Editorial

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Biographical notes: Graham Hudson is an Associate Professor in the Department of Criminology at the Ryerson University. He obtained his BA (Hons.) in History and Philosophy from the York University, JD from the University of Toronto, LLM from the Queen's University, and PhD from the Osgoode Hall Law School. His current research interests include: national security law; the securitisation/ criminalisation of migration; the role of ('sanctuary') cities in the governance of migration; and, legal theory. He is an executive member of the Canadian Association for Refugee and Forced Migration Studies, and Senior Research Affiliate of the Canadian Network for Research on Terrorism, Security and Society.

Delphine Nakache teaches in the areas of public international law and migration and refugee law. Her research and writing interests include securitisation of migration and citizenship policies, migration and human rights standards, immigration federalism and employment standards. One of her current research focuses on the protection of temporary migrant workers in Canada and on pathways to permanent residency for these workers. She is also involved in several research projects: one is looking at the policy consequences and human rights impacts of asylum policies in Europe and Canada and the two others are studying employment standards (in a context of employment-related geographical mobility in Canada and of precarious jobs in Ontario).

Idil Atak is an Associate Professor and the Graduate Program Director for the Department of Criminology. She joined the Department of Criminology in 2013. She received her PhD from the Université de Montréal's Faculty of Law. She was a SSHRC Postdoctoral Fellow at the McGill Centre for Human Rights & Legal Pluralism. She is the Editor-In-Chief of *International Journal of Migration and Border Studies* (IJMBS). She is a member of the International Association for the Study of Forced Migration's (IASFM) executive committee, the former President of the Canadian Association for Refugee and Forced Migration Studies (CARFMS), and a Research Associate at Hans & Tamar Oppenheimer Chair in Public International Law (McGill University). Her research interests include irregular migration, refugee protection, and international and European human rights law.

The criminalisation of migration describes one of the ways in which state power is used to exclude non-citizens from social, legal and geographic spaces. Although its precise meaning remains unclear, a juridical reading of the criminalisation of migration or 'crimmigration' refers to the apparent blurring if not fusion of the functions of immigration law and criminal law, even while they remain formally distinct (Stumpf, 2006; Guild, 2010; Aliverti, 2012). The façade of legal form conceals the unfettering of executive power from the rule of law, which is then deployed in ways that can be described (and is certainly experienced) as vindictive, punitive, and dehumanising. The starkest examples of crimmigration are to be found in the corpus of laws, policies and practices that largely (though far from exclusively) global North states have employed to prevent and reduce undesirable human mobilities (Bigo, 2002; Vázquez, 2015). The removal of legal pathways of migration and the construction of illegal alternatives underscore the inseparability of the governance of migration and the governance of security, where public and private actors manage perceived threats to state and citizen.

Although its roots stretch deeper, the criminalisation of migration bourgeoned following 9/11. Owing to a mixture of domestic, international, and technological factors, states have increasingly sought to exhibit authority to conceal the functional and normative limits of their control over borders. Among the most conspicuous measures deployed are: the dismantling of fair asylum systems, mass and indefinite detentions, enhanced surveillance practices, a host of interdiction strategies, such as carrier sanctions and visa regimes, and the conscription of private parties in the practice of bordering (Mountz, 2010; De Giorgi, 2010; Atak et al., 2018). They adopted what they call, presumably without a sense of irony, 'smarter' approaches to border control, characterised above all by reliance on technologies and security professionals (Topak et al., 2015; Sontowski, 2017). One consequence is that police, security intelligence agencies, and other domestic agencies that have historically had little to do with immigration are now key players in the governance of migration (Waller Meyers, 2003; Bigo, 2014). The integration of national security agencies is mirrored by growing regional and international networks, aimed at increasing information-sharing and law-enforcement cooperation.

This byzantine web of agreements, memorandums of understanding, policies and laws provides the appearance of legality to even more diffuse operational practices that remain untethered to legitimate exercises of state authority. This is most evident in the relative indifference of courts to questions of rights and the rule law in such contexts. Domestic courts have tolerated, if not stamped their imprimatur, on virtually every instance of crimmigration, including abject deprivations of liberty, the use of secret

evidence in deportation hearings, and the deportation of *de facto* small-time criminals and security threats to face the well-founded fear of persecution. Already subject to exceptionalism, immigration law has been hollowed out even further by the infusion of security processes (Hudson, 2018).

This special issue reflects on the ways in which crimmigration is constituted, constructed, and challenged in diverse settings. It seeks to promote a better understanding of the dynamics and processes pertaining to crimmigration, and to provide a critical analysis of the practical and human rights implications associated with it.

The special issue starts with an article by Alessandro Spena, who exposes the disconnect between crimmigration law and the democratic-republican principles up which state authority rests, including respects for rights and the rule of law. Spena argues that the exercise of legal authority, as coeval with political authority, presupposes relations of inclusion among members of, or visitors in, a political community. This requires us to adopt a nuanced and shifting conception of the meaning and boundaries of belonging, citizenship, and non-citizenship. But crimmigration is in essence a 'programmatically' exclusionary enterprise, targeting entire groups of persons as undeserving of political and legal recognition. Spena uses the figure of the 'bad' migrant (e.g., the terrorist, war criminal) and the 'ugly' migrant (e.g., the 'irregular migrant', 'bogus refugee', 'queue jumper') to trace how rote exclusionary practices cannot be justified by reference to (legitimate) state authority, which presupposes a relationship of mutual recognition. He concludes that the logic of crimmigration forces us to treat it, not as an instance of state authority, but as an illustration of 'purely physical power'. This leaves us wondering what role law might play in contesting crimmigration.

Graham Hudson takes up this question by exploring professional and academic reliance on criminal law principles as an antidote for judicial indifference to the constitutional rights claims of migrants. Reviewing jurisprudence in the USA and Canada, Hudson observes that the practical success of this strategy depends on legal analogies between criminal punishment and a rather small body of immigration measures that produce 'extreme' or 'exceptional' hardships. On the one hand, invoking the familiar language of punishment can stoke more empathetic responses among the judiciary. On the other, this strategy concedes hierarchical distinctions between criminal consequences and immigration consequences, rendering the recognition of constitutional rights conditional on the form of a measure and not its moral implications. The article concludes that, at least in law, the power of cirmmigration lies in paradox: to contest it, we must accept its basic terms.

Efrat Arbel and Ian C. Davis provide the first of two looks at crimmigration in the context of Canada. Arbel and Davis situate their analysis of Canadian immigration detention within the framework of time. They argue that one of the most problematic aspects of the Canadian regime is that detentions are indefinite: with no clear limit on length of detention and no inclusive process of detention review, detainees 'never know when – or if their detention will end'. Arbel and Davis analogise immigration detention with solitary confinement, illustrating the myriad of mental health implications produced by indefinite detention in both regimes. Their analysis shows that despite these similarities, judicial reviews of the two regimes have been markedly different: courts have declared aspects of solitary confinement unconstitutional, while upholding the legality of immigration detention. This is so because courts reviewing immigration detention have failed to meaningfully engage with factual submissions relating to the

mental health implications of indefinite detention; by contrast, courts rely extensively on such evidence when reviewing solitary confinement. Their findings challenge courts and legislatures to justify this distinction or to align immigration detention with the constitutional principles and doctrine currently applied in the context of solitary confinement.

Jona Zyfi and Idil Atak examine the safe country of origin (SCO) – now the designated country of origin (DCO) policy in Canada, which the government consciously modelled after a similar EU regime was implemented. Beyond formal legal similarities, we learn that the histories, rationales, and implementation of SCOs in the two jurisdictions share much in common. In the EU context, SCOs were used to manage the mobility of 'undesirable' migrants within the Schengen zone, and have been supported by extensive integration of domestic asylum policies and legislation as well as transnational security/information-sharing networks; but a primary concern was, and remains, efficient case management amidst growing backlogs and escalating costs of the refugee systems. Canada likewise employs the language of security, border control, and 'bogus' refugees to rationalise the cost-saving dismantling of substantive and procedural rights. Zyfi and Atak meticulously parse through the byzantine procedural changes ushered in through the SCO regimes in Canada and the EU. Their findings highlight that each SCO/DCO regime lacks a principled justification and, if retained, should be radically reformed to cohere with principles of procedural fairness, equality, and *non-refoulement*.

Elspeth Guild surveys the use of technologies and rationalities of border control to ease the collection of personal data of travellers. Guild uses Donald Trump's travel bans as a case study, which requires states to provide information relating to their citizens and resident foreigners to US authorities in return for being left off the list of banned countries. Guild's findings highlight that this measure, initially billed to the US people as concerned with preventing Muslims from entering the USA, has in fact been used to bolster the global influence of US security and law enforcement agencies. In particular, the USA has compelled targeted states to make a stark choice: hand over swaths of personal information relating to some of their own citizens, or, risk all citizens being excluded from the USA. Guild discusses how this leveraging violates individual rights to privacy and the presumption of innocence as well as the international legal principle of reciprocity, which protects the capacity of states to freely and carefully negotiate the terms of information sharing.

Susan Kneebone and Antje Missbach explore the transnational dimensions of crimmigration through the lens of Australian and Indonesian anti-human smuggling laws. Kneebone and Missbach focus on the pernicious human rights effects of these laws over time, which are historically rooted in a complex interplay of bilateral, international, and domestic policy dynamics. As with Guild's analysis of Trump's travel bans, we see the transnational influence of Australia's political power in the region, which has drawn Indonesian citizens (chiefly economically vulnerable fishermen) into draconian criminal law machinery unhinged from serious considerations of moral blameworthiness. As their chief example, they highlight that Australia's anti-smuggling laws apply to persons who facilitate irregular entry, even for reasons unrelated to profit or transnational organised crime; of particular note is the fact that these laws are mechanistically applied to youth offenders, contrary to international norms. The domestic application of Australia's criminal power against Indonesian citizens has had multiple, negative impacts on Indonesian law and, more fundamentally, on Indonesian social attitudes towards asylum seekers.

Jean-Pierre Cassarino provides significant theoretical clarity to the relationship between international relations and law, arguing that crimmigration at the international scale is neither unidirectional nor hierarchically imposed. Adopting a largely constructivist lens, Cassarino explores how interactions between EU and North African states in the field of border control draw from, and reconstitute, a kaleidoscopic array of both international and domestic interests, identities, and expectations that polarise the diffusion of euro-centric norms. He posits that the responsiveness of North African states to international border/security frameworks has been conditioned by local government's willingness to consolidate domestic and regional power, in the face of vulnerabilities linked to their retreat from the economy, inability to produce public goods, a restless working class, and poor social dialogue. The prospect of filling regional power vacuums following the collapse of the Gaddafi regime in Libya and competing with rising non-state powers has also conditioned the response of some states to EU pressures. Importantly, these dynamics have reconstituted the content and process of international norms, with the rise of informal, *ad hoc* arrangements between the EU and individual North African states that encode material interests and (customary) norms within cross-cutting transgovernmental networks or 'systems of reciprocal conditionalities'. Cassarino concludes that, far from 'adhering to a Western script', North African countries are able to 'reinforce their own centrality or betweenness in the relations between Europe and the African continent'.

The seven articles selected for this special issue improve our knowledge and understanding of crimmigration. They highlight important theoretical and empirical implications associated with this growing phenomenon. Consequently, we hope that the contributions will retain the attention of researchers and stakeholders interested in this challenging topic. We wish you excellent reading!

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