

## Crimmigration: The Risks of the Growing Use of Immigration Law within the Criminal Justice System

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Translated by **Ana Carla Farrer Gonçalves**. Original article published as: Brandariz José Ángel, *Crimigración: los riesgos del uso creciente del derecho migratorio en el marco del sistema penal*, Revista Derecho Penal y Criminología (Vol. 45/119) 2024, pp. 145-170.

**Suggested citation:** José Ángel Brandariz, Crimmigration: The Risks of the Growing Use of Immigration Law within the Criminal Justice System, translated by Ana Carla Farrer Gonçalves, Journal DPPC, 2026, 2, 20-43.

URL: <https://www.dppc.online/en>

## Abstract

In March 2024, the fifth global congress on crimmigration studies was held in Portland (USA). Over the last fifteen years, crimmigration has become a fundamental framework for studying the processes of criminalisation of irregular mobility and, more generally, the growing interrelation between criminal law and immigration law. This paper presents the main lines of debate surrounding the theory of crimmigration. Alongside this, it analyses an aspect that has not received sufficient attention in the international literature on the subject, namely the tension between the objectives of migration control and those of criminal control. This tension, which manifests itself both at the regulatory level and even more so in the application of the law, has given rise in various countries to different punitive models, which generally tend to prioritise the interests of migration control over those of criminal law and the criminal justice system.

**Keywords:** crimmigration, criminalisation of immigration, migrationisation of criminal law, immigration control system.

## Résumé

En mars 2024 s'est tenu à Portland (États-Unis) le cinquième congrès mondial des études sur la crimmigration. Au cours des quinze dernières années, la crimmigration est devenue un cadre d'analyse fondamental pour l'étude des processus de criminalisation de la mobilité irrégulière et, plus généralement, de l'interrelation croissante entre le droit pénal et le droit des migrations. La présente contribution expose les principales lignes du débat autour de la théorie de la crimmigration. Elle analyse en outre un aspect qui n'a pas reçu une attention suffisante dans la littérature internationale en la matière, à savoir la tension entre les objectifs du contrôle migratoire et ceux du contrôle pénal. Cette tension, qui se manifeste tant au niveau normatif que, plus encore, dans l'application du droit, a donné naissance, dans divers pays, à des modèles punitifs différents, lesquels tendent généralement à faire primer les intérêts du contrôle migratoire sur ceux du droit pénal et de la justice pénale.

**Mots-clés:** crimmigration, criminalisation de l'immigration, migrationisation du droit pénal, système de contrôle de l'immigration.

## Resumen

En marzo de 2024 se celebró en Portland (EE. UU.) el quinto congreso mundial de estudios sobre crimigración. Durante los últimos quince años, la crimigración se ha convertido en un marco fundamental para el estudio de los procesos de criminalización de la movilidad irregular y, más en general, de la creciente interrelación entre el derecho penal y el derecho migratorio. Este trabajo presenta las principales líneas de debate en torno a la teoría de la crimigración. Asimismo, analiza un aspecto que no ha recibido suficiente atención en la literatura internacional sobre la materia, a saber, la tensión entre los objetivos del control migratorio y los del control penal. Esta tensión, que se manifiesta tanto en el plano normativo como, aún más, en la aplicación del derecho, ha dado lugar en diversos países a distintos modelos punitivos, que en general tienden a dar prioridad a los intereses del control migratorio sobre los del derecho penal y el sistema de justicia penal.

**Palabras clave:** crimigración, criminalización de la inmigración, migracionización del derecho penal, sistema de control migratorio.

## Contents

|                                                                                                         |           |
|---------------------------------------------------------------------------------------------------------|-----------|
| <b>Introduction .....</b>                                                                               | <b>23</b> |
| <b>I. The crimmigration thesis: basic content .....</b>                                                 | <b>23</b> |
| <b>II. Fractures in crimmigratory convergence: the priority of immigration control objectives .....</b> | <b>27</b> |
| <b>Conclusion .....</b>                                                                                 | <b>36</b> |
| <b>Bibliography .....</b>                                                                               | <b>37</b> |

## Introduction

[1] Academic debates on the criminalisation of mobility have gained increasing relevance over the last two decades. In this context, a growing number of authors have adopted the crimmigration thesis to analyse changes in migration control. This theoretical perspective argues that (administrative) migration law (hereinafter ML) and criminal law (hereinafter CL) have been converging in the recent past, leading both to the criminalisation of breaches of ML and to the imposition of ML sanctions in cases of crimes committed by foreign nationals. The crimmigration thesis has opened up new avenues of analysis and revitalised academic discussions on immigration control, detention, deportation and, more generally, on the legal response to crimes committed by foreign nationals. It is therefore appropriate to analyse how and to what extent the type of reforms examined by the crimmigration thesis have strained basic principles of the criminal justice system, particularly in relation to immigration law. However, before doing so, it seems appropriate to review the crimmigration thesis, its content and the main debates it has generated.

### I. The crimmigration thesis: basic content

[2] At the beginning of this century, the criminalisation of immigration became a topic of analysis that generated increasing interest in the American academic literature<sup>1</sup>. At the same time, European literature was examining European Union (EU) policies in this area as an example of the securitisation of migration and asylum<sup>2</sup>. Certainly, there were good reasons for academic studies to adopt such perspectives. The United States had passed a series of legislative reforms in the 1990s with the intention of facilitating the use of immigration control measures to deal with crimes committed by foreign nationals – notably the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act, both of 1996. Subsequently, changes in budgetary policies and logistical reforms implemented at the turn of the century reinforced the criminalisation of irregular foreign nationals in the United States<sup>3</sup>. In the EU,

<sup>1</sup> CHACÓN J. M., *Managing Migration through Crime*, Columbia Law Review Sidebar (Vol. 109) 2009, 135 – 148; LEGOMSKY S. H., *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, Washington & Lee Law Review (Vol. 64/2) 2007, 469 – 528; MILLER T. A., *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, Georgetown Immigration Law Journal (Vol. 17) 2003, 611 – 666.

<sup>2</sup> FERNÁNDEZ BESSA C., *Frontera Sur: Nuevas políticas de gestión y externalización del control de la inmigración en Europa*, Barcelona 2008; HUYSMANS J., *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, Abingdon 2006.

<sup>3</sup> GOODMAN A., *The Deportation Machine: America's Long History of Expelling Immigrants*, Princeton 2020; KANSTROOM D., *Deportation Nation: Outsiders in American History*, Cambridge 2007.

meanwhile, irregular migration was becoming an increasingly significant and contentious issue in the political arena<sup>4</sup>. Europe, too, was joining the trend towards criminalisation through the adoption in 2002 of the so-called 'Facilitators Package'<sup>5</sup>, which criminalises activities that facilitate irregular migration<sup>6</sup>.

[3] In this context, the American legal scholar Juliet Stumpf<sup>7</sup> developed an innovative perspective to analyse this set of regulatory reforms. By studying the new laws and policies implemented in the United States, Stumpf highlights that although they have traditionally been two distinct and loosely related branches of the legal system, immigration law and criminal law have gradually merged to form a new legal order, distinct from its two components<sup>8</sup>. Specifically, Stumpf<sup>9</sup> notes that "*the merging of the two branches, in both substantive and procedural terms, has created parallel systems, in which immigration law and the criminal justice system are separated only formally*".

[4] Nevertheless, Stumpf<sup>10</sup> emphasizes that significant differences still exist between immigration law and criminal law, ranging from the validity of constitutional guarantees to the role played by race and national origin in both branches of the legal system. These are not minor differences, if only because "*the constitutional guarantees that have traditionally protected defendants in criminal proceedings [...] have not crossed the boundary between immigration law and criminal law*"<sup>11</sup>.

[5] Notwithstanding these differences, Stumpf<sup>12</sup> considers that convergence in criminal law is particularly evident in certain specific areas. Firstly, there is an overlap between immigration law and criminal law in substantive terms<sup>13</sup>, as a result of various legal innovations, notably the expansion of deportation on criminal grounds, the criminalisation of immigration offences, and the detention and deportation of foreign nationals on grounds of public security. Alongside this, the progressive strengthening of immigration policing systems and agencies is leading the field of mobility control to increasingly resemble the criminal justice system<sup>14</sup>. Finally, there is a growing parallelism between criminal proceedings and immigration sanctioning procedures<sup>15</sup>: beyond the development of immigration policing powers and jurisdictional procedures of an immigration nature

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<sup>4</sup> BALIBAR E., *Nous, Citoyens d'Europe? Les frontières, l'État, le peuple*, Paris 2001; GUILD E., *Security and Migration in the 21st Century*, Cambridge 2009.

<sup>5</sup> The "Facilitation Package" consists of Directive 2002/90/EC of 28 November 2002, aimed at defining the facilitation of unauthorised entry, movement and residence, and Framework Decision 2002/946/JHA of 28 November 2002, aimed at strengthening the criminal law framework for the suppression of the facilitation of unauthorised entry, movement and residence.

<sup>6</sup> MITSILEGAS V., *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, Cham 2015; MITSILEGAS V., *The Criminalisation of Migration in the Law of the European Union: Challenging the Preventive Paradigm*, in: Gatta G. L. / Mitsilegas V. / Zirulia S. (édit.), *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on 'Crimmigration'*, Oxford 2021, pp. 25 – 45.

<sup>7</sup> STUMPF J., *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, American University Law Review (Vol. 56) 2006, 367 – 419.

<sup>8</sup> See also STUMPF J., *Crimmigration: Encountering the Leviathan*, in: Pickering S. / Ham J. (édit.), *The Routledge Handbook on Crime and International Migration*, Abingdon 2015, pp. 237 – 250.

<sup>9</sup> STUMPF, *Crimmigration Crisis*, p. 376.

<sup>10</sup> STUMPF, *Crimmigration Crisis*, pp. 392 – 395, 416 – 417.

<sup>11</sup> STUMPF J., *Two Profiles of Crimmigration Law: Criminal Deportation and Illegal Migration*, in: Pakes F. (édit.), *Globalisation and the Challenge to Criminology*, London 2013, pp. 91 – 109, p. 94. On the key issue of the scope of rights and guarantees in the field of criminal law, see, at length, SPALDING A., *The Treatment of Immigrants in the European Court of Human Rights: Moving Beyond Criminalisation*, Oxford 2022.

<sup>12</sup> STUMPF, *Crimmigration Crisis*, p. 381.

<sup>13</sup> STUMPF, *Crimmigration Crisis*, pp. 381 – 386.

<sup>14</sup> STUMPF, *Crimmigration Crisis*, pp. 386 – 390.

<sup>15</sup> STUMPF, *Crimmigration Crisis*, pp. 390 – 392.

that resemble those of the criminal justice system, the consolidation of detention practices clearly illustrates this aspect of criminological convergence.

[6] In contrast to this body of work, which has enjoyed considerable influence, Stumpf's<sup>16</sup> analysis of the crimmigratory turn from the perspective of membership theory and his penological reflections have had a limited impact<sup>17</sup> and appear rather obsolete in light of the significant reforms to the criminal justice system that have taken place in the United States and elsewhere over the past fifteen years<sup>18</sup>.

[7] Following an initial phase in which the debate on crimmigration focused largely on the United States, Stumpf<sup>19</sup> noted that "*it remains to be seen whether the crimmigration trend will gain ground in immigration law beyond the US experience*", suggesting that "*there is evidence that crimmigration is gaining some traction in Europe*"<sup>20</sup>. His intuition was not misplaced. The theory of crimmigration gained global prominence in the 2010s, when a growing number of authors internationally took up Stumpf's analyses<sup>21</sup> and used her perspective to study the innovations in migration control taking place across a range of countries and regions<sup>22</sup>. Stumpf herself contributed to this debate, refining her theory in various publications<sup>23</sup>. Other US authors also engaged in the debate, adapting criminological analyses to innovations in immigration control practices<sup>24</sup>.

[8] Such studies have focused substantially on legal issues and have paid attention, above all, to the practices that constitute the essence of the criminological-migrationist turn, namely the criminalisation of immigration offences, the increasing use of deportation on criminal grounds, the development of a wide-ranging detention system, and the consolidation of expansive models of immigration policing<sup>25</sup>. Nevertheless, other authors have helped to broaden the scope of this

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<sup>16</sup> STUMPF, *Crimmigration Crisis*, pp. 396 – 419.

<sup>17</sup> See, however, ARMENTA A. / VEGA I. I., *Latinos and the Crimmigration System*, Race, Ethnicity and Law (Vol. 22) 2017, 221 – 236; FRANKO K., *The Crimmigrant Other: Migration and Penal Power*, Abingdon 2020.

<sup>18</sup> BRANDARIZ J. A., *Beyond the Austerity-Driven Hypothesis: Political Economic Theses on Penalty and the Recent Prison Population Decline*, European Journal of Criminology (Vol. 19/3) 2022, 349 – 367.

<sup>19</sup> STUMPF, *Two Profiles*, p. 92.

<sup>20</sup> STUMPF, *Two Profiles*, p. 97.

<sup>21</sup> GUIA M. J. / VAN DER WOUDE M. / VAN DER LEUN J. (édit.), *Social Control and Justice: Crimmigration in the Age of Fear*, The Hague 2013; KOULISH R. / VAN DER WOUDE M. (édit.), *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, New York 2020; VAN DER WOUDE M. / BARKER V. / VAN DER LEUN J. (édit.), *Special Issue on Crimmigration in Europe*, European Journal of Criminology (Vol. 14/1) 2017, 3 – 139.

<sup>22</sup> BILLINGS P., *Crimmigration in Australia: Law, Politics and Society*, Cham 2019; GATTA G. L. / MITSILEGAS V. / ZIRULIA S. (édit.), *Controlling Immigration through Criminal Law: European and Comparative Perspectives on 'Crimmigration'*, Portland 2021; MA T., *Contesting Crimmigration in Post-Hukou China*, Cham 2022; ROSENBERG-RUBINS R., *Crimmigration under International Protection: Constructing Criminal Law as Governmentality*, London 2023; STARING R. / TIMMERMAN R., *The Crimmigration Trend in the Netherlands: Some Critical Reflections*, Crimmigratie & Recht (Vol. 5/1) 2021, 60 – 71.

<sup>23</sup> STUMPF J., *Doing Time: Crimmigration Law and the Perils of Haste*, UCLA Law Review (Vol. 58) 2011, 1705 – 1748; STUMPF, *Two Profiles*; STUMPF J., *The Process Is the Punishment in Crimmigration Law*, in: FRANKO AAS K. / Bosworth M. (édit.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford 2013, pp. 58 – 75; STUMPF, *Encountering the Leviathan*; STUMPF J., *The Terrorism of Everyday Crime*, in: Koulis R. / van der Woude M. (édit.), *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, New York 2020, pp. 89 – 115.

<sup>24</sup> See, for example, GARCÍA HERNÁNDEZ C. C., *Creating Crimmigration*, Brigham Young University Law Review (Vol. 2013) 2014, 1457 – 1516; GARCÍA HERNÁNDEZ C. C., *Deconstructing Crimmigration*, University of California Davis Law Review (Vol. 52) 2018, 197 – 253.

<sup>25</sup> BOWLING B. / WESTENRA S., "A Really Hostile Environment": *Adiaphorisation, Global Policing and the Crimmigration Control System*, Theoretical Criminology (Vol. 24/2) 2020, 163 – 183; GARCÍA HERNÁNDEZ, *Deconstructing Crimmigration*; GATTA G. L., *Global Trends in 'Crimmigration' Policies: From the EU to the USA*, in:

academic debate. In several particularly influential publications, the Dutch socio-legal researchers Maartje van der Woude and Joanne van der Leun<sup>26</sup> emphasise that the criminological perspective must extend far beyond the legal sphere to examine the cultural, social and political factors contributing to the rise in the criminalisation of foreign nationals. This innovative proposal has the potential to open a dialogue between the theory of crimmigration and the criminology of mobility or border criminology, an equally influential theoretical framework that began to gain particular significance in the mid-2010s<sup>27</sup>.

[9] In summary, the crimmigration thesis has demonstrated a remarkable ability to make sense of the migration control practices occurring in many places and to resonate with the research interests of various academic communities. However, like any theory that enjoys widespread acceptance, the crimmigration thesis has also generated a range of criticisms and questions.

[10] Various authors have questioned the very term 'crimmigration', pointing out that it may encourage xenophobic interpretations by linking immigration and crime<sup>28</sup>. In addition, a section of the English-language literature has placed particular emphasis on the racial dimension of criminological models<sup>29</sup> and the differences in the treatment meted out to various groups of foreign nationals<sup>30</sup>, an aspect that was scarcely considered in Stumpf's original publications<sup>31</sup>.

[11] The Canadian legal theorist Graham Hudson<sup>32</sup>, for his part, questions the formalist interpretation of legal categories adopted within the criminological perspective, which assumes differences between branches of law and overlooks the fact that the penetration of a punitive rationale into immigration law is part of a process that also affects other legal fields. By starting from mistaken premises, the crimmigration thesis misses the opportunity to utilise currently existing legal resources to grant constitutional guarantees to criminalised foreign nationals.

[12] A further criticism of the crimmigration thesis, and probably the most significant, is that the literature has placed excessive emphasis on the convergence between immigration law and

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Gatta G. L. / Mitsilegas V. / Zirulia S. (édit.), *Controlling Immigration through Criminal Law: European and Comparative Perspectives on 'Crimmigration'*, Portland 2021, pp. 47 – 79; WONDERS N., *Sitting on the Fence Spain's Delicate Balance: Bordering, Multiscalar Challenges, and Crimmigration*, *European Journal of Criminology* (Vol. 14/1) 2017, 7 – 26; see also STUMPF, *Two Profiles*; STUMPF, *Process Is the Punishment*; STUMPF, *Encountering the Leviathan*; STUMPF, *Terrorism of Everyday Crime*.

<sup>26</sup> VAN DER LEUN J. / VAN DER WOUDE M., *A Reflection on Crimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing*, in: Guia M. J. / van der Woude M. / van der Leun J. (édit.), *Social Control and Justice: Crimmigration in the Age of Fear*, The Hague 2013, pp. 41 – 60, pp. 43 – 46; VAN DER WOUDE M. / VAN DER LEUN J. / NIJLAND J.-A., *Crimmigration in the Netherlands*, *Law & Social Inquiry* (Vol. 39/3) 2014, 560 – 579, pp. 562, 575.

<sup>27</sup> BOSWORTH M. / FRANKO K. / PICKERING S., *Punishment, Globalisation and Migration Control: "Get Them the Hell out of Here"*, *Punishment & Society* (Vol. 20/1) 2018, 34 – 53; PICKERING S. / BOSWORTH M. / FRANKO K., *The Criminology of Mobility*, in: *The Routledge Handbook on Crime and International Migration*, Abingdon 2015, pp. 382 – 395.

<sup>28</sup> CHACÓN J. M., *Producing Liminal Legality*, *Denver University Law Review* (Vol. 92/4) 2015, 709 – 767; MELOSSI D., *Crime, Punishment and Migration*, London 2015.

<sup>29</sup> ARMENTA / VEGA; BHATIA M., *Crimmigration, Imprisonment and Racist Violence: Narratives of People Seeking Asylum in Great Britain*, *Journal of Sociology* (Vol. 56/1) 2020, 36 – 52; MENJÍVAR C. / GÓMEZ CERVANTES A. / ALVORD D., *The Expansion of "Crimmigration" Mass Detention, and Deportation*, *Sociology Compass* (Vol. 12/4) 2018, e12573; VÁZQUEZ Y., *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, *Ohio State Law Journal* (Vol. 76/3) 2015, 599 – 657.

<sup>30</sup> See also ROSENBLUM R. E., *Beyond Severity: A New View of Crimmigration*, *Lewis & Clark Law Review* (Vol. 22/3) 2018, 663 – 708.

<sup>31</sup> See, however, STUMPF, *Crimmigration Crisis*; STUMPF, *Encountering the Leviathan*.

<sup>32</sup> HUDSON G., *Does Crimmigration Theory Rest on a Mistake?*, *International Journal of Migration and Border Studies* (Vol. 4/4) 2018, 303 – 325, pp. 310, 315.

criminal law. Given its significance, this criticism and its implications are analysed in detail in the following section.

[13] In summary, the debate on crimmigration has been particularly intense in recent years, during which the thesis has played a fundamental role in consolidating an international academic community working on migration control<sup>33</sup>. Within the framework of these debates, the reflections of van der Woude and van der Leun sound as revealing today as they did in the mid-2010s. Crimmigration studies have managed to move beyond their original focus on US immigration criminalisation<sup>34</sup>, conducting comparative analyses that examine the situated factors shaping criminological practices, including, amongst others, processes of racialisation<sup>35</sup>. Furthermore, criminological analyses must go beyond legal categories, developing interdisciplinary perspectives and analyses of law in action regarding the determinants and implications of criminological legal frameworks<sup>36</sup>.

[14] When analysing the heterogeneity of current migration penalisation, criminological literature should take into account that the ongoing (partial) differentiation between migration control practices and criminal control practices is giving rise to varied and contextualized combinations of both types of punitive instruments. At a time when the theory of criminology is taking shape, its analyses should examine why and how practices of migration penalisation change over time. In this regard, the brilliant distinction developed by the American legal scholar Daniel Kanstroom<sup>37</sup> between ‘extended border control’ – which aims to protect the border and prevent irregular crossings – and ‘post-entry social control’ – which focuses on controlling the behaviour of foreign nationals already present in the country in question, imposing upon them a sort of probationary status may prove particularly useful for analysing the variations in criminal immigration frameworks observed in the United States, Europe and elsewhere. Specifically, this distinction can be used to analyse aspects of Stumpf’s thesis that have not been sufficiently developed, such as the internal differentiation of crimmigratory practices<sup>38</sup>.

## II. Fractures in crimmigratory convergence: the priority of immigration control objectives

[15] Notwithstanding the points made so far, the criminological-migration literature must address an additional question of particular relevance. Crimmigration theory appears to maintain a certain ambiguity regarding the agonistic nature of the convergence between migration interests and punitive interests. In this regard, the literature seems to have concluded that crimmigration is the result of two mirror-image processes, namely the criminalisation of irregular migration and the

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<sup>33</sup> STUMPF, *Encountering the Leviathan*; STUMPF, *Terrorism of Everyday Crime*.

<sup>34</sup> VAN DER LEUN / VAN DER WOUDE; VAN DER WOUDE / VAN DER LEUN / NIJLAND; see also VAN DER WOUDE M. / BARKER V. / VAN DER LEUN J., *Introduction: Crimmigration in Europe*, *European Journal of Criminology* (Vol. 14/1) 2017, 3 – 6.

<sup>35</sup> FRANKO, K., *The Crimmigrant Other: Migration and Penal Power*, Abingdon: Routledge 2020.

<sup>36</sup> VAN DER LEUN / VAN DER WOUDE; VAN DER WOUDE / VAN DER LEUN / NIJLAND; see also KOULISH R. / VAN DER WOUDE M., *Introduction: The “Problem” of Migration*, in: Koulish R. / van der Woude M. (édit.), *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, New York 2020, pp. 1 – 30.

<sup>37</sup> KANSTROOM, *Deportation Nation*; KANSTROOM D., *Aftermath: Deportation Law and the New American Diaspora*, Oxford 2012.

<sup>38</sup> See STUMPF, *Two Profiles*, pp. 101 – 102, 104.

‘migrationisation’ of CL<sup>39</sup>. When describing these processes in rather general terms, the relevant literature does not appear to give preference to either of these two dimensions<sup>40</sup>. Although the result of this convergence is described as a new legal (and political) construct, academic studies seem to assume that criminological and migration practices and policies contribute to both border control and crime prevention. In other words, apparently, neither the interests of mobility control nor the objectives of criminal control are undermined by criminological and migration convergence. It could therefore be argued that, with criminological convergence, crime is governed through (the control of) migration and, conversely, human mobility is governed through (the control of) crime<sup>41</sup>.

[16] The literature on border criminology has clearly highlighted that changes in bordered penal systems<sup>42</sup> are progressively consolidating a bifurcated penal system. This dual model reveals marked differences in the way nationals and foreigners are treated at every stage of the criminal proceedings and in the determination and enforcement of sentences<sup>43</sup>. The differences are so marked that the question arises as to whether both subsystems truly pursue the interests of crime prevention, at least to the same extent. In fact, a close examination of the new models of border criminality reveals a fundamental aspect that the existing literature seems to overlook, namely that the coexistence of the objectives of immigration control and the fight against crime is less harmonious than is generally assumed. In fact, the relationship between these two types of interests is antagonistic<sup>44</sup> and, as will be seen below, in practice preference is being given to the immigration control agenda.

[17] There is at least one important reason why the criminological literature has overlooked, with some exceptions<sup>45</sup>, the fundamental role played by mechanisms of migrationisation in many countries of the global North. As previously noted, this type of study has essentially focused its attention on the US context. In that country, the conclusion that criminological immigration policies serve both the interests of crime control and those of immigration control – and indeed that a far-reaching criminalisation of ML is taking place – is apparently more justifiable than in other areas. This is particularly evident in the field of immigration offences. Although irregular border-crossing behaviours, such as illegal entry and illegal re-entry, were criminalised in the early 20th century,

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<sup>39</sup> The ‘immigrationisation of criminal law’ is a concept coined by the American legal scholar Teresa Miller (MILLER, *Citizenship & Severity*, p. 618) to describe the ‘intersection of regulatory and administrative practices [...] of immigration control within the criminal justice system’, as a dimension of crimmigration that must be distinguished from the ‘criminalisation of immigration law’ (see also LEGOMSKY; VAN DER WOUDE M. A. H. / VAN BERLO P., *Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package*, *Utrecht Law Review* (Vol. 11/1) 2015, 61 – 79).

<sup>40</sup> KOULISH / VAN DER WOUDE, *Introduction*.

<sup>41</sup> FRANKO AAS K., *The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State*, in: FRANKO AAS K. / Bosworth M. (édit.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford 2013, pp. 21 – 39; BOSWORTH M. / GUILD M., *Governing Through Migration Control: Security and Citizenship in Britain*, *The British Journal of Criminology* (Vol. 48/6) 2008, 703 – 719; WEBER L. / McCULLOCH J., *Penal Power and Border Control: Which Thesis? Sovereignty, Governmentality, or the Pre-emptive State?*, *Punishment & Society* (Vol. 21/4) 2019, 496 – 514.

<sup>42</sup> FRANKO AAS K., *Bordered Penalty: Precarious Membership and Abnormal Justice*, *Punishment & Society* (Vol. 16/5) 2014, 520 – 541; FRANKO, *The Cimmigrant Other: Migration and Penal Power*, see also TODD-KVAM J., *Bordered Penal Populism: When Populism and Scandinavian Exceptionalism Meet*, *Punishment & Society* (Vol. 21/3) 2019, 295 – 314.

<sup>43</sup> EAGLY I. V., *Prosecuting Immigration*, *Northwestern University Law Review* (Vol. 104/4) 2010, 1281 – 1359; EAGLY I. V., *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, *New York University Law Review* (Vol. 88) 2013, 1126 – 1223; GARCÍA ESPAÑA E., *A criminological approach to migration*, Madrid 2018.

<sup>44</sup> GOODMAN M. / PAGE J. / PHELPS M., *Breaking the Pendulum: The Long Struggle Over Criminal Justice*, New York 2017.

<sup>45</sup> See SKLANSKY D. A., *Crime, Immigration, and ad hoc Instrumentalism*, *New Criminal Law Review* (Vol. 15/2) 2012, 157 – 223; STUMPF, *Terrorism of Everyday Crime*.

until recently these cases were primarily managed through administrative measures, such as returns/deportations<sup>46</sup>. The reforms implemented in the first decade of the century, notably the so-called Operation Streamline in the US-Mexico border area, drastically changed this situation. Indeed, since 2005, Operation Streamline has implemented the logistical measures necessary to prosecute, on a massive scale, those who cross the border irregularly, leading to an exponential increase in federal criminal proceedings against foreign nationals<sup>47</sup>. In the late 2010s, this policy of criminalisation was further reinforced within the framework of the Trump administration's border control agenda<sup>48</sup>.

[18] However, the immigration and criminal justice landscape is very different in other parts of the world. Despite the efforts of EU institutions to criminalise a range of immigration offences, in empirical terms this criminalisation process has played a minor role in immigration and criminal justice reforms within the European context. Analysing the case of the United Kingdom, the socio-legal researcher Ana Aliverti<sup>49</sup> notes that immigration offences are rarely prosecuted. Tellingly, the author shows that criminal proceedings are only resorted to when immigration control measures, such as deportation, prove unfeasible<sup>50</sup>. Data indicate that this situation is not very different in other Western European countries, with the exception of Italy<sup>51</sup>.

[19] At the same time, the significance of migration regimes in general has gone unnoticed because the criminological literature has placed excessive emphasis on the convergence between crime control practices and immigration control practices. Several authors have highlighted that, despite innovations in the fields of criminology and migration, criminal and migration procedures continue to operate with greater autonomy than the literature typically acknowledges<sup>52</sup>. In analysing what he terms 'interlegal jurisdictional games', the Canadian criminologist David Moffette<sup>53</sup> has brilliantly

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<sup>46</sup> ABREGO L. / COLEMAN M. / MARTÍNEZ D. E. / MENJÍVAR C. / SLACK J., *Making Immigrants into Criminals: Legal Processes of Criminalisation in the Post-IIRIRA Era*, Journal on Migration and Human Security (Vol. 5/3) 2017, 694 – 715; CHAZARO A., *Challenging the "Criminal Alien" Paradigm*, UCLA Law Review (Vol. 63/3) 2016, 594 – 664; VÁZQUEZ Y., *Crimmigration: The Missing Piece of Criminal Justice Reform*, University of Richmond Law Review (Vol. 51) 2017, 1093 – 1147.

<sup>47</sup> KUBAL A. / OLAYO-MÉNDEZ A., *Mirrors of Justice? Undocumented Immigrants in Courts in the United States and Russia*, in: Koulis R. / van der Woude M. (édit.), *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, New York 2020, pp. 198 – 224; MARTÍNEZ D. E. / SLACK J. / MARTÍNEZ-SCHULTZ R., *The Rise of Mass Deportation in the United States*, in: Martínez Jr. R. / Hollis M. E. / Stowell J. I. (édit.), *The Handbook of Race, Ethnicity, Crime, and Justice*, Hoboken 2018, pp. 173 – 201.

<sup>48</sup> CULLEN F. / GRAHAM M., *Crime and Justice in the Trump Era*, London 2020; GARCÍA HERNÁNDEZ C. C., *Migrating to Prison: America's Obsession with Locking Up Immigrants*, New York 2019; WADHIA S. S., *Banned: Immigration Enforcement in the Time of Trump*, New York 2019.

<sup>49</sup> ALIVERTI A., *Exploring the function of criminal law in the policing of foreigners: The decision to prosecute immigration-related offences*, Social & Legal Studies (Vol. 21/4) 2012, 511 – 527, p. 519.

<sup>50</sup> ALIVERTI A., *Making People Criminal: The Role of the Criminal Law in Immigration Enforcement*, Theoretical Criminology (Vol. 16/4) 2012, 417 – 434; ALIVERTI, *Exploring the function*; ALIVERTI A., *Crimes of mobility: Criminal law and the regulation of immigration*, Abingdon 2013; see also BOSWORTH / GUILD; KUBAL A., *Struggles against Subjection. Implications of Criminalisation of Migration for Migrants' Everyday Lives in Europe*, Crime, Law and Social Change (Vol. 62/2) 2014, 91 – 111.

<sup>51</sup> BRANDARIZ J. A., *Anti-smuggling penal policies: a cross-national exploration*, in: Militello V. / Spena A. (édit.), *The challenges of illegal trafficking in the Mediterranean area*, Cham 2023, 91-115.

<sup>52</sup> FRANKO, *The Crimmigrant Other: Migration and Penal Power*; MENJÍVAR / GÓMEZ CERVANTES / ALVORD, *The Expansion of "Crimmigration," Mass Detention, and Deportation*; VAN DER WOUDE M., *A Patchwork of Intra-Schengen Policing: Border Games over National Identity and National Sovereignty*, Theoretical Criminology (Vol. 24/1) 2020, 110 – 131.

<sup>53</sup> MOFFETTE D., *The Jurisdictional Games of Immigration Policing: Barcelona's Fight against Unauthorised Street Vending*, Theoretical Criminology (Vol. 24/2) 2020, 258 – 275, pp. 259, 270; see also MOFFETTE D. / PRATT J., *Beyond criminal law and methodological nationalism: Borderlands, jurisdictional games and legal intersections*, in:

demonstrated that the ongoing (partial) differentiation between the two fields of state control is what actually drives criminological changes in practice. Indeed, such differentiation — that is, the availability of various alternatives — allows agencies within the criminal justice system to draw upon a range of control instruments and procedures<sup>54</sup>, in accordance with their institutional needs and priorities.

[20] By focusing on what divides this dual legal order, rather than what unifies it, one can see the true nature of innovations in criminal justice, which lead agencies within the criminal justice system to employ various legal instruments when managing different populations<sup>55</sup>. This control strategy is a good example of what the American legal scholar David Sklansky<sup>56</sup> termed ‘ad hoc instrumentalism’, that is, ‘[...] a way of thinking about law and legal institutions that [...] pays little attention to formal legal categories and views legal rules and procedures as a set of interchangeable instruments’. Within this framework, Sklansky<sup>57</sup> adds: ‘when addressing any problem, the regulatory authorities have an incentive to employ the instrument that is most effective against the person [...] who is causing the problem’.

[21] At least in the European context, the instrumentalism taking hold in the field of criminal migration policy shows some divergence from Sklansky’s analysis, suggesting the consolidation of a certain ‘migratory’ rationality. Contrary to the American legal scholar’s thesis, in the context of criminal migration there is not really an ‘ad hoc’ instrumentalism, as it does not operate on a case-by-case basis but increasingly adopts a structural framework. In reality, decision-making patterns are neither random nor changeable; rather, this type of instrumentalism aims to prioritise migration control measures. Indeed, unlike in the United States, the interests of mobility control take centre stage in the European context, which means relegating the objectives of crime control to a secondary role when managing foreign nationals involved in criminal proceedings. In Europe, in short, the criminalising dimension is not the centre of gravity of criminological change.

[22] The prominence that instrumentalist/migration-focused approaches have acquired is surprising from a legal perspective. European legal traditions and the principles derived from the *ne bis in idem* principle require that criminal proceedings take precedence where different legal systems intersect in a specific (criminal) case. However, in the context of the consolidation of a dual criminal justice system, legal principles are set aside in favour of more mundane and pragmatic considerations<sup>58</sup>.

[23] In this regard, numerous authors have emphasised that the pre-eminence of immigration control regimes over criminal proceedings stems from the fact that the latter operate — to a greater

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Côté-Lussier C. / Moffette D. / Piché J. (édit.), *Contemporary Criminological Issues: Moving beyond Insecurity and Exclusion*, Ottawa 2020, pp. 15 – 39.

<sup>54</sup> ALIVERTI A., *Policing the Borders Within*, Oxford 2021; BOSWORTH M., *Border criminology: How migration is changing criminal justice*, in: Bosworth M. / Hoyle C. / Zedner L. (édit.), *Changing contours of criminal justice*, Oxford 2016, pp. 213 – 226; EAGLY, *Prosecuting Immigration*.

<sup>55</sup> CHACÓN, *Liminal Legality*; FRANKO AAS, *Bordered Penalty*; FRANKO, *The Crimmigrant Other: Migration and Penal Power*.

<sup>56</sup> SKLANSKY, *Crime, Immigration, and ad hoc Instrumentalism*, p. 161.

<sup>57</sup> SKLANSKY, *Crime, Immigration, and ad hoc Instrumentalism*, p. 161.

<sup>58</sup> GUNDHUS H. O. I., *Sorting Out Welfare: Crimmigration Practices and Abnormal Justice in Norway*, in: Koulisch R. / van der Woude M. (édit.), *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, New York 2020, pp. 249 – 278.

or lesser extent — under a series of safeguards inherent to the rule of law<sup>59</sup>. However, what is at stake in these cases is not only legal rules and procedural rights, but also issues of logistics and speed<sup>60</sup>. At a time when xenophobia is spreading across Europe and institutional actors are feeling increasing pressure to adopt expedited solutions when dealing with unwanted foreigners, managerial concerns are gaining the upper hand over traditional considerations of justice. Leaving legal arguments aside, this innovation is understandable; indeed, it can be seen as an expected outcome of the alignment of crime prevention objectives with those of migration control. When deportation is established as the legal response to be applied in all cases of offences (whether immigration-related or criminal) committed by foreign nationals, it seems natural for political and administrative actors to implement measures designed to carry out expulsions as quickly as possible.

[24] This management framework is driven by compelling considerations of efficiency and cost-effectiveness<sup>61</sup>, and can be seen as a manifestation of the growing incorporation of managerial rationalities into the field of migration control<sup>62</sup>. Certainly, the effectiveness of deportation in terms of crime prevention is debatable<sup>63</sup>. Many states lack adequate measures to prevent individuals deported on criminal or other grounds from returning to the country where they were convicted. Problems of effectiveness are exacerbated in the case of EU citizens deported from EU countries, as entry bans are of little use in such cases<sup>64</sup>. However, despite all these drawbacks, those involved in the criminal justice system are often convinced that deportations are useful in terms of crime prevention<sup>65</sup>. Therefore, prioritising migration considerations over crime control objectives merely needs to overcome the obstacle posed by the institutional cultures of criminal justice agencies<sup>66</sup>. However, this obstacle has been overcome in several European countries through managerial measures, namely by imposing performance targets centred on deportation indicators<sup>67</sup>. In this sense, instrumentalism in criminal justice — like any managerial model<sup>68</sup> — brings many benefits to actors within the criminal justice system. Protocols designed to remove unwanted foreign nationals as quickly as possible reduce the workload, avoid the burdensome task of criminal

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<sup>59</sup> BOSWORTH / GUILD; VELLOSO J. G. Vieira, *Beyond Criminocentric Dogmatism: Mapping Institutional Forms of Punishment in Contemporary Societies*, *Punishment & Society* (Vol. 15/2) 2013, 166 – 186; ZEDNER L., *Penal subversions: When is a punishment not punishment, who decides and on what grounds?*, *Theoretical Criminology* (Vol. 20/1) 2016, 3 – 20.

<sup>60</sup> WALTERS W., *Migration, vehicles, and politics: Three theses on viapolitics*, *European Journal of Social Theory* (Vol. 18/4) 2015, 469 – 488.

<sup>61</sup> FRANKO AAS, *Bordered Penalty*; FRANKO, *The Crimmigrant Other: Migration and Penal Power*; GUNDHUS, *Sorting Out Welfare: Crimmigration Practices and Abnormal Justice in Norway*.

<sup>62</sup> BOSWORTH / GUILD; BRANDARIZ J. A. / FERNÁNDEZ-BESSA C., *The managerial turn: The transformation of Spanish migration control policies since the onset of the economic crisis*, *Howard Journal of Crime and Justice* (Vol. 56/2) 2017, 198 – 219; MOFFETTE D., *Governing Irregular Migration: Bordering Culture, Labour, and Security in Spain*, Vancouver 2018; see also ROSENBERG-RUBINS.

<sup>63</sup> Gundhus, *Sorting Out Welfare: Crimmigration Practices and Abnormal Justice in Norway*.

<sup>64</sup> DI MOLFETTA E. / BROUWER J., *Unravelling the 'crimmigration Knot': Penal Subjectivities, Punishment and the Censure Machine*, *Criminology and Criminal Justice* (Vol. 20/3) 2020, 302 – 318.

<sup>65</sup> FRANKO *The Crimmigrant Other: Migration and Penal Power*.

<sup>66</sup> ALIVERTI A., *Patrolling the 'thin blue line' in a world in motion: An exploration of the crime-migration nexus in UK policing*, *Theoretical Criminology* (Vol. 24/1) 2020, 8 – 27; ALIVERTI, *Policing the Borders Within*; GUNDHUS; KAUFMAN E., *Punish and Expel: Border Control, Nationalism, and the New Purpose of the Prison*, Oxford 2015.

<sup>67</sup> FRANKO, *The Crimmigrant Other: Migration and Penal Power*; GIBNEY M. J., *Asylum and the Expansion of Deportation in the United Kingdom*, *Government and Opposition* (Vol. 43/2) 2008, 146 – 167; WALTERS W., *The Flight of the Deported: Aircraft, Deportation, and Politics*, *Geopolitics* (Vol. 21/2) 2016, 435 – 458.

<sup>68</sup> BRANDARIZ J. A., *The managerial-actuarial model of penalisation: Efficiency, risk and the penal system*, Madrid 2016.

investigation, and appear to serve the interests of crime control in the eyes of the authorities and the public.

[25] In short, it is not difficult to understand why an instrumentalist, migration-oriented approach is able to take root in the European context. The remainder of this section is devoted to analysing two specific areas in which this trend can be observed.

[26] The first manifestation of the migration-oriented approach that is changing crime control practices in European countries primarily affects the policing sector. When dealing with minor criminal offences committed by foreign nationals, police agencies are increasingly prioritising the use of deportation measures (DM) rather than resorting to strictly criminal proceedings. In other words, when the requirements for expulsion are (potentially) met, the police are increasingly resorting to fast-track procedures in which alleged offenders are referred for detention and deportation, bypassing the normal criminal prosecution procedures. As is evident, this model of intervention streamlines police work and aims to provide a swift punitive response to cases of petty urban crime involving foreign nationals<sup>69</sup>. Consequently, in this case, the prioritisation of the principles of efficiency and border control interests over the objectives of criminal justice is particularly evident.

[27] This model of intervention is found in various parts of Europe, such as in the Scandinavian countries<sup>70</sup> or in the United Kingdom — as part of the so-called Operation Nexus<sup>71</sup>. The Italian case is similar, though even more striking from a criminal law perspective. In Italy, as a result of the well-known ineffectiveness of the deportation mechanism, it is detention measures, rather than expulsions, that are primarily used for crime control<sup>72</sup>.

[28] Countries in which the tasks of crime control and border control are carried out by the same police agency are particularly conducive to this model of intervention, in which DM — in particular, deportation — becomes a primary policing tool. One such case is Spain<sup>73</sup>. As is the case in other European countries<sup>74</sup>, such strategies of 'migrationisation' are largely unknown. In fact, this efficiency-driven shift has not been debated in public discourse or in the political arena. However, certain events show that the control of foreign nationals is significantly transforming police work, distancing it from traditional forms of crime prevention and enforcement.

[29] As has been the case in other countries of the Global North<sup>75</sup>, the punitive climate in Spain has cooled considerably over the last fifteen years. The incarceration rate fell by 28.5 per cent between

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<sup>69</sup> ALIVERTI, *Patrolling the 'thin blue line' in a world in motion: An exploration of the crime-migration nexus in UK policing*; ALIVERTI, *Policing the Borders Within*; PARMAR A., *Arresting (non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalisation*, *Theoretical Criminology* (Vol. 24/1) 2020, 28 – 49.

<sup>70</sup> FRANKO AAS, *Bordered Penalty*; FRANKO, *The Crimmigrant Other: Migration and Penal Power*; GUNDHUS, *Sorting Out Welfare: Crimmigration Practices and Abnormal Justice in Norway*.

<sup>71</sup> ALIVERTI, *Patrolling the 'thin blue line' in a world in motion: An exploration of the crime-migration nexus in UK policing*; ALIVERTI, *Policing the Borders Within*; PARMAR, *Arresting (non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalisation*.

<sup>72</sup> CAMPESI G. / FABINI G., *Immigration Detention as Social Defence: Policing 'Dangerous Mobility' in Italy*, *Theoretical Criminology* (Vol. 24/1) 2020, 50 – 70; FABINI G., *Internal bordering in the context of undeportability: Border performances in Italy*, *Theoretical Criminology* (Vol. 23/2) 2019, 175 – 193; FABINI G., *Polizia e migranti in città: Negoziare il confine nei contesti locali*, Rome 2022.

<sup>73</sup> MOFFETTE, *Jurisdictional Games*.

<sup>74</sup> FRANKO AAS, *Bordered Penalty: Precarious Membership and Abnormal Justice*.

<sup>75</sup> See BRANDARIZ, *Austerity-Driven Hypothesis*; BROWN D., *Mass Incarceration*, in: Carlen P. / França L. Ayres (édit.), *Alternative Criminologies*, Abingdon 2018, pp. 364 – 385; KARSTEDT S. / BERGIN T. / KOCH M., *Critical*

2009 and 2022<sup>76</sup>. At the same time, opinion polls such as those carried out by the Centre for Sociological Research or Eurobarometer show that concern about crime has fallen very significantly within Spanish society<sup>77</sup> since the late 2000s. Against this backdrop, media-fuelled crime waves have become increasingly rare. However, in the second half of 2019, various media outlets repeatedly reported on an alleged wave of urban crime plaguing the centre of Barcelona and the metro network<sup>78</sup>, which led certain sections of the middle class, particularly the foreign middle class, to form neighbourhood watch groups<sup>79</sup>. The police responded by carrying out several large-scale raids, aimed at controlling marginalised groups of foreign nationals. Despite the scale of these interventions, the results were rather limited, at least from the usual perspective of crime control. The majority of suspects detained (specifically, 59 out of 68, in the various raids carried out between August and November) were not subject to criminal proceedings but were referred to immigration control procedures<sup>80</sup>. Police interventions of this kind, which have also taken place in Barcelona in previous years<sup>81</sup>, are a good example of the logic of ‘migrationisation’.

[30] The shift in criminal control analysed here primarily affects policing practices. This shift could be well received by the public, insofar as it focuses on petty urban crime. A second manifestation of the ‘migratory’ logic is clearly different, as it affects the strategy for combating terrorism<sup>82</sup>, an area far more controversial and sensitive than day-to-day policing.

[31] Europol’s annual reports entitled ‘Terrorism Situation and Trend’ (hereinafter Te-SAT)<sup>83</sup> show that both terrorist activities and counter-terrorism tactics have changed significantly in Europe over recent decades. Firstly, the main objectives of counter-terrorism have shifted, as the focus of criminal policing has moved from violence related to political independence to jihadist activities. Between 2010 and 2014, the ratio of individuals arrested in the EU for political separatist violence to those arrested for jihadist terrorism was 1 to 0.8, whilst between 2015 and 2019 this ratio increased to 1 to 8.4. This trend has continued since then<sup>84</sup>. Secondly, these figures show that European security agencies have been stepping up their surveillance of jihadist actors<sup>85</sup>. Indeed, the fight against jihadism has intensified during a period in which, with a few particularly tragic exceptions, radical jihadist networks have failed to increase their capacity for violent action in the countries of the Global North. The Te-SAT reports document that 150 jihadist attacks (including

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*Junctures and Conditions of Change: Exploring the Fall of Prison Populations in US States*, Social & Legal Studies (Vol. 28/1) 2019, 58 – 80.

<sup>76</sup> Source: General Secretariat of Penitentiary Institutions. Spain ([www.institucionpenitenciaria.es](http://www.institucionpenitenciaria.es); last accessed: 5 December 2023).

<sup>77</sup> See [https://www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos\\_html/TresProblemas.html](https://www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html); <https://europa.eu/eurobarometer/surveys/browse/all/series/4961> (last accessed: 5 December 2023).

<sup>78</sup> See HERNÁNDEZ O., *Dónde y cómo trabajan los carteristas del metro de Barcelona*, *El Periódico*, 25 June 2019; HERNÁNDEZ O., *Un centenar de carteristas actúan cada día en el metro de Barcelona*, *El Periódico*, 25 June 2019.

<sup>79</sup> MARÍN H., *De patrulla contra los carteristas en la ciudad “sin ley” de Colau*, *El Mundo*, 21 July 2019.

<sup>80</sup> MUÑOZ T., *Mossos y Policía Nacional identifican a 70 carteristas reincidentes en el metro en solo dos horas*, *La Vanguardia*, 27 August 2019.

<sup>81</sup> MOFFETTE, *Jurisdictional Games*.

<sup>82</sup> See GOLASH-BOZA T., *The Parallels between Mass Incarceration and Mass Deportation: An Intersectional Analysis of State Repression*, *Journal of World-Systems Research* (Vol. 22/2) 2016, 484 – 509; KAUFMAN S. B., *The Criminalisation of Muslims in the United States*, 2016, *Qualitative Sociology* (Vol. 42/4) 2019, 521 – 542.

<sup>83</sup> See <https://www.europol.europa.eu/publications-events/main-reports/tesat-report> (last accessed: 5 December 2023).

<sup>84</sup> Between 2020 and 2022, the ratio of people detained for pro-independence political violence to those arrested for jihadist terrorism was 1 to 9.4 (source: Europol. Te-SAT).

<sup>85</sup> COLMENERO-FERREIRO B. / BRANDARIZ J. A., *Reinventing counter-terrorism tactics and practices in the post-ETA Spanish criminal justice system*, *Studi Culturali* (Vol. XVI/1) 2019, 43 – 67.

both completed and attempted acts) took place in Europe between 2010 and 2022, whilst 4,908 people suspected of jihadist militancy were arrested during the same period. By contrast, there were 1,043 separatist attacks and 1,630 people suspected of separatist militancy were detained during the same period.

[32] This set of innovations has significantly transformed the counter-terrorism landscape. Interventions in this field are increasingly focused on foreign nationals<sup>86</sup>, who are considered particularly likely to be involved in jihadist violence. At the same time, the expanding remit of security agencies has enabled them to increasingly adopt pre-crime strategies<sup>87</sup>. Consequently, counter-terrorism systems in several European countries are succeeding in preventing terrorist acts before they reach the violent stage. This development has altered the profile of terrorism cases with which European criminal justice agencies must deal; these cases are less lethal than in previous decades, such as the 1970s. In short, generally speaking, actors within the criminal justice system — the police, the judiciary and the prison system — are dealing with relatively low-profile terrorism cases.

[33] As a side effect of these changes, immigration control measures have become increasingly significant in the field of counter-terrorism. This situation is not entirely new. Indeed, as jihadist cells began to take centre stage in the counter-terrorism arena between 2000 and 2005, deportation practices found their way into the counter-terrorism toolkit, particularly in the United Kingdom<sup>88</sup> and the United States<sup>89</sup>. At that time, deportations began to be used to repatriate alleged members of radical circles<sup>90</sup> and to manage foreign nationals with irregular status detained in the context of counter-radicalisation operations<sup>91</sup>. However, at least during the first decade of the 21st century, deportation did not become a routine component of the counter-terrorism agenda. The migration-based rationale is much more firmly established today, and its origins lie in the expanding scope of counter-terrorism interventions, not in the post-9/11 anti-jihadist drive.

[34] Spain is a case that merits attention in this regard. For historical reasons, Spain has had one of the most comprehensive counter-terrorism systems in Europe<sup>92</sup>, which has long been characterised by a high number of arrests, trials, convictions and prisoners. Spanish security agencies have never made public the number of people deported on anti-terrorism grounds. However, the available data show that deportations of this kind are not a marginal measure. Between 2013 and 2017, 101 people charged and arrested for their links to jihadism were

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<sup>86</sup> BOSWORTH / FRANKO / PICKERING; CARVALHO H. / CHAMBERLEN A. / LEWIS R., *Punitiveness beyond criminal justice: Punishable and punitive subjects in an era of prevention, anti-migration and austerity*, *The British Journal of Criminology* (Vol. 60/2) 2020, 265 – 284.

<sup>87</sup> MCCULLOCH J. / PICKERING S., *Pre-crime and Counter-terrorism: Imagining Future Crime in the 'War on Terror'*, *The British Journal of Criminology* (Vol. 49/5) 2009, 628 – 645; PALMER P., *Dealing with the exceptional: Pre-crime anti-terrorism policy and practice*, *Policing and Society* (Vol. 22/4) 2012, 1 – 19; WALKLATE S. / MYTHEN G., *Contradictions of Terrorism: Security, Risk, Resilience*, London 2014.

<sup>88</sup> ALIVERTI, *Crimes of mobility*; GIBNEY.

<sup>89</sup> CHACÓN J., *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, *Connecticut Law Review* (Vol. 39) 2007, 1827 – 1891; WELCH M., *Scapegoats of 11 September*, New Brunswick 2006.

<sup>90</sup> Gibney, M. J., *Asylum and the Expansion of Deportation in the United Kingdom*, *Government and Opposition* 43(2) 2008, 146-167.

<sup>91</sup> HERNÁNDEZ D. M., *Pursuant to Deportation: Latinos and Immigrant Detention*, *Latino Studies* (Vol. 6/1-2) 2008, 35 – 63.

<sup>92</sup> COLMENERO-FERREIRO B. / BRANDARIZ J. A., *Reinventing counter-terrorism tactics and practices in the post-ETA Spanish criminal justice system*.

deported<sup>93</sup>, and a further 17 were expelled between January 2018 and May 2019<sup>94</sup>. These are figures worthy of consideration, especially when compared with judicial data. Between 2013 and 2017, 101 people were deported from Spain on grounds of jihadist terrorism; during the same period, 276 people were arrested for this type of political violence and only 90 people were brought to trial<sup>95</sup>.

[35] These figures are particularly revealing, as they show that, in the field of counter-terrorism too, deportation measures have become a key tool. Furthermore, in this as in other areas of crime control, deportation is increasingly serving as the predominant punitive response for foreign nationals who are arrested, charged and convicted, whilst ordinary prison sentences remain the main punitive measure for nationals. This dual punitive regime would not be noteworthy if it were structured in accordance with a conventional criminal law framework, in which foreign nationals are deported after serving their prison sentences. However, this model is far from being the norm. Both the available data and official information<sup>96</sup> reveal that, in the field of counter-terrorism too, a standard procedure of criminal prosecution and conviction is by no means the general rule. On the contrary, in Spain, a significant number of individuals allegedly linked to jihadism are deported without following the normal criminal prosecution procedures; that is, without having been tried, convicted or having served (in whole or in part) their prison sentences. Although alleged national security reasons prevent state agencies from disclosing data on these anti-terrorism deportation practices, there are indications that such measures are also frequently used in other European countries, particularly in Italy<sup>97</sup>.

[36] These changes are redefining counter-terrorism strategies, not only in relation to jihadism but also in relation to other forms of political violence. In this regard, the punitive approach to the so-called threat of insurrectionary anarchism in Spain is a good example. In 2014–2015, Spanish police agencies launched two large-scale operations against the radical anarchist movement, resulting in dozens of arrests<sup>98</sup>. However, this counter-terrorism effort yielded scant results, as it led to almost no convictions<sup>99</sup>. The only notable exception was a criminal case against two Chilean nationals. Following an initial trial, their prison sentences were commuted to deportation, leading

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<sup>93</sup> CARO J. L., España expulsa en tres años a 34 extranjeros por actividades terroristas, *ABC*, 19 September 2016; CARO J. L., España ha expulsado por terrorismo este año a 28 presos, tres de ellos del 11-M, *ABC*, 9 December 2017.

<sup>94</sup> Source: member of the communications office of a Spanish intelligence agency. Personal communication (September 2019). This figure does not take into account the number of foreign nationals investigated on anti-terrorism grounds and deported without having been imprisoned. No subsequent data is available. However, it is well known that mobility restrictions imposed for public health reasons drastically reduced the number of deportations (which fell by 62.4% between 2020–2022 compared to the 2017–2019 period; source: Eurostat; <https://ec.europa.eu/eurostat/web/migration-asylum/managed-migration/database>; last accessed: 5 December 2023).

<sup>95</sup> COLMENERO-FERREIRO B. / BRANDARIZ J. A., *Reinventing counter-terrorism tactics and practices in the post-ETA Spanish criminal justice system*; source: Europol reports (Te-SAT). Although they appear to be decreasing in recent years, these discrepancies between police and judicial data in cases of jihadism are also common in other countries. Between 2010 and 2022, 4,908 people were arrested for jihadist terrorism in the EU, but only 3,093 were prosecuted (source: Europol reports. Te-SAT).

<sup>96</sup> CARO, España expulsa en tres años a 34 extranjeros; CARO, España ha expulsado por terrorismo este año a 28 presos; GARCÍA T. / PRAT J., Las cloacas de la “lucha antiyihadista”, *El Salto*, 30 December 2015. Citing official sources, GARCÍA / PRAT note that of 652 people arrested in Spain for jihadist terrorism between 2004 and 2015, only 216 were tried and no more than 144 were convicted.

<sup>97</sup> MARONE F., *The Use of Deportation in Counter-Terrorism: Insights from the Italian Case*, ICCT, 2017; PICULICKA-WILCZEWSKA A., *Deporting Muslim Immigrants Won't Make Poland Safer*, Foreign Policy, 19 October 2020.

<sup>98</sup> COLMENERO B., *Vidas Culpáveis: O. control neoliberal do crime*, Santiago de Compostela 2017.

<sup>99</sup> COLMENERO-FERREIRO B. / BRANDARIZ J. A., *Reinventing counter-terrorism tactics and practices in the post-ETA Spanish criminal justice system*.

to their deportation and release in Chile in March 2017<sup>100</sup>. This is a clear example of the drive towards 'migrationisation', as a major counter-terrorism effort ultimately boiled down to the implementation of a low-profile deportation measure. This case, like many others in the fight against jihadism, demonstrates that deportation is now a crime-control tool routinely used to manage relatively minor cases of political violence in which foreign nationals are (allegedly) involved. In short, the logic of 'migrationisation' has also affected highly sensitive counter-crime strategies, such as those relating to terrorist activities.

## Conclusion

[37] The theory of crimmigration has made a significant contribution to the study of migration control policies and practices, drawing attention to the growing importance of the intersections between migration policy and criminal policy. It has done so, moreover, at a crucial moment, when policy proposals aimed at managing crime committed by migrants were taking centre stage in legislative reform agendas and in public and political debate. The increase in the arrival of migrants in various regions primarily in the Global North has led to a proliferation of what Kanstroom<sup>101</sup> refers to as 'probationary' status. The American legal scholar aptly points out that one of the regimes of migration control (which he terms 'post-entry social control') *'is not concerned [...] with border control, but with the actions and qualities of former foreigners following their entry'*<sup>102</sup>. It is, in effect, a model geared towards controlling the behaviour of new arrivals *'for a certain period following admission'*<sup>103</sup>. As such, it takes the form of a probationary period, in which the imposition of administrative sanctions for criminal behaviour constitutes the most paradigmatic expression.

[38] There is no doubt that this model of governance of the foreign population has gained increasing importance in various places. In this regard, the article has paid particular attention to how this control paradigm is being articulated in the European context. Following a presentation of the most salient aspects of the theory of crimmigration and the debates it has generated, the article focuses on one of the main issues of analysis in this field, namely the political-criminal consequences of the fact that immigration law and criminal law, beyond their points of convergence, continue to operate as partially autonomous sanctioning regimes. Indeed, the study shows that, despite having generated a great deal of debate<sup>104</sup>, the criminalisation of immigration offences is by no means the most significant aspect of the legal transformation we refer to as 'crimmigration'. As noted, this phenomenon of criminalising irregular entry or irregular stay is significant in some countries, such as the United States. However, in many parts of the Global North, the proportion of foreign nationals in the criminal justice system is far higher than in the United States, the United Kingdom, Australia and other Anglo-Saxon countries. It is therefore not surprising that in those places practices have developed which, following a purely managerial logic, prioritise the swift deportation of foreign nationals who have been prosecuted or convicted, over almost any other consideration. Obviously, these models of response to crime generate significant axiological and normative friction, by disregarding the aims of the CL and creating dual systems of criminal liability, differentiated by

<sup>100</sup> DUARTE F., El silencioso regreso de los chilenos condenados por bombazo en España, *La Tercera*, 7 March 2017.

<sup>101</sup> KANSTROOM, *Deportation Nation*; see also MOFFETTE D., *Governing immigration through probation: The displacement of borderwork and the assessment of desirability in Spain*, *Security Dialogue* (Vol. 45/3) 2014, 262 – 278.

<sup>102</sup> KANSTROOM, *Aftermath*, p. 38.

<sup>103</sup> KANSTROOM, *Deportation Nation*, p. 5.

<sup>104</sup> See MITSILEGAS, *Criminalisation of Migration in Europe*; MITSILEGAS, *Preventive Paradigm*.

criteria of nationality<sup>105</sup>. The article shows that such models are not only becoming entrenched in areas of limited social relevance, such as police raids targeting petty urban crime, but more surprisingly in particularly sensitive matters, such as the fight against terrorism.

[39] In this regard, the paper aims to stimulate debate on the criminalisation of migration, highlighting a dimension of the 'migrationisation of the criminal justice system' that has not received sufficient attention. It thus suggests that the debate on crimmigration should not focus solely on regulatory reforms, but also on enforcement practices, which determine how the so-called convergence of criminal and migration law is playing out in practice, at any given time and place. In this way, the proposed perspective can enrich the discussion on the role of the criminal justice system in the governance of migration, developing a new perspective on aspects such as the presence of forms of criminal exceptionalism<sup>106</sup> – what in the German-derived criminal legal culture is termed 'enemy criminal law' – in the response to crime committed by migrants.

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<sup>105</sup> FRANKO AAS, *Bordered Penalty*; FRANKO.

<sup>106</sup> STUMPF, *Terrorism of Everyday Crime*; WEBER / McCULLOCH.

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