in some jurisdictions (Aas 2014; Barker 2017, 2018; Bosworth et al. 2018; Franko 2020). Although the actual significance of this recent turn varies from one jurisdiction to another, crucially conditioned by the robustness and actual influence of rights-based arrangements and penal welfarism principles, it is ultimately leading to the consolidation of a bifurcated or dual criminal justice system, separated by membership (i.e., citizenship) criteria (Aas 2014; Bosworth 2016).

In addition, the border criminology literature has made an inspiring contribution to academic debates on punitiveness (Barker 2017; Bosworth 2019; Bosworth et al. 2018; Pickering et al. 2015). In elaborating its widened perspective on the penal power, this literature has argued that migration enforcement measures such as detention and deportation should be taken into consideration to provide an accurate assessment on state punitiveness. Consequently, this body of scholarship sees incarceration rates as an incomplete and misleading indicator of penal severity (Aas 2014; Bosworth et al. 2018; Franko 2020; Pickering et al. 2015; see also Carvalho et al. 2020). In elaborating these claims, the border criminology literature has shed new light on a number of deeply entrenched conclusions on

penalty, such as the so-called ‘Scandinavian exceptionalism’ thesis (Barker 2018; Franko 2020; see also Weber 2015). In fact, these contributions highlight that bordered penalty policies show that certain penal systems such as those of the EU - and especially those of Northern EU states (Aas 2014) - are much less tolerant and humanitarian than is generally assumed, since the inclusive traits of these systems are largely restricted to national populations (Aliverti 2015; Franko 2020; Turnbull 2017; Weber 2015).

4. Exploring immigration, crime and citizenship in troubled times

In engaging in the debates on migration, crime, and penalty presented so far, the articles forming this REIC special issue bear witness of the thematic, methodological, and geographic diversity of criminology and socio-legal studies in this field. In fact, these contributions make up a sample of the academic explorations being developed in this emergent academic field across Europe. Specifically, they examine topics ranging from human rights of migrant children and youngsters in Belgium and Greece, to crimmigration practices in Italy, Spain, and the UK, to new perspectives on human trafficking in Spain, and to border control policies in Poland.

Ioannis Papadopoulos and Marijke van Buggenhout Vrije’s article scrutinises reception proceedings in Greece and the administrative processes that follow a child’s application for international protection in Belgium. In developing their two-country case study, Papadopoulos and van Buggenhout call for in-depth empirical analyses of children’s rights in the context of migration, an academic effort that is especially needed in a time in which noncitizen children’s groups are widely criminalised. Methodologically, this contribution lays bare both the particularities and the significance of rights-based research methods in immigration studies involving children. More precisely, it stresses the importance of giving voice to immigrant children and youngsters in both research activities and migration law procedures.

Byron Villagómez-Moncayo’s article, in turn, illustrates the actual operation of crimmigration policies by carrying out an empirical exploration of court practices. Drawing

on focused observation of a court setting and semi-structured interviews with judges, prosecutors, and other legal actors, Villagómez examines judicial decision-making in the framework of administrative removal procedures targeting indicted noncitizens in Spain. His piece unambiguously shows that criminal justice actors handle these deportation orders according to their own cultural codes and notions of justice. Consequently, these non-penal migration enforcement measures are essentially used as crime prevention resources aiming to pursue criminal justice goals.

Human trafficking is a serious human rights violation and multi-faceted criminal phenomenon that is nourished by globalisation processes. Although human trafficking crimes do not always involve border crossing activities, they are frequently perpetrated by organised crime groups operating in irregular migration environments. That makes human trafficking a critical concern for both criminal justice agencies and migration enforcement agencies, as well as for criminology studies on migration and crime. This special issue includes two articles on human trafficking, which gives testimony to both the wide variety of perspectives embraced by criminal scholars in addressing this criminal phenomenon and the marked diversity of human trafficking victims. Silvia Rodríguez-López analyses the current situation of labour trafficking in Spain. Gloria Fernández-Pacheco Alises and María del Mar García-Navarro, in turn, elaborate a pilot study assessing human trafficking risks faced by African women.

In her article, Rodríguez-López evaluates whether the international obligations to prevent and prosecute human trafficking and to protect trafficking victims have been adequately fulfilled in Spain. For these purposes, she scrutinises Spanish anti-trafficking policies, with a special focus on the available data regarding inspection, investigation, and prosecution of labour exploitation cases, including case-law. This contribution lays bare the significant obstacles hampering the identification of labour trafficking victims and the prosecution of these trafficking crimes. In this regard, Rodríguez-López concludes that the decades-long exclusive focus of trafficking policies on sexual exploitation cases has left labour trafficking victims enduringly unattended.

Fernández-Pacheco and García-Navarro's article maps the developing process of a risk assessment tool aimed at detecting potential trafficking victims. Their study is based on empirical data taken from the Ödos Project, a pioneering action aimed at providing care and support to African migrant women which was set in motion in Andalusia, Spain in 2018. Drawing on both gender-based and victimology perspectives, Fernández-Pacheco and García-Navarro elaborated a risk assessment instrument specifically adapted to sub-Saharan women crossing Europe's southern border who are pregnant or accompanied by young children, and who may be at risk of trafficking victimisation for sexual exploitation purposes. This targeted focus makes this paper a path-breaking contribution that encourages human trafficking scholars to seriously consider the diversity of trafficking victims and risk factors.

Irregular mobility and border control policies are also pivotal topics in the field of migration, crime, and penalty. In the framework of this special issue, Magdalena Perkowska's contribution examines one of the most critical EU land borders, that is, the border separating Poland from non-EU neighbouring countries. Specifically, Perkowska sheds light on the impact of the so-called 'migration crisis' on the Polish scenario, by exploring irregular migration flows arriving to Poland from 2014 to 2018 and comparing them with irregular mobility phenomena affecting other EU countries. Her article, which combines desk research and statistical methods, stresses the key role played by geographical and political conditions in giving shape to Poland's migration enforcement and asylum policies.

Laura Scomparin and Giovanni Torrente's article aims to disentangle the various dimensions of crimmigration practices in Italy. For these purposes, they analyse the ways in which criminal justice policies and migration enforcement policies overlap in the fields of criminal law, criminal procedure, and criminal sentencing. Scomparin and Torrente show that in the Italian case punitive-era policies are not on the decline, and that migration enforcement procedures and immigration concerns are not replacing 'old' criminal justice instruments and crime-related moral panics but supplementing them. In so doing, the Italian authors cast light on the peculiar part played by criminal justice policies in managing

unwanted noncitizen populations in Italy, as well as on the significant gap between law in the books and law in action in the Italian case.

In closing this special issue, the article authored by Diego Boza-Martínez addresses an underexplored dimension of crimmigration arrangements, by spotlighting the discourses associating immigration and crime and their influence on public policies. Drawing on the analysis of news on immigration published by British media in the months before the Brexit referendum, Boza sheds light on a paradigmatic case of media rhetoric criminalising immigration for electoral purposes. His article conducts quantitative and qualitative research on UK broadsheets and tabloids' pre-Brexit discourses on immigration, by setting them in relation to pool surveys and referendum results. In so doing, Boza shows that anti-immigration media rhetoric had a significant impact on the electoral success of the Leave campaign in June 2016.

Criminology studies on migration and crime and on the criminalisation of immigration have long been consolidated in both Spain and continental Europe. However, the momentum gained by this field of study in the Anglo-American academic landscape, as well as critical recent events such as the so-called 'migration crisis' have led migration, crime, and penalty debates to take centre stage within the criminology field. This REIC special issue aims to foster a much-needed cross-national conversation on border criminology and crimmigration topics. In this way, it contributes to cement the emerging academic communities coalescing around the ESC Working Group on Immigration, Citizenship and Crime and the Spanish SEIC Working Group on Social Control and Immigration. These networks gathering scholars from a variety of academic disciplines and geographical areas assist in enriching a protean scholarly field that requires situated and comparative explorations. Against this backdrop, the mobility restrictions imposed in the framework of the coronavirus pandemic pose new challenges to immigration, crime, and penalty debates. However, contributions engaging in a genuine cross-national discussion like those forming this special issue make up a suitable compass to address new challenges and to lead our academic field into uncharted territories.

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