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Beyond criminalization: Immigration and the challenges for criminology
Au-delà de la criminalisation : l'immigration et les enjeux pour la criminologie
Más allá de la criminalización: inmigración y los desafíos de la criminología

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Résumé de l'article

Le but de cet article est de discuter de l'importance croissante des châtiments légaux administratifs dans le champ pénal, à partir de la judiciarisation des conflits d'immigration au Canada. À l'aide d'une analyse documentaire et des résultats d'une enquête de terrain menée à la Commission de l'immigration et du statut de réfugié du Canada entre 2007 et 2009, nous présenterons certaines caractéristiques de la mise en forme des conflits en droit de l'immigration et de leur façon de punir et nous soutiendrons que celles-ci diffèrent substantiellement de celles propres à la mise en forme pénale. Notre objectif ultime consistera à problématiser l'idée de criminalisation de l'immigration comme une catégorie capable de nuancer la complexité des formes de réaction sociale administratives. Nous suggérerons qu'il faut plutôt appréhender la punition en droit administratif comme telle (*mesures de police* et *sanctions administratives*) et repenser son rôle au sein du champ pénal et ce, afin de mieux comprendre l'ensemble des réactions sociales dans les différentes institutions juridico-politiques, l'interaction et la complémentarité de celles-ci ainsi que leurs logiques de gouvernance, de mise en forme et leurs implications sociales.

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Beyond criminalization: immigration and the challenges for criminology

João Velloso

Abstract

This paper discusses the increasing importance of administrative punishment in the penal field, using the judicialization of immigration conflicts in Canada as an example. Based on documentary analysis and the results of fieldwork conducted at the Immigration and Refugee Board of Canada between 2007 and 2009, I will present some characteristics of the legal translation of conflicts in immigration law and the forms of punishment involved. I will argue that these differ substantially from those in criminal law. My ultimate goal is to question the idea of criminalization of immigration as a category capable of nuancing the complexity of administrative forms of social response. Instead, I suggest that we should understand the forms of punishment in administrative law as they are (*police measures* and *administrative sanctions*), rethinking their role in the penal field to better understand how these forms of penalisation may even supplement or superimpose traditional criminalisation processes.

Keywords

Immigration Control, Punishment, Penology, Penal Policy, Immigration and Refugee Board of Canada (IRB).

Introduction[1]

In the last decade, different forms of regulation arose in response to the *9/11 Attacks*, especially regarding security, characterizing what former U.S. vice-president Cheney called in a speech just after the attacks, "the new normalcy".[2] These measures have most directly affected foreign nationals who were already facing the exclusionary effects of the securitization of borders in developed countries during the 1990s (Bigo, 1998; Calavita, 2003, Simon, 1998; Wacquant, 1999). While migrants were already among the most vulnerable (Calavita, 1998; Simon, 1998; Pratt, 2005), these new policies led to an important degradation of their limited rights in the United States, and more broadly in the West. This was also true in Canada,[3] even though the *Immigration and Refugee Protection Act* (IRPA; 2001, c.27), the main piece of legislation regulating migration in Canada, was already before the Senate before *9/11* and received royal assent without amendment two months later. In fact, the *new normalcy* discourses have had a greater impact on subsequent immigration policies and related regulations and practices, especially those regarding the enforcement of the IRPA and the policing of immigration.[4]

In an attempt to describe the nature and effects of newly adopted pieces of regulation and practices, social and legal scholars almost unanimously suggested that immigration control had become a matter of *crimmigration*, a fusion of immigration and criminal law (e.g. Miller, 2005; Stumpf, 2006; Aas, 2011) or, more commonly, that what was happening corresponded to a *criminalization of immigration* (e.g. Sayad, 1998; Palidda, 1999; Wacquant, 1999; Mathieu, 2001, 2006; Miller, 2003, 2005; Bosworth, 2008; Bosworth & Guild, 2008; Di Giorgi, 2010; Zedner, 2010; Bosworth & Kaufman, 2011). These concepts oversimplify the regulation of immigration conflicts, relabeling them as "crimes", and hide the most disturbing aspects of immigration control. In fact, immigration control is primarily, if not exclusively, based on

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[2] In: Bob Woodward, *CIA Told To Do "Whatever Necessary" to Kill Bin Laden,* Washington Post, 21-10-2001, Al. Available at http://www.pulitzer.org/archives/6612, last accessed 2012-02-28.

[3] A good inventory of this may be found in Crépeau & Jimenez, 2004.

[4] The *Canada Border Services Agency Act* (2005, c.38) and *Department of Public Safety and Emergency Preparedness Act* (2005, c.10) are good examples. These statutes created the new structure of Public Safety Canada and changed the role that the federal government played in the courts or in enforcing the IRPA.

administrative law, and most of the concerns raised by legal scholars with respect to the lack of legal safeguards provided in the immigration justice system are related to the fact that immigrants are not "criminalized", but dealt with through administrative law regimes. The main problem of the so-called criminalization of immigration is that immigrants are being detained, deported and kept under surveillance without having access to the package of rights generally associated with the criminal process.[5] In that sense, it is more accurate to suggest that: "immigration law has borrowed the enforcement components of criminal justice without the corresponding adjudication components", as Stephen Legomsky put it (2007, p.473).

Legomsky's concept of an *asymmetric incorporation of criminal justice norms* (2007) is particularly interesting. It clearly emphasizes the selectiveness with which immigration law has retained certain punitive aspects of the criminal justice system without incorporating the corresponding legal and procedural safeguards. But it can also be misleading. Indeed, the notion of incorporation presupposes that punitiveness is located solely in the criminal justice system and that it radiates to other normative systems.[6] This "contamination argument" is historically questionable. The use of administrative law as a non-criminal and quasi-legal punitive form of social control is not new,[7] although it surely became more explicit post-9/11 with the increasing use of military law and immigration law during the war on terror. Therefore, both *criminalization* and *asymmetric incorporation* are somewhat problematic concepts. In this paper, I will take Legomsky's approach a step further, challenging both fronts of the criminalization consensus. In particular, I argue that immigration control is not about crime, but rather about the process of administrative translation of conflicts (*mise en forme administrative*

[5] This was one of the issues raised before the Supreme Court of Canada in Charkaoui *v.* Canada (Citizenship and Immigration) 2007 SCC 9. The Court held that it was valid to use immigration law for domestic security.

[6] "Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication-in particular, the bundle of procedural rights recognized in criminal cases-have been consciously rejected. Rather than speak of importation of the criminal *justice* model, then, a more fitting observation would be that immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal *enforcement* model while rejecting the criminal *adjudication* model in favor of a civil regulatory regime" (Legomsky, 2007, p.472).

[7] Johan Steyn (2004) reminds us that the use of administrative law, and especially military law, is in fact a recurring theme throughout history in times of crisis. For instance, he notes that during the Second World War, the use of detention without charges or trial, and courts' significant deference to the executive were the norm. Similarly, the *1834 Poor Law Act* referred to by Foucault (1995) was not criminal law, but administrative law.

des conflits); and that immigration punishment is not about penalties (*poena* / *peines*), but about police measures.

In my view, immigration control in Canada can be fairly described as a continuous state of exception within the Rule of Law, a sort of legal grey hole (Dyzenhaus, 2006; Vermeule, 2009) where the constraints on ministerial action are so weak that they allow the government to do more or less whatever it wants and often with a tribunal's stamp of approval. More specifically, I focus on the judicial component of immigration control,[8] presenting how events are translated into penal facts at the Immigration and Refugee Board (IRB), and how this type of punishment differs from mainstream (criminal-based) forms of punishment.

These observations are based on documentary analysis of the different statutes, regulations and guidelines governing the IRB, as well as its decisions and mainly my impressions of its practices (Bourdieu, 1990) and legal sensibilities (Geertz, 1986) that are based on two years of ethnographic fieldwork conducted in the eastern region of the IRB (Montréal and Ottawa). The IRB, Canada's largest independent administrative tribunal,[9] is a specialized federal tribunal that operates throughout the country and is responsible for the judicial administration of conflicts and disputes regarding immigration, and decisions for refugee protection claims made in Canada. The tribunal is organized in four divisions: Refugee Protection Division (RPD), Refugee Appeal Division (RAD),[10] Immigration Division (ID) and Immigration Appeal Division (IAD), with their own members, guidelines, procedures and practices. I decided to exclude the refugee cases and sponsorship appeals from this analysis due to argumentative reasons and to space limitations; consequently, my

[8] Not all cases will reach the tribunal. Illegal immigrants and visitors, for instance, are a matter of policing and dealt almost exclusively by the Canada Border and Security Agency (CBSA).

[9] Until recently, the true independency of the IRB was questionable because members had temporary mandates (usually for 3 years; renewable) and "political motivations" played an important role in appointments and renewals, as revealed by different members during my fieldwork and by other scholars (e.g., Crépeau & Nakache, 2008). The combination of these two variables is highly problematic because it placed members in a vulnerable position to keep their jobs. As one of my interlocutors said: "if you don't 'perform' (do you know what I mean?), you won't get a renewal… a friend had a one year [renewal] and she got the message".

[10] The RAD was designated by the IRPA (ss. 110, 111 and 171), but it came into force only on Dec. 15, 2012, roughly six months after the *Protecting Canada's Immigration System Act* received Royal Assent. This division did not exist during my fieldwork at the IRB and therefore it is not discussed in this article.

portrayal of the IRB is based mainly on practices and decisions that are directly related to punishment.

My argument will be organized in two main sections: In Part I, *Beyond Criminalization*, I will examine the administrative style of penal translation (Acosta, 1986) at play at the IRB, focusing on rules of evidence, procedural aspects and key symbolic issues of the ID and IAD. In *Beyond Penalties* (II), I will present some forms of punishment in immigration law that look similar to criminal forms of punishment (detention, removals and surveillance), but will emphasize they are essentially preventive and that most of the time they are not following the same sentencing principles. These sections illustrate two main aphorisms: 1) immigrants are far from being criminalized; and 2) immigrants are most of the time not subjected to penalties, but to police measures. I conclude by arguing that immigration control raises a number of theoretical and methodological challenges for criminology, suggesting that these forms of penalization should be thought of on their own terms. In that sense, I follow Valverde who directs us to analyze legal effects by asking: 'what a certain limited set of legal knowledges and legal practices *do*, and how they work, rather than what they are (2003, 11; Bourdieu, 1990; Valverde, 2009). In this case, irrespective of the interests guiding legislative action and practices, their real effects are that non-criminalization, or even decriminalization, may be more punitive than traditional criminalization.

Beyond criminalization: on the administrative translation at the IRB

One of the first lessons students learn in Immigration and Refugee Law classes is that any possibility of adjudication is better than having to deal only with immigration bureaucracy. As mentioned above (Steyn, 2004), a substantial part of immigration control and penalization is simply policing. The Canada Border and Service Agency (CBSA) police immigration, but they have a broader mandate than traditional public police institutions. In addition to a policing role, CBSA officers also act as public prosecutors at the tribunal (IRB) and as judges, because they also have jurisdiction over non-permanent residents, not needing an IRB decision to deal with them. In other words, illegal immigrants and temporary residents can be arrested, detained and/or deported directly by CBSA at their own discretion – without *making crime* (Ericson, 1981; Acosta, 1987) or accessing any kind of tribunal. Moreover, exceptional procedures such as *security certificates*, that may detain and remove foreigners, are

completely outside of the scope of the IRB. Therefore, in the following paragraphs, I will focus on a more limited facet of immigration control: what kind of justice system manages migrants with stable status in Canada? I will briefly portray how the Immigration and Immigration Appeal Divisions deal with permanent residents when they breach the IRPA and/or its regulations. This will help to clarify how events are, judicially, penally translated (Acosta, 1987) in the immigration system and how this process differs from criminalization.

The Immigration Division (ID) conducts two kinds of hearings: (in)admissibility hearings and detention reviews. The first one is held to decide if a foreign national or permanent resident is inadmissible or removable from Canada. The second hearing is a review of the grounds for detention, deciding if the foreigner should remain in detention or not (and if released, under which conditions). Both hearings are adversarial, allowing cross-examination and other legal procedures associated with due process. However, the low standards of proof and credibility issues significantly affect the balance between the parties, undermining the fairness of the procedures. The key issue in this division is the use of the strict liability standard to assess the immigrant's responsibility for the violation of immigration rules. The Minister is credible by definition and the defendant's intent is not relevant. This symbolically structures the division in such a way that, in practice, there is nothing to be disputed. As an illustration of this, at the beginning of my fieldwork different actors strongly discouraged me from conducting any observation at the ID, arguing that it would be a "waste of time". Appellants' counsels told me that "there is not a lot to do there [at the ID] because you have already lost" and the Minister's counsels said that "it is really fast [compared to appeals] (…) ID members do not have a lot of jurisdiction [power to influence]". Not surprisingly, as I will detail later, the outcomes of the ID are highly exclusionary in terms of remaining in detention and removal orders.

The Immigration Appeal Division (IAD) follows the same procedural system and rules of evidence but, in this division, the adversarial system surprisingly works (at least as it is supposed to work in a normative system with low standards of proof). What makes a difference is that the IAD can take humanitarian and compassionate grounds (H&C) into consideration.[11] This completely changes the conflict resolution dynamics because H&C

[11] There are three criteria to allow appeals (or at least, to stay a removal order): "(a) the decision appealed is wrong in law or fact or mixed law and fact"; "(b) a principle of natural justice has not been observed"; or "(c) (…)

opens some room for disputes. Thus, even if the liability standard is technically still the same, the appellant's intentions are a central aspect when assessing H&C. When there are H&C, there are disputes on how the appellant has been dealing with the breach(s) of the IRPA (and/or Criminal Code), if the conditions imposed by any constituted authority are being complied with, and other circumstances of the case (e.g. best interests of a child).

The IAD deals with different kinds of conflicts including hearing appeals from rejected sponsorship applications, failures to comply with the residency obligation and ID admissibility hearings decisions (removal order appeals and Minister's appeals, which are rare as they lose on average only 3% of the cases[12]). Overall, appealing a decision made by the immigration bureaucracy (sponsorships and residency obligations) can be easier for the migrants because IAD members may find that a visa officer or the CBSA made an error of law and/or of fact or that they did not observe a principle of natural law (IRPA, s. 67.1(a) and (b)). However, appealing an ID admissibility decision based on ss. 67.1(a) and/or (b) is very rare because law and facts are almost indisputable at the ID. Finally, the only viable option for persons appealing removal orders is under H&C (IRPA, s. 67.1(c)) because in such cases there is something to be disputed. These dynamics were recurrent during my fieldwork. In the few cases I observed where the appellant believed that the ID made an error, he or she usually dropped ss. 67.1(a) and/or (b) during the pre-hearing conference and continued the appeal only on the basis of H&C. Interestingly, when looking at both divisions more broadly, we realize that it is the exception (H&C) that re-establishes the main characteristic of legal institutions ("settle disputes": Bohannan, 1965) and provides the main effective arguments to avoid or reduce punitiveness.

Rules of evidence are at the core of any normative system. They constitute its epistemological basis: a set of procedures, techniques and practices orienting how knowledge is or should be built. Generally, these rules are structured through three major questions or principles. First, what is admissible as data? Second, who has the duty to prove a disputed assertion, or who has the burden of proof? And third, what is the level of verification required to validate a given

sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case" (IRPA; s. 67.1).

[12] IRB, 2002b, 2003, 2004, 2005, 2006, 2007, 2008, 2009a, 2010, 2011, 2012.

position and/or a piece of information, or what is the standard of proof? The arrangement of these epistemological questions, added to the liability criteria and the procedural system in place, will more or less determine a tribunal's ontology. If one adds jurisprudence and practices, this constitutes the tribunal's worldview (*weltanschauung*), how its actors interpret, define and represent social reality.

According to the IRPA, the Immigration and Refugee Board (IRB) "is not bound by any legal or technical rules of evidence" and "may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances"[13]. In other words, the IRB may receive practically anything. Concerning the second principle, the formal rule is that the burden of proof lies on the claimant, whether he or she is claiming a refugee status (the 'refugee'), a removal order (the Ministry), a sponsorship appeal (a citizen who is sponsoring), etc. This is especially true at the ID, but at the IAD the burden of proof may shift from one party to the other due to H&C and the practical dynamics of the disputes. For instance, sometimes the Minister's counsel is clearly not comfortable when the appellant counsel is flagrantly weak or not well prepared for the appeal, and he or she will produce evidence for the appellant as well. On some occasions, the Minister's counsel approached me during pauses and/or lunchtime saying: "I feel bad when [the appellant's] counsel is not doing his job" or "Did you see? I had to produce evidence for him. I am not here to do his job, but it is not fair when a counsel sits there and does nothing". Moreover, as a cross-examination technique and dispute strategy, the appellant counsels anticipated the Minister's counsel by questioning their own clients. This allowed them to adduce evidence that would in any case be brought forward by the Minister's counsel, but in a manner that is favourable for their clients (e.g., by emphasizing their knowledge and remorse about their past wrongdoing, letting them contextualize the original conflict, how they are rehabilitated and their plans to avoid this kind of behaviour in the future). Consequently, it does not really matter *a priori* who has the burden of proof; the important issue is how this burden will be managed in the proceedings.

[13] In: *IRPA*, respectively ss.170 g) and h) (regarding the RPD proceedings), 173 c) and d) (for the ID), and 175 b) and c) (for the IAD).

Finally, regarding the third principle, the IRB works with the civil standard of proof and not the criminal one ("beyond any reasonable doubt", which requires more certitude). The general standard of proof for all divisions is the "balance of probabilities" (more likely than not), but the standard can vary according to the legal issue before the board. Sometimes, the *IRPA* specifies what the applicable standard of proof is, but jurisprudence and practices also play a major role. For example, lower standards of proof such as "serious possibility" or "reasonable grounds to believe" are used by the tribunal: the first can be applied to the danger of torture (*s.97(1)(a)*) at the RPD; and the second, an even lower standard, is usually applied in cases of organized criminality (*s.37(1)(a)*) at the IAD. This criterion of "reasonable grounds to believe" is problematic, being just above that of "mere suspicion". This is interesting (and tragic) because the lowest possible criterion is applied specifically to criminal law-like offences, which would require much higher standards if they were pursued in the criminal justice system. This leads to paradoxical situations where the Crown cannot substantiate a criminal accusation due to lack of evidence, but charges laid by the police are enough to satisfy administrative standards for the purposes of detaining foreigners, prosecuting them through the IRB and eventually removing them from Canada.

A good example is the definition of gang member used at the Board. To consider someone to be a gang member in the immigration justice system, there is no need to have a criminal decision establishing membership. You just need to satisfy the criteria elaborated by Criminal Intelligence Service Canada and that are "used by every police force throughout Canada" (*Jean-Yves Brutus v. CIC*, 2002; file no. 0018-A2-01385):

> "1) Information from a reliable source (that is, inside gang member or rival gang member, community resource, school authority, member of the business community, citizen); 2) A police surveillance report confirming that the person associates with known gang members; 3) An admission from the person; 4) The person's direct or indirect involvement in a gang crime; 5) Judicial findings that confirm the person's membership in a gang; 6) The person displays gang identification marks, has performed initiation rituals, or possesses gang paraphernalia and symbols (tattoos, weapons, clothing)." (*Jean-Yves Brutus v. CIC,* 2002).

Basically, a little more than "mere suspicion" of involvement with gangs may be enough to arrest, detain and/or deport a foreigner. This reasoning is not restricted to the IRB, but was confirmed by higher courts as legally valid, for instance in the case of the judicial reviews in *Thanaratnam v. Canada (2004) F.C.* and *(2005) F.C.A.*

Mr. Thanaratnam was arrested and charged several times, but none of the charges resulted in trial. His application for judicial review was first allowed, sending him back to the IRB for a hearing *de novo* because "the Board's conclusion that Mr. Thanaratnam was a member of a gang was not supported by the evidence". However, the federal government appealed the decision and won at the Federal Court of Appeal a year later, restoring the initial decision of the IRB. The Court's reasoning is both instructive and clear as to what criteria is to be used by the Board:

> "The Court's function is to decide not whether, on the evidence before the Board, there were 'reasonable grounds to believe', but only whether it was obviously irrational for the Board to conclude that there were. In the absence of an allegation that the Board erred in law, or that its procedure was unfair, it was difficult to establish that the Board's conclusion that 'reasonable grounds to believe' existed was patently unreasonable. A conclusion is not patently unreasonable merely because inferences different from the Board's could reasonably be drawn from the evidence. While no single piece of evidence was determinative in this case, the overall evidence was sufficient to ensure that the Board's decision could not be characterized as patently unreasonable."[14] (Emphasis mine)

[14] Thanaratnam v. Canada F.C.A. (2005). *Note added to the original in 2021:*
Please note that before the Supreme Court decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of deference to review IRB decisions was "patent unreasonableness", a standard developed in *Baker v. Canada* [1999] 2 SCR 817. During my fieldwork, the *Baker* era, unless the IRB decision was found patently irrational or unreasonable, it was okay to defer to whatever the decision maker had decided. *Dunsmuir v. New Brunswick* did away with the distinction between "patent unreasonableness" and "reasonableness *simpliciter*". The Court suggested referring to this standard of review as "reasonableness *simpliciter*", but insisted that in doing so, it did not "pave the way for a more intrusive review by courts" (par. 48). One year later and after I left the field, the Supreme Court ruled in *Canada v. Khosa*, 2009 SCC 12 that the standard of "reasonableness *simpliciter*" applied to immigrations matters. However, it seemed clear that the reasonableness standard was fairly less reasonable when applied in the immigration context than in labour issues, such as in *Dunsmuir*. Justice Fish's dissenting opinion (par. 139 to 157) in *Khosa* is very interesting and revealing in this regard. Justice Fish agrees that the standard of review is indeed reasonableness, but he argues that the IAD decision was unreasonable (par. 147-148). More recently in *Canada v. Vavilov*, 2019 SCC 65, the Supreme Court ruled that reasonableness is the default standard of review in administrative law in Canada, reaffirming *Dunsmuir*, and specifying two exceptions to this general rule, under which the correctness standard would apply: first, when the legislature indicates that correctness is appropriate standard; and second, where the rule of law requires a correctness standard. Finally, it is not only fairly reasonable, but also correct to infer that whether one

The presumption of innocence is not the relevant principle here. This is not a situation in which the maxim *in dubio pro reo* (in doubt, on behalf of the accused) applies, but rather one where that of *in dubio pro rex* (in doubt, on behalf of the king) applies. Administrative punishment is grounded on this inversion of principles and on the lack of legal safeguards. This process of punitive decriminalization (Velloso, 2006) / *undercriminalisation* (Ashworth & Zedner, 2010) has been a frequently used alternative path to punishing immigrants while avoiding criminal trials since at least the nineteenth century (Walters, 2002).

The notion of *legal holes* (Steyn, 2004, Dyzenhaus, 2006; Vermeule, 2009) is very useful to think about this process and to take Legomsky's arguments a step further. The concept of legal holes was originally developed in the context of military law by Lord Steyn, using *Guantánamo Bay* as an example, and later nuanced as *black and grey holes* and extended more broadly to administrative law by Dyzenhaus and Vermeule. Vermeule summarizes Dyzenhaus' (2006) definitions as follows:

> "Legal black holes arise when statutes or legal rules 'either explicitly exempt [] the executive from the requirements of the rule of law or explicitly exclude [] judicial review of executive action'. Grey holes, which are 'disguised black holes', arise when 'there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases'. Grey holes thus present 'the façade or form of the rule of law rather than any substantive protections'." (Vermeule, 2009, p.1096).

Framing immigration control and the IRB as a *legal grey hole* seems to be even more nuanced than the idea of *asymmetric incorporation*. It is a justice system specialized in immigration that is based on administrative law principles and does not necessarily incorporate criminal justice enforcement or theories. Not only does the immigration model reject criminal adjudication, but also, it does not consider more fundamental legal guarantees. The degradation of rights continues, making the IRB far too deferential to the executive. Judicial review technically exists, but most applications will end at the "leave" stage. When cases are

follow the pragmatic and functional approach (from *Baker*) or the current standard of review analysis (from *Dunsmuir*, *Khosa* and *Vavilov*), the result is quite similar: patently unreasonable decisions made by the IRB are still given a lot of deference by higher courts as if they were reasonable.

actually heard, Federal Courts barely set limits to executive action, which can be partially explained by the limited purview of judicial review itself. Moreover, there is no need to invoke the Schmittian idea of *exception* (Schmitt, 1985) and, therefore, temporarily suspend rights and civil liberties to regulate immigration because, by definition, foreigners do not enjoy the same rights and civil liberties that are available to ordinary citizens. That is what it is ultimately about: ordinary laws, regulations, policies and practices.

In the following section, I discuss the kinds of punishment that may be inflicted on foreign nationals, showing how immigrants who go through such a system are almost always punished in some way.

Beyond penalties: Notes on the administrative way of punishing immigration conflicts

There are instruments in the immigration justice system that can be associated with the notions of punishment or exclusive forms of social control. However, they are not exactly equivalent to the criminal notion of punishment (*peine*), or even to administrative sanctions (e.g.: fines). Yet, before going further on the punitive outcomes of the IRB, I will briefly contextualize punishment from an immigration law perspective. In administrative law, there are two conceptions of legal intervention with a punitive dimension: administrative sanctions and police measures. The main distinction is that administrative sanctions are considered repressive, and police measures, preventive. Administrative sanctions are similar to penalties (*peine*) in that both are framed as an *a posteriori* response to a given event (repressive). However, the legal guarantees are weaker in the case of administrative sanctions: no *mens rea* is required, strict liability is often sufficient and lower standards of proof are applied.

The punitive instruments used in immigration law in Canada are not administrative sanctions, but policing measures (*mesures de police*). They are not an *a posteriori* response to an alleged offence, but an *aprioristic* one aiming to maintain public order.[15] The legal reasoning is not to sentence a wrongdoer, but to take the necessary measures to guarantee peace and public order. For instance, the logic behind refusing entry or removing someone

[15] Paolo Napoli (2011) links the origins of police measures to the development of state bureaucracies during the Ancient Regime, based on a different rationale than contemporary liberal forms of criminal law.

from Canada is not necessarily to inflict a punitive response, but to prevent the immigrant from endangering an ordered Canadian society or potentially offending in the future (*IRPA*, ss.34 to 42). The *security* and *health* grounds of inadmissibility are quite explicit in this sense:

> "34. (1) A permanent resident or a foreign national is inadmissible on **security grounds** for: (*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (*b*) engaging in or instigating the subversion by force of any government; (*c*) engaging in terrorism; (*d*) being a danger to the security of Canada; (*e*) engaging in acts of violence that would or might en-danger the lives or safety of persons in Canada; or (*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*)."; and: "38. (1) A foreign national is inadmissible on **health grounds** if their health condition: (*a*) is likely to be a danger to public health; (*b*) is likely to be a danger to public safety; or (*c*) might reasonably be expected to cause excessive demand on health or social services." (emphasis mine).

It is no coincidence that one of the major immigration detention centers in Canada, located in Laval (QC) is called *Centre de prévention de l'immigration* (Immigration Prevention Center). In fact, this makes sense in an administrative law perspective and is coherent with what was presented in the previous section. As Walters argues, we are after all dealing with pre-liberal "forms of rule" and "deportation [wa]s anticipated by the local police of the poor in sixteenth and seventeenth century Europe" (2002: 281), when criminal and administrative law were still blurred in municipal and royal law. "Although the twentieth century will witness the juridification of deportation within national and international law," he adds, "in its inception, it is an administrative not a juridical measure" (281). This represents a second counterpoint to Legomsky's argument, similarly to the *legal holes* concept: pre-liberal (barely limited) police power and police measures are administratively based. As a result, the punitive use of administrative law is not necessarily the consequence of a spreading out or a "widening of the carceral archipelago", as it is sometimes suggested (i.e., Cohen, 1985; Feeley & Simon, 1992). In fact, if any "contamination argument" can be made, it is the other way around, with administrative law strategies increasingly influencing the criminal justice system (e.g., zoning restrictions, preventive detention, preventive orders, security perimeters). As we will see

below, the use of police measures in immigration control is exclusionary and may be imposed concurrently with other forms of punishment from different normative systems.

Detention

Foreign nationals are not incarcerated in immigration detention centres (or prevention centres) as part of a sentence. They are not serving time or accessing carceral programs. Instead, they are just there waiting for their release or for any other police measure to be executed (e.g., conditional release or removal), which rarely takes more than two months.[16] As discussed in the previous section, the Immigration Division reviews the grounds for detention applying lower standards of proof and stricter liability criteria. The exclusionary results of detention reviews are quite impressive, as those who get in, do not get out unpunished. The most recent statistics (from 2011-2012) show that out of almost 18.000 finalized detention reviews,[17] 81% remained in detention (the peak post-IRPA), 12% were released on terms and conditions, 1% had their conditions changed and only 6% were released without conditions (IRB, 2012). These numbers were similar in 2010-2011 (IRB, 2011: 17-19), but the ID was slightly more exclusionary in the previous years: 4% were released without conditions in 2009-2010, 6% in 2008-2009, 5% in 2007-2008, 4% in 2005-2007, and only 3% in 2004-2005 (IRB, 2008; 2010). Here again, these immigration terms and conditions are not necessarily the same as those imposed by a criminal court or by the parole board. I will come back to this issue later in this section.

Removals

The Immigration Division also conducts (in)admissibility hearings to determine whether a foreigner should remain in Canada or not. As the population and the key issues of the division are more or less the same, the results are also not that different. In 2011-2012, 71% of approximately 2900 admissibility hearings "resulted in a removal order being issued" (inadmissible); "4% resulted in permission to enter or to remain in Canada; "7% were subject to the withdrawal of the inadmissibility allegation by the CBSA at the hearing"; and "16% were

[16] The recent *MV Sun Sea* case is a clear exception to this: 443 of the 492 Tamils smuggled in the *Sun Sea* were detained, costing over $ 22 million in detention plus almost one million in ID procedures. (Nakache, 2011: 58-62)

[17] Please note that the same person can pass through more than one detention review process as they are carried out after 2, 7 and every 30 days. Thus, the actual number of foreigners in detention is quite lower.

closed after the person failed to appear" (IRB, 2012). These numbers remained fairly stable since the IRPA came into force.

Three factors should be taken into account to understand better how these statistics translate into removals. First, the lower number of hearings in comparison to detention reviews can be explained by the fact that there is usually more than one detention review per person (Nakache, 2011) and that CBSA may directly issue removal orders if the person is not a permanent resident (temporary residents, visitors and illegals) or for "less complicated breaches" (CBSA, 2004), such as falsified passport or misrepresentation. Second, when someone fails to appear, a removal order is issued: therefore, we should add that 16% to the removal numbers. Third, CBSA withdrawals do not necessarily mean permission to enter or to remain in Canada; sometimes it means a voluntary departure. As a result, the removal outcome of "more complicated breaches" is not 71%, but something between 87% and 96%. In some cases, removal orders can be appealed (at the Immigration Appeal Division) or judicially reviewed by the Federal Court. Once appealed, the removal order will not be executed until a decision is made, but it does not mean that the foreign national is "free" as detention and/or surveillance measures may apply.

Surveillance (Terms and conditions, and Stays)

I use the category surveillance in this paper to refer to the forms of free-floating control (Deleuze, 1990: 240) imposed by the IRB as possible outcomes of detention reviews and removal order appeals. I prefer using "surveillance" to "probation" because the conditions imposed are not exactly equivalent to probation and they are not necessarily associated to the purposes and principles of sentencing. Moreover, immigration conditions are operationally distinct from those eventually imposed by criminal courts and/or parole boards. Apart from CBSA bureaucratic mechanisms (border control, customs, etc.), there are two main forms of surveillance that may be imposed by the IRB: 1) *terms and conditions* associated with release from detention; and 2) *stay orders* that are the temporary suspension of removal orders under strict conditions.

In both cases, terms and conditions are imposed on a foreign national, but the conditions imposed upon release from detention are fairly light when compared to those of the

stay orders. In the first case, there are measures to make sure that the person will appear in court and will keep "clean" or "out of trouble" (that he or she will report to CBSA, keep the peace etc.). Stay order conditions can be very harsh as they are usually framed as an alternative to deportation. Almost everything is possible, including "counselling with priests", "learning to read", other unconventional measures and *welfare sanctions* (e.g., making reasonable efforts to seek and maintain full time employment) (Garland, 1981, 1985). Such conditions can be problematic when reviewing their cases, especially when there is a failure to comply because the foreigner will end up in detention or facing deportation.

In fact, this is not surprising as IRB members are free to decide whatever they want as long as it is not "obviously irrational" or "patently unreasonable" (Thanaratnam v. Canada, 2005). In the case of stay orders conditions, it can be even "worse" as there is no control from any higher instance court[18] and no apparently "landing zone"[19] for stay orders. Basically, there are no sentencing principles such as uniformity, proportionality, predictability and equality; it is a matter of discretion. It does not matter what the original offence was, even if symbolically this is taken into consideration. Everyone who appears there is facing the same fate (banishment). The bottom line is to dismiss the appeal and execute the removal order, or to allow the appeal, which is quite rare prior to a stay order.

If the IAD member decides to stay the removal order, as a practical rule, she or he can choose the length of the stay between one to five years, generally taking into consideration what was submitted by the parties in terms of time and conditions. Observation shows that these negotiations play a larger role than the criteria established on the IRB Removal Order Appeals Guidelines (2002a and 2009b: Chapters 9-10). Further, the member may simply "copy and paste" the terms and conditions that are generally imposed (regardless of the offence originally committed or of the offender's background) or choose specific ones that are more suitable to the circumstances of the case (e.g., prohibiting someone with gambling problems from attending a casino or other related institution). As a result, someone who was imprisoned for one year might

[18] "Because appellants tend not to seek judicial review of specific terms and conditions imposed as part of a stay order there is no judicial authority on terms and conditions within the immigration field" (IRB, 2002a:10-4).
[19] Criminal law judges use the term "landing zone" (or "*fourchette*" in Quebec) to situate the minimum and maximum length of punishment that may be imposed to an offender in comparison to other similar cases. Thus the landing zone is where a judge can "land" his or her decision without running the risk of being overturned by upper instances (also being in the land zone requires less justifications).

have a stay of two years, whereas another person who committed the same crime and served the same penalty in the criminal justice system could end up with a five-year stay. The legal realist maxim of "what really matters is what the judge had for breakfast" may be very true at the IRB.

The following case is a good example of how theses dynamics are totally disconnected from the original crime and sentence. In this case, the appellant counsel (AC) proposed a five-year stay to the Minister's counsel (MC) to settle joint submissions as follows:

> *AC – Stay?*
>
> *MC – How long?* [MC was agreeing and was open to negotiations]
>
> *AC – Five years.*
>
> *MC – Five years?* [MC was very surprised; AC asked the maximum]
>
> *AC – Well, the youngest kid will be 18* [years old] *by the end*…

Since the key issue on appeal is humanitarian and compassionate grounds, in this case, the best interests of the children was the main aspect to be taken in consideration. His youngest child was almost 14 at the time and would be 18 by the end of the stay. It was the age of his child that determined the length of the stay (surveillance) and not the offence itself or the offender's individual characteristics, as usually occurs in criminal sentencing and parole. Surprisingly, this appellant ended up with a five-year stay with 16 conditions that were added to his probation conditions. They were supplementary and concurrent for at least one year (double surveillance by corrections and CBSA) and then he became subject to immigration control only. The total time of punishment was also extended, jumping from five years (combined criminal sentences) to around nine years (not considering the exponential effect of concurrent punishment).

Moreover, by the end of that long punitive period, there is no guarantee that the appeal will be allowed. The member may decide to dismiss the appeal (and the removal order will be executed) or even to extend the stay order, either changing or maintaining the previous conditions. Also, there are some situations in which a removal order is issued and the appeal is not granted, but the person is not deportable (e.g., risk of torture, stateless person, etc.). The result is a sort of limbo with indefinite carceral conditions. The reasoning is simple: if removal is not imposed, another

type of policing measure such as detention or surveillance will be substituted. This is exactly what happens in most security certificate cases: foreigners under a security certificate are considered inadmissible, but if they resist deportation, they are kept on detention or under strict surveillance conditions indefinitely or until they become deportable. Unfortunately, however, these indefinite carceral conditions are not restricted to these exceptional cases.

Beyond criminocentric dogmatism: Challenges to Criminology

To conclude, I would like to make some remarks on the case of the brothers Freddy and Danny Villanueva, a tragic story widely reported throughout the Québécois media. In the evening of August 9 2008, two police officers showed up in the parking lot of the Henri-Bourassa arena (Montreal-Nord), where they questioned a group of youth who were playing dice. Thereafter, there was an altercation between the police and the youth, and one officer fired four times, killing young Freddy Villanueva and injuring two other young people. The coroner's report has yet to be released and no charges have been laid so far. However, my interest here is on his brother Danny and the intersections between crime and migration. Danny has a past criminal record and, at the time of the events, was under bail conditions and a probation order to keep the peace following a criminal conviction in 2006 and charges for two distinct events that had occurred in June 2008 (robbery, using an imitation firearm, breach of probation, and shoplifting, breaches of ordinance and of an undertaking made a week earlier).[20] He was playing dice on that fateful date and as such, he would likely have received a ticket for a minor municipal offense (participating in gambling),[21] breaching his previous ordinance, probation order and undertaking again. It is not clear when he started dealing with the immigration system, but in April 2010, the ID issued a removal order against him and later in 2011 his appeal at the IAD was dismissed and the Federal Court refused to hear his request for judicial review. Danny Villanueva was once criminalized, but in 2008 he was immersed in a myriad of normative systems, most of them administratively based (pre-trial ordinances (bail), probation, regulatory offences and immigration).

[20] R. c. Villanueva Madrid, 2011 QCCM 23266; Villanueva Madrid c. R., 2011 QCCS 4851.
[21] Règlement sur les parcs, R.R.V.M., c. P-3, art. 6 : « Il est interdit à quiconque visite ou fréquente un parc : [...] 10°de conduire des jeux de hasard ou d'y participer ».

The concept of criminalization is not adequate to explain the penalization of migrants, and also cases such as Danny Villanueva's. Criminocentric approaches do not fully account for the nuances and the complexity of the punitive social reactions, both in terms of policing and judicialization, that we are facing more and more in the twenty-first century. Decriminalizing criminology is not a new or a radical proposal, but almost the natural development of the social reaction paradigm. Clifford Shearing (1989) and others have already suggested this regarding policing studies more than twenty years ago. We can reasonably argue that policing has changed a lot since then and today they are not even reduced to State institutions or to the idea of reaction (e.g., prevention, risk management, etc.). However, justice studies in criminology remain fairly criminocentric, even when approaching topics that barely touch upon criminal justice or that are not administrated by it (immigration, elite deviance, homelessness, etc.).

Building a society in which human diversity is "not subjected to the power of criminalize" (Taylor et al., 1974, p.282) misses the point of resistance to punitiveness and/or setting limits to State punitive intervention. The criminology of the future will not be criminocentric and, it will most likely review its own biased past. As Taylor, Walter and Young predicted: "this 'new' criminology will in fact be *old* criminology, in that it will face the same problems that were faced by classical social theorists." (1974, p.278). Framing social reaction as it is, beyond crimes and penalties, raises various methodological and theoretical challenges to a discipline that has the study of crime in its own name.[22] In that sense, the dialogue with other domains of social, socio-legal and legal scholarships that also collaborate in thinking about the penal field is more than welcome. This new wave of justice studies in criminology must venture out in the non-criminal world, even if to do so, criminologists have to partially abandon their traditional objects of study and approaches. Otherwise, our fate will be a certain obscurantism that will disconnect critical thinking from the increasingly recurrent forms of social reaction and their exclusionary effects.

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[22] I discuss the implications of administrative punishment to criminology in more depth in Velloso, 2013.

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Au-delà de la criminalisation : l'immigration et les enjeux pour la criminologie

Résumé

Le but de cet article est de discuter de l'importance croissante des châtiments légaux administratifs dans le champ pénal, à partir de la judiciarisation des conflits d'immigration au Canada. À l'aide d'une analyse documentaire et des résultats d'une enquête de terrain menée à la Commission de l'immigration et du statut de réfugié du Canada entre 2007 et 2009, nous présenterons certaines caractéristiques de la mise en forme des conflits en droit de l'immigration et de leur façon de punir et nous soutiendrons que celles-ci diffèrent substantiellement de celles propres à la mise en forme pénale. Notre objectif ultime consistera à problématiser l'idée de criminalisation de l'immigration comme une catégorie capable de nuancer la complexité des formes de réaction sociale administratives. Nous suggérerons qu'il faut plutôt appréhender la punition en droit administratif comme telle (*mesures de police* et *sanctions administratives*) et repenser son rôle au sein du champ pénal et ce, afin de mieux comprendre l'ensemble des réactions sociales dans les différentes institutions juridico-politiques, l'interaction et la complémentarité de celles-ci ainsi que leurs logiques de gouvernance, de mise en forme et leurs implications sociales.

Mots clés

Contrôle de l'immigration, Punition, Pénologie, Politique pénale, Commission de l'immigration et du statut de réfugié du Canada (CISR).

Más allá de la criminalización: inmigración y los desafíos de la criminología

Resumen

El propósito de este articulo es debatir la importancia creciente de las sanciones legales administrativas en el campo penal, a partir de la judicialización de los conflictos de inmigración en Canadá. Con el aporte de la literatura y de los resultados de un estudio de campo llevado a cabo entre 2007 y 2009 en la Comisión de la inmigración y de la condición de refugiado de Canadá, presentaremos ciertas características de los conflictos en el derecho inmigratorio, así como también de su manera de punir, y sostendremos que éstas

difieren substancialmente de aquéllas propias al funcionamiento penal. Nuestro objetivo final consistirá en problematizar la idea de criminalización de la inmigración como una categoría capaz de diferenciar la complejidad de las formas de reacción social administrativas. Sugerimos que es necesario, más bien, considerar la punición en derecho administrativo como tal (medidas policiales y sanciones administrativas) y repensar su rol en el seno del campo penal a fines de comprender mejor el conjunto de reacciones sociales en las distintas instituciones jurídico-políticas, la interacción y complementariedad de éstas, sus lógicas de gobernabilidad y de funcionamiento, así como también sus implicaciones sociales.

Palabras clave

Control de la inmigración, punición, penología, política penal, Comisión de la Inmigración y de la condición de refugiado de Canadá.