

## **Punishment, globalization and migration control:**

### **“Get them the hell out of here”<sup>1</sup>**

“We will have strong borders again,”... “You’ve seen it on television. ... . The gang members — bad, bad people. I said it Day 1. And they’re going out, or they’re being put in prison. But for the most part, get them the hell out of here. Bring them back to where they came from.” (Donald Trump, 2017)<sup>2</sup>

This article considers the future of punishment in a world shaped by competing and reinforcing forces of globalization and nationalism. In it, we call for a wider conversation about the growing interdependence between criminal justice and migration control and of its implications for many of the key concepts and approaches within the field of punishment and society. We also draw attention to how the progressive destabilization of citizenship and the precarity of membership and belonging are inimically linked to increasingly potent exhortations of penal power that affect us all.

As globalization and global mobility continue to accelerate, there has been a concomitant growth in border control methods that are separate to, yet increasingly integrated within, systems of punishment. Such developments, in which the criminal justice systems in many countries of the global north are put to work in managing migration, are shifting the reach, impact and nature of punishment. Yet, outside the field

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<sup>2</sup>[https://www.nytimes.com/2017/02/19/us/politics/trump-immigration-deportations.html?\\_r=0](https://www.nytimes.com/2017/02/19/us/politics/trump-immigration-deportations.html?_r=0)

of border criminology, such developments remain largely absent from view (Aas, 2014; Aas and Bosworth, 2013; Barker, 2013b; Bosworth, 2017a; Kaufman, 2015; Barker, 2017b). Instead, studies of punishment and penalty remain firmly anchored *within* the nation state and its penal institutional backbone (courts, prisons, probation services, etc.). Intrinsically connected to modernity and the nation state, much of the scholarship thus assumes a bounded national polity.

In this article, we seek to update some of the central conversations in the field which have been structured around punishment and (late) modern society (Garland, 1990; 2001) and reorient them around the global. We take some of the central concepts which have defined the field of punishment and society and examine how they might be adjusted and rethought in the context of mass migration to capture the current transformation of penal power better. We also highlight the growing body of scholarship on how the global is situated in and transforming everyday penal practices in national and local settings.

In the criminalization of migrants, their detention and eventual deportation, governments the world over deploy a combination of criminal justice and administrative powers. As these two sets of law and practice merge, not only is the impact, reach and nature of punishment changing, but some of its fundamental protections are eroding as well (Zedner, 2016). Such matters have wide implications, well beyond the field of migration control. Therefore, and as we have argued for some time now, it is time that studies of punishment change as well (Bosworth, 2012; Aas and Bosworth, 2013; Pickering, 2005).

Below, we begin with a brief, historical overview that identifies some long-standing gaps in the scholarship and their global inflections. Next, we raise a series of concepts that

have been intellectually productive for understanding punishment and discuss how they may need some reassessment in a global frame. Finally, we conclude by calling for a greater unity between empirical and conceptual labour, noting the intellectual impoverishment on both sides when they are not better integrated. While the focus of the paper is epistemological, there are methodological causes of some of the gaps in our knowledge: as theorizing becomes too distinct from the institutions in question it is easy to overlook emerging developments. To illustrate this point, where possible we draw on examples and testimonies from our three research projects, conducted in Britain, Norway, and Australia.

### **Punishment and the globalized penal field: A genealogy and its discontents**

In 2002, Malcolm Feeley observed that transportation was a vital technology of punishment in England in the 17<sup>th</sup> and 18<sup>th</sup> century:

Transportation was a significant feature of English penal policy for over two centuries, and constituted its most significant forms of serious sanctioning for half this period. It operated as the dominant form of severe sanctioning for a period longer than the modern prison has existed. (Feeley, 2002: 329)

This ‘forced mobility’ as it might be cast in today’s terms, of Britain’s social problems first to the North American colonies and then to Australia, was marked by a similar entrepreneurial spirit and embrace of market solutions that exists in many contemporary market-oriented criminal justice systems. Used primarily for unwanted citizens, but also for political opponents and prisoners of war, transportation offers an important reminder of the historic contingency of punishment, its flexibility, and its

reach. Nevertheless, apart from Feeley's contribution, the practice has been virtually unnoticed by criminologists and punishment scholars, and is absent from most textbooks in the field (with some notable exceptions e.g., Rusche and Kirchheimer, 1939; Weber, 2014, Grewcock, 2014, Carrington et al., 2016; Stanley, forthcoming).

One year after Feeley's piece was published, in a trenchantly entitled article 'What's wrong with the sociology of punishment?' John Braithwaite (2003) pushed the argument further. Studies of punishment and society, he asserted, had taken a particular route, heavily influenced by a specific set of books and authors, most notably Michel Foucault's (1979) *Discipline and Punish* and David Garland's (1990) *Punishment and Modern Society*. While this approach had generated a series of concepts that were enormously productive for critical scholarship, he argued, it had unduly narrowed the focus of the field to the prison.

Fifteen years later, similar charges could be leveled. Despite the undoubted contribution of many scholars of punishment and society to a range of intellectual and policy debates, large parts of the field have become locked into repetitive discussions of prison rates, penal excess and punitivism. The focus on the prison has largely continued, notwithstanding a growing recognition of other penal practices like the fine (O'Malley, 2009), probation (McNeil and Dawson, 2014) and community sanctions (Hannah-Moffat and Marutto, 2012). So, too, the emphasis on the criminal justice system persists, even as governments deploy a growing number of regulatory and administrative mechanisms and effects that often feel punitive and exist alongside and amplify criminal sanctions (Beckett and Murakawa, 2012; Eagly, 2013).

This understanding of penal culture and punitiveness, centered on the prison and on prison rates, usually assumes a national frame within a limited geographical range.

Scholars of punishment rarely look beyond a selection of European states and the US (Carrington et al., 2016). So, too, the field remains characterized by narrow temporal frame. Such 'historical myopia' (Rafter, 2010) has obscured interconnections between the global north with the south, and some of their distinctions, leaving the field blind to colonialism and colonial history (although see Brown, 2014).

Such matters, as Braithwaite and Feeley suggested, spring from the epistemological roots of the field. Although colonial studies are deeply indebted to the Foucauldian concept of discourse, Foucault himself paid little attention to colonial violence. Such oversight has had many effects on wider understandings of state power. As Foucault's close contemporary, Franz Fanon (1952; 1961) explained, racialised violence in Algeria had a profound effect on the Metropole, shaping the development of the French nation state, its sense of identity and methods of coercion. So, too, colonial violence in British-ruled India did not follow Foucault's trajectory (Sharpe, 1993). In short, rather than being hidden and insidious, punishment by colonial rulers was often excessive, ritualized and ceremonial.

### **Expanding the penal field**

Taking a global frame allows and indeed requires a more diffuse approach. Topics that have previously been bracketed off, due to their location in other legal systems, spring into view. Most obviously, bordered forms of penalty like immigration detention, prisoner transfers and deportation draw into question the definition of punishment and the penal field (Aas, 2014; Bosworth, 2017a, b; Barker, 2017b). For those experiencing them, the similarities are clear. Whether or not they have ever been imprisoned before,

detainees commonly refer to their administrative incarceration in punitive terms. 'I'm in prison!' they claim. 'I'm in prison, but I've done nothing wrong.' 'They treat us like criminals'. 'They treat us worse than animals.' Such sentiments are ubiquitous (Bosworth, 2014; Griffiths, 2014; Turnbull and Hasselberg, 2017). Staff members are not immune, expending considerable effort in trying to differentiate their job from that of a prison officer (Bosworth, 2016). "Let's not beat around the bush," one detainee custody officer in Heathrow IRC told Mary.

"you've got metal fencing with razor wire, you've got bars at the window, you've got locks, bolts on doors, okay, so yes, it is theoretically, a prison environment. Yes, we do hold ex-foreign national prisoners here. So, we do have people that have committed quite serious crimes here but not forgetting, and I keep telling myself we're not a prison because we don't, we, we have guys that have never been in, inside a custodial environment in their life, you know. They've just messed up their paperwork or they've done something that that is against the UK immigration rights. So, it, although it is like a prison, I keep telling myself it's a, it's a removals, an immigration removals centre, that's it, although it looks like one." (cited in Bosworth, 2017a).

Yet, until recently immigration control practices have been considered marginal to the overall understanding of penalty (Lynch, 2017; Aas and Bosworth, 2013; Barker, 2017b). Expulsion and termination of membership have remained, in academic and legal terms, separate from penal discourse. From a legal perspective, different standards of rights and rule of law protections characterize the criminal law and immigration process. Consequently, deportation continues to be conceptualized as something other

than punishment. Yet, as scholars in border criminology and in law have been arguing for some time, migration and border control dramatically change the nature of contemporary penalty (Hernández, 2014).

A long-term legal resident in the UK, who was awaiting deportation to Kenya after his indefinite leave had been revoked due to a criminal conviction, offers a compelling example. Referring to one of his friends in detention, Asa<sup>3</sup> reported, 'I read Ray's file, and it said in it that he has been suspected for arm possession and trafficking.' Ray had neither been charged nor convicted of these allegations. Yet, Asa pointed out bitterly, in the immigration system, there can be no expectation of due process. 'When the judge sees that on the file and then looks at him from Jamaica than he is already been labeled. He is labeled as a drug dealer so what chances does he have? Why is it in the file?' Asa wanted to know, before muttering again, 'What chances does he have?' (Kenya, IRC Tinsley House).

Administrative processes around deportation, and especially its subjection to direct political intervention, breaks the nexus between sentencing and punishment (Grewcock, 2014). The purpose of border control thus supplements, and may even override a prison sentence, as detention and deportation erode the original aims and justifications of punishment. Such matters affect the experience of punishment, another detainee made clear. "When I was in prison," Waldo said angrily, "they told me, 'look, do these courses. It will help you to not re-offend.' I done them," he went on, "But now I'm sitting here [in detention] doing extra time" (Ghana, IRC Brook House, cited in Bosworth, 2013: 133).

Administrative practices such as detention and deportation not only are *experienced* as punishment by those subjected to them (Gerlach, 2017; Hasselberg, 2016; Golash-Boza,

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<sup>3</sup> Not his real name. All participants have been allocated pseudonyms.

2015), but also are *intended* as such. In so doing, they change the role and social purpose of penalty.

The interdependence of the two systems was vividly articulated by US President Trump in 2017 when he asserted that law enforcement practices targeting gang members should not, primarily, be concerned with imprisoning “bad, bad people” but for the most part should focus on “getting them the hell out of here”. Though infamous for his intemperate speech, Trump is not the only politician to express such views. On June 6, 2016, while still British Home Secretary, for instance, Theresa May, asserted in a House of Commons debate over the removal of foreign national offenders that: “Since 2010, the Government have removed over 30,000 foreign national offenders, including 5,692 in 2015-16—the highest number since records began.” Their strategy was simple: “We aim to deport all foreign national offenders at the earliest opportunity.” Under the previous government, she complained, “there was no plan for deporting foreign national offenders. Their rights were given a greater priority than the rights of the public here, and they were routinely abusing the appeals system to avoid deportation.”<sup>4</sup>

Indeed, it is not just politicians who view deportation as essential to punishment. In 2010, the US Supreme Court in *Padilla v. Kentucky* clearly stated that: “as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” The perception that deportation is more painful and therefore more efficient form of crime prevention is also common among Norwegian criminal justice authorities, usually considered far more moderate than those in the US or the UK. As one Norwegian police officer put it in Katja’s study:

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<sup>4</sup> Full text of the debate available here: <https://www.theyworkforyou.com/debates/?id=2016-06-06b.840.3>



To foreigners it doesn't matter as much if they are put in prison. It does not feel like punishment. Many are here in the country only to commit crime. So what is the countermove by the police? We have to use deportation. [...] This is a change from when I attended Police College. Then, crime prevention was prison, individual and general prevention. For East-Europeans prison is like a hotel where they get a daily allowance. Yes, ok, they are kept away from the society for a while. But with deportation they will be kept away in the long term! (cited in Franko and Mohn, 2015: 171).

Such statements are clear. Deportation is not auxiliary to the 'main' part of the process, the penal sentence; quite the opposite. 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. Deportation, in other words, is not just a vital addition to a prison sentence, but can even be used as a substitute for a criminal conviction (Aas, 2014).

Such developments are not merely qualitative matters, affecting the nature and purpose of punishment and penal power, although they are that as well. Particularly in the European context, these issues are also quantitative and, in their scale, raise considerable questions about the effectiveness of European human rights traditions (Snacken and van Zyl Smit, 2009) as a barrier to popular punitivism (Bosworth, 2011). Foreign nationals represent about half of the prison population in countries like Switzerland, Belgium, Greece and Austria, and about one third of the prison populations in the Scandinavian countries, Spain, Germany and Italy.<sup>5</sup> Western Europe is clearly a penal outlier in this context, a role that is seldom acknowledged in punishment and

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<sup>5</sup> <http://www.prisonstudies.org/map/europe>

society literature, where the label has been reserved for countries such the US, Russia and the UK (Melossi, 2015).

To be sure, actual deportation practices vary greatly, and depend in part on state resources. Governments may also face considerable resistance from destination countries as well as from critics in their own country. For example, since Britain reactivated a dormant deportation scheme for Jamaican nationals in 2016, a range of critics from radical No-Borders and anti-deportation groups to sitting Members of Parliament and the media have raised public awareness of this scheme (HMIP, 2017). The policy is also very unpopular in Jamaica, and has been widely criticized in local newspapers and in Parliament (Bosworth, 2017b; de Noronha, 2017).

As the numbers of 'deportable' foreign national prisoners has been steadily increasing in most countries in the global north (See Weber, 2014; Weber and Pickering, 2013, 2013a), states have increasingly turned to prisoner transfer agreements to 'get them out of here' before their sentence is finished (Pakes and Holt, 2017). Whereas, until recently, such arrangements were purely voluntary, over the past decade states in the global north have made them more robust. In Europe, such legal arrangements have their roots in the EU Prisoner Transfer Agreement that was brought in under the 2008 Framework decision 2008/909/JHA. Originally, this 2008 decision sought to encourage member states to return their citizens to one another. Yet, it has had a far wider effect, inspiring states like Britain and the US to sign treaties with a range of countries in the global south to force foreign nationals to serve out their prison sentences in their country of citizenship (Bosworth, 2017b; Kaufman, 2017; Mujuzi, 2012; Omale, 2014).

These treaties between governments are often facilitated by non-governmental actors, who 'secure' the individual on the flight, and design and administer incentive programs

in the return country for the local 'at risk' populations. In the involvement of these private firms, charities, and international humanitarian agencies, we witness the flexibility of punishment and how easily it is unhinged from the state and its territory (Bosworth, 2017a; 2017b). In so doing, the state itself is transformed (Barker, 2017b).

While the volume and scale of legal agreements pursued by the global north towards the south have increased over the last few decades, many of these arrangements take a familiar form. Not only are the individuals targeted by programs of forcible return often citizens of former colonies, and the justifications to remove them as Asa observed above, often racialized, but for those who are moved to serve the remainder of their criminal sentence, the prisons to which they are reassigned may have been originally constructed in the colonial era. This is certainly the case in Jamaica and Nigeria, where the UK has invested considerable effort and money in trying to enforce mandatory prisoner transfers (Bosworth, 2017b). Perhaps less obviously, the growing number of intra-EU deportations and transfers reveal similar post-colonial and neo-colonial dynamics within Europe, as citizens from Eastern European states are forcibly removed from the West (Barker, 2017a).

### **Penalty and its institutional design**

As the definition, character and reach of punishment changes, so too does the institutional design of its execution. Thus, we are witnessing the emergence of a novel, parallel institutional framework including not only immigration detention centres, but also prisons exclusively designed to hold foreign nationals (Kaufman, 2015; Ugelvik, 2012). At the same time, there has been a related expansion of policing agencies

dedicated to border enforcement and deportation (Bowling and Westenra, 2018). In the US, today, border policing makes up the majority of work conducted by the federal Department of Homeland Security, while in a growing number of states local police also check the immigration status of those whom they consider to be foreign (Armenta, 2017; Lynch, 2017). Across Europe, domestic police not only check immigration status but also run detention centres and enforce removals and deportations. In the UK, they are now required to check the immigration status of suspects, in order to help identify 'high harm' offenders who may be deported (Parmar, 2018). In Australia, the Department of Immigration has been renamed the Department of Immigration and Border Protection where its most high profile and contentious operations are lead by a new Australian Border Force with expanded powers that reach beyond those of traditional police officers. In Norway, the Police Immigration Unit, which is responsible for removals, is now half of the size of Oslo Police Department and larger than the national organized crime unit.

These examples reveal considerable variety in the institutional arrangements related to border policing and immigration control. Criminal justice and immigration elements form a number of assemblages (Aas, 2013) each of which require academic attention to nuance and empirical detail. The arrangements are, nevertheless, marked by a growing intersection between immigration control and criminal justice termed by Stumpf (2006) and others (De Guia et al, 2013; Bowling and Westenra, 2018) as 'crimmigration control'. In this system, the two spheres of control that were previously considered to be separate have become mutually reinforcing. As a result, traditional institutions, like the police and prisons, benefit from state investments in immigration control, acquiring new equipment alongside their expanded powers and responsibilities (Parmar, 2018).

However, border control and crime control may not always fit comfortably together. Prison officers often remain attached to traditional justifications of punishment, and may feel uncomfortable in the differential treatment of foreigners (Bosworth, 2011). Police too, are not always happy about their new powers and responsibilities to guard the border; the federal program known as 'secure communities' in the US, was initially rejected by a number of police forces (Chácon, 2012: 629). In the UK scholars have found some confusion among officers about the new focus of their work on foreign nationals, preferring instead to work on combating more traditional crime (Parmar, 2018). Similar matters have been identified in Holland (van der Woude and Brouwer, 2017)

Attention should therefore also be paid to competition between the two systems and to forms of resistance against the emerging hybrid rationalities. These new control strategies remain dependent on the public (Aliverti, 2015) as well as private actors and non-governmental organisations. The field is malleable and ripe with innovation, ad hoc thinking, and discretion (Sklansky, 2012). Although it can be argued that the state has always had administrative processes to fall back on, migration control is pregnant with possibility for a more unchecked and far reaching penalty. Thus, we see, for example, how Australian customs agents effectively operate custodial suites at sea where migrants are intercepted and returned, or transported directly to offshore detention (Pickering, 2014). This interplay between imprisonment, administrative detention and expulsion is yet to attract sustained attention from students of contemporary penalty not only when it comes to institutional design, practical arrangements and the standard of rights, but also in terms of understanding penalty's social role and purpose.

## **Penality's role and purpose in a global society**

Deportation, immigration detention, foreign-only prisons and prisoner transfer agreements do not only change the institutional and geographical nature of punishment but they suggest a different logic and purpose. Traditionally, modern criminal justice has sought to reintegrate offenders into the social and, just as importantly, has been justified in these terms (Braithwaite, 1989). The prison, Foucault insisted, sought to discipline and then return delinquents as productive members of society. More recently, attention has been given to incapacitation, warehousing and mass imprisonment, particularly in the Anglo-American context, as forms of governance and social control (Alexander, 2012; Garland, 2001; Simon, 2009; Gottschalk, 2006).

As several observers have pointed out, the emerging institutional regimes, and the bureaucratic efforts and therapeutic work that is conducted in sites of bordered penalty like immigration detention centres, are driven by a different logic (Ugelvik, 2012; Bosworth, 2013; Kaufman, 2015; Barker, 2017a; 2018). Their main purpose is to facilitate expulsion and to encourage the willingness of foreign nationals to return (to their presumed land of origin) rather than to reintegrate (into the national). Non-citizens are neither to be reintegrated into the community nor warehoused within state territory, although they may at various points find themselves included in such strategies. Rather than desert or rehabilitation, famously targeted at the 'soul', the punishment of foreigners seeks to return people to where they 'belong'. The intentionality of the state is thus directed outwards, beyond state territory, rather than inwards, back into the social. This rationality has been described by Bigo (2006) and others (Aas, 2011; Weber, 2014) as 'ban-optic'. Instead of the panoptic 'training of souls' (Foucault, 1979); priority is put on banishment and territorial exclusion (Aas, 2011).

In the movement from the Panoptican to the Banoptican we bear witness to a more complex interplay between territory, geopolitics and penalty as deportation and prison transfer agreements organize bodies geographically and according to state-defined markers of membership. Such practices expand the geographic reach of the contemporary penal state, revealing significant interconnections between internal and external dimensions of the penal field and, in their geographical orientation, make visible global dimensions of penal power and its colonial history and reiterations (Aas, 2013; Bosworth, 2017b; Bosworth, Parmar and Vázquez, forthcoming, 2018).

A vital point here is that bordered forms of penalty enact different aspects of state sovereignty from traditional penal strategies. Governments operate with a bifurcated purpose, maintaining internal order with an external focus (Aas, 2013), as they seek to return people to their 'proper sovereigns' (Barker, 2017a). Their focus, in other words, is on *who* the offenders are rather than on the seriousness of their offence. Punishment, in this case, is not so much concerned with moral censure than it is with issues of identity (Bosworth, 2012), nationality and control of cross-border movement.

Such factors are evident in the recent wave of criminalisation of minor offences related to unauthorised movement evident in many countries in the global north. In the US, immigration offences now outnumber all federal offences, including drugs, and now account for half of all federal arrests (Chácon and Bibler Coutin, 2018). Criminal prosecutions for illegally entering and re-entering account for a large proportion of federal government's law enforcement in a trend that is likely to continue under the current administration (Lynch, 2017). Also the UK and other jurisdictions have witnessed progressive criminalisation of immigration related offences, even though the actual enforcement may not always follow legislative fervour (Aliverti, 2012).

In these examples, we can see that, under conditions of globalization, the penal field has become infused by novel rationalities with particular focus on expulsion and control of unwanted cross-border movement. However, it would be misleading to think that the emerging penal rationalities and discourses are purely exclusionary. As the influential body of work on humanitarianism (Fassin, 2011) and penal humanitarianism (Bosworth, 2017b) shows, those excluded from the inclusionary, bio-political and welfare rationalities directed at western citizens, are governed by an emerging humanitarian language and reasoning, which may at least offer a form of minimalist bio-politics (Redfield, 2005; Johansen, 2013; Franko and Gundhus, 2015). This trend is related to the rise of new penal actors in the field such as NGOs and other private actors, which are actively involved in practices such as detention and deportation.

“The political dream” of many of these schemes, political theorist William Walters (2016: 438) suggests, “is to provide a sufficient level of material inducement such that the migrant places themselves on the plane, without the need for guards, restraints or any spectacle of enforcement.” In as much as punishment and migration control has relied on coercive measures, it has plied a side business in the promotion of ‘voluntary’ compliance with migration management whereby internal border controls are structured so as to drive migrants to ‘voluntarily’ report to the authorities. Some parts of the world describe this as ‘intent management’ which Weber and Pickering (2013a) have identified as a part of a neo-liberal responsabilisation agenda in which “state authority operates through a veneer of individual choice (2013a: 1)

### **Tough on crime, tough on migration and crime: enduring punitiveness**



In the current global political climate, to be tough on crime is to be tough on immigration and crime. The demonisation and criminalisation of alien others over a period of decades is well traced and documented (see Arendt, 1968; Pickering, 2001). As Mona Lynch (2017: 214) puts it, “through an iterative process, unauthorized immigrants come to be viewed publicly and politically as criminal subjects who need to be managed through criminal justice means ... [and] as immigrants come to be seen as criminals, support for using law enforcement resources for immigration control increases.”

The high octane political and public debates over immigration, particularly in relation to asylum seekers, have often been marked by emotionality and exclusionary use of old racial, gendered and religious tropes. In this rhetoric, the realities or facts around immigration and crime are unnecessary – for it is the perceived existential threat, rather than the real that has propelled the criminalisation of alien others. The deserving and the undeserving, the genuine and the bogus are elided in an exclusionary push justified by unbridled electoral and populist politics.

Expending significant political, material and ideological efforts on border policing regimes is rightly regarded as the heart of the regulatory effort to sustain national sovereignty. Assertions of borders in crisis and out of control have assumed the necessity of blended criminal justice and, increasingly, military style responses. NATO vessels thus patrol Europe’s southern borders, creating a sense of control and political vigor at a time of perceived crisis. The militarised response is particularly salient when it comes to the greatest external criminal threat – the terrorist, who has been detached from a political base and tied, through ethno-racial-religious markers, with the threatening migrant.

At the same time, heightened anxieties over 'home grown terror' have come to epitomize the ways the welcomed migrant remains forever cast as a potential threat. The 2017 US Presidential travel ban applied to seven predominantly Muslim countries was presented as means of focusing US energy on the intertwined threats of terrorism, illegal immigration and border security. The effect was to ensure membership is never certain or complete for a migrant – and that the actions available, instrumental and symbolic – are unencumbered by the usual requirements of process and punishment. The sense of exceptionalism and the amplification of historical and racial prejudice has militated against longer term, transnational considerations and responses to mass migration (Pickering, 2014).

Drawing on fears of terrorism and ethno-religious conflict, the criminal-alien other gives penal populism a common sense appeal when on so many other fronts its attractiveness has begun to fade (Bhui, 2018). Many Western countries today are experiencing a decline in popular punitiveness and have begun to experiment with the decriminalization of drugs and alternatives to mass imprisonment. As fear of crime has dropped in public opinion surveys, and where it is replaced by concerns about economy and immigration, familiar emotionally charged language and symbolic politics has been directed against non-members (Barker, 2018).

Walls, as Wendy Brown (2010: 70) observes, offer “the spectacle of a clear and strong inside/outside, friend/enemy distinction comporting (or aiming to comport) with national borders”. They may look like articulations of hyper-sovereignty, but are actually often compensating for its loss (ibid. 67). However, these developments cannot be simply read as a “return” of the national – a vindication to all those who may have doubted the salience of global frames of understanding. Instead, they spring from global

inequality and are continuously put into a global context by media and political discourse. In other words, through the resurgence of nationalism, contemporary penalty reveals its truly global nature.

Such developments challenge traditional understanding of, and some established assumptions about, punitiveness. They demand that we rethink not only the dynamics behind popular punitiveness but also the relationship between punitiveness and welfare (Barker, 2018). In most accounts of penal power, societies with high levels of welfare are assumed to be more inclusive and less punitive. This narrative has been most notably established in the influential studies of Scandinavian exceptionalism (Pratt, 2009; Ugelvik and Dullum, 2011; Pratt and Eriksson, 2013). However, a growing body of recent scholarship has documented the strength of exclusionary sentiments in Scandinavian societies directed particularly against non-members (Ugelvik, 2012; Barker, 2013; Aas, 2014; Barker, 2017a; 2017b; 2018). These places, Vanessa Barker (2013a) observes, have a Janus-faced nature. For example, while topping world rankings on welfare and happiness, and by most accounts considered one of the most humane and inclusionary welfare states, Norway is also among European leaders in deportation (Franko and Mohn, 2015).

Paying attention to bordered forms of penalty illuminates how the application of standards and governmental rationalities vary in terms of membership. When viewed in this light what constitutes a punitive or an inclusive society, is not always clear. A society may be inclusive, parsimonious and welfare-oriented towards members, yet deeply exclusionary and punitive towards non-members. Under these circumstances, scholars of punishment need to be mindful of differentiated narratives about penal power. Central elements and characteristics of penal power including rights, institutional

settings, reintegration and punitive sentiments vary by citizenship, adding and mixing with other, more familiar vectors of identity like class, ethnicity, and gender. At the same, time, however, foreigners, by virtue of their lack of legal citizenship are particularly vulnerable to bordered forms of penalty that create boundaries of membership which determine who is deserving of certain penal rationalities, rights, inclusionary sentiments and the civilizational achievements of the rule of law and welfare provisions.

## **Conclusion**

Nearly thirty years ago, David Garland (1990: 3), exhorted criminologists to consider “how penal processes come to exist in their present form and with what kinds of consequences.” That text, *Punishment and Modern Society*, played a crucial role in extending the methodological and epistemological base of much criminological scholarship, and eventually gave birth to the field known as punishment and society. In this article we have argued that an epistemological move beyond the nation state framework requires that studies of punishment and society need to adjust if they are to make sense of current transformations of penal power. Although there is by now an established body of work on international criminal justice and the international criminal court (Savelsberg, 2010; Lohne, Forthcoming), the impact of globalization inside national criminal justice systems, and on the nature of penal power more broadly, is in dire need of theoretical rejuvenation.

Our aim has been to argue that some of the key penal concepts need fundamental rethinking in the global context. Globalization, we have suggested, demands a different

and expanded understanding of punishment and penal power in geographical and substantial terms. Moreover, not only the definition, but also central aims and justifications of punishment, as well as its institutional design and execution, need to be adjusted in order to include the proliferation of bordered forms of penalty. Penal power in a global context is often driven by a different logic and purpose, and includes a series of practices and actors, which deserve further scholarly attention. These include among other humanitarian actors, volunteers and other private and transnational organizations. Finally, we have argued that understanding penal power in a global context challenges the established assumptions about punitiveness and the relationship between punitiveness and welfare. The proliferation of border control and bordered forms of penalty reveal intricate connections between citizenship, penal power and social exclusion which are equally, or even more pronounced, in societies which have been traditionally considered less punitive and committed to human rights.

This theoretical work needs empirical ballast. In its attention to prison and the internal workings of the (western) nation state, punishment and society literature has all too often been characterized by a division of intellectual labour in which much of the literature on punishment and society exists at some distance from empirical studies of penal processes and effects (Bosworth and Kaufman, 2012). As a consequence, real people have been, however unintentionally, stripped out of much theoretical analysis, obscuring gendered and racialized contingencies and individual experiences. Bodies subjected to discipline and control, are, in much of the field, theorized with little attention to skin color, class, gender and nationality. Together such matters have left many slow to register the impact of globalization on structures, practices and experiences of punishment which always come to ground through routine daily

practices. Punishment in a global society is complex, nuanced, not always what we expect. It requires subtle and persistent investigation to understand.

In a global context, penal power is increasingly deployed to cancel membership of particular groups (Aas, 2014; Zedner, 2016). Deportation is, as Grewcock (2014: 124) observes, a mechanism for “reconfiguring established members of the community as aliens”. Several observes have pointed out in this journal, (Melossi, 2003; De Giorgi, 2010; Calavita, 2003), that by creating an environment of fear and insecurity about membership, states turn large categories of people into probationary and shadow members who live in conditions of permanent illegality. In so doing, contemporary penal strategies targeting foreigners display an affinity with neo-liberal economic policies. People who are illegal are also exploitable. These developments call for a nuanced understanding of membership. Studies of contemporary penal power should take into account not only the divisions between citizens and non-citizens, but also growing categories of conditional and probationary, or precarious, members, whose status is being revoked or drawn into question through the use of criminal law (Zedner, 2010, 2013).

Hollowing out and destabilizing the notion of citizenship affects everyone. Thus, as prisons and detention centres hold increasing numbers of foreign citizens for deportation, they make clear the contingency of rights and belonging for us all. These developments can thus by no means be considered marginal, but stand at the center of debates about the constitution and nature of contemporary societies. They also reveal with renewed urgency the productive role of penal power (Foucault, 1979) in the raging political and wider societal debates about national identity and membership. Students of

punishment can bring important contributions to these conversations. However, much more work needs to be done.

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