



THE BORDERS OF PUNISHMENT

MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION

EDITED BY

KATJA FRANKO AAS

AND MARY BOSWORTH



OXFORD

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THE BORDERS OF PUNISHMENT

KFA: For my grandparents, Vida and Iztok

MB: For my daughters, Ella and Sophia

Preface

Katja Franko Aas and Mary Bosworth¹

Immigration and its control are highly charged topics in contemporary policy and politics. Over the past two decades they have become subjects of extensive scholarly analysis, primarily in fields such as anthropology, sociology, human geography, refugee studies, and human rights law. It is all the more surprising then, that, with some notable exceptions, criminologists have been relatively slow to pay them much attention. The apparent lack of criminological interest is by no means merited by the size of the phenomena and the intensity of the legal, social, and sociological developments in this area. In the United States, for instance, immigration-related prosecutions outnumber all other federal criminal prosecutions, including drugs and weapons prosecutions, while Immigration and Customs Enforcement is now the largest investigative arm of the US Department of Homeland Security (Stumpf, Chapter 3 in this volume). In Europe, rapidly growing foreign populations represent on average 20 per cent of prison inmates, reaching extraordinary highs in countries such as Switzerland (71.4 per cent), Luxembourg (68.8 per cent), Cyprus (58.9 per cent), Greece (57.1 per cent), and Belgium (44.2 per cent).² All states have criminalized at least some aspects of immigration, establishing networks of immigration detention centres and extending their powers to deport.

Under these conditions, traditional distinctions between criminal law and immigration law are eroding. Institutions like the police and the prison, previously bound to the nation state, these days extend well beyond its borders. As more foreigners end up in prison and as states pursue more vigorously additional forms of confinement in immigration detention alongside deportation, the distinct justifications of punishment and administrative penalties blur. The book's title, *The Borders of Punishment*, alludes, on the one hand, to the literal activities of border control, and on the other hand, to punishment in its extended sense, where its borders become blurred and merge with various forms of migration control, deprivation of welfare, and social exclusion. Finally, the overlapping nature of those subject to internal and external border controls and minority communities within host countries, reveal the enduringly racialized nature of citizenship and its protections.

¹ This has been a collaborative venture, not just between the editors but also with the contributors. We would therefore like to thank our contributors, each of whom produced a fascinating account at the conference at the Centre for Criminology in the University of Oxford in April 2012, as well as those who helped us in organizing that event and participated in it (in particular, in Oslo: Per Jørgen Ystehde and Julie E. Stuestøl; in Oxford: Ana Aliverti, Steve Allen, Chris Giacomantonio, Sophie Palmer, and Lea Sitkin). Finally, we would like to thank the European Research Council 2010 and 2012-StG, the British Academy, the University of Oslo, and the Law Faculty and Centre for Criminology at the University of Oxford each of whom provided funding for various aspects of this project.

² Source: <<http://www.prisonstudies.org/info/worldbrief/>>.

Such developments solicit in new ways some of the fundamental and enduring questions of criminal justice and criminology: What is punishment? What is crime? What should be the normative and legal foundation for criminalization, for police suspicion, for the exclusion from the community, and for the deprivation of freedom? How, if at all, does popular punitivism shift in relation to foreign citizens? They also raise questions about methodology. Can we understand the prison today, for instance, simply in terms of life within it, when its effect may be felt many continents away? Do qualitative or quantitative techniques developed with citizens in mind, work when applied to foreigners? How might we capture the similarities between criminal justice and migration control while remaining alert to the specific nature of each field and to the vulnerabilities of non-citizens?

These questions animate this volume. In it we seek, with the assistance of colleagues drawn from across the world, to bring migration and borders to the criminological home front. We believe not only that an understanding of criminal justice is essential to explaining practices such as detention and deportation of foreign citizens, but also that mobility and its control are central to any analysis of the criminal justice system. The purpose of this collection is therefore to sketch out a particular sub-field within criminology and criminal justice, the *criminology of mobility*. We do this, not to put up borders to keep people out, but rather to chart an intellectual space and a theoretical tradition within criminology to house scholars dealing with issues of citizenship, race, ethnicity, and immigration control.

In so doing, we seek to extend traditions of criminological theory concerned with membership, matters of social exclusion, and penal power. With some notable exceptions, theoretical work on punishment and criminal justice has not explicitly questioned the national frame of analysis, leaving the discipline with an implicitly static notion of society at its core. As a result, according to Dario Melossi (Chapter 15 in this volume), even when classical theorists such as Marx addressed issues of migration and mobility, these have not been taken into account in further theoretical analyses of punishment.

Matters of mobility are by no means an historic novelty. They have productively inspired sociological and criminological writings in previous periods, including the writings of the Chicago School, the Birmingham Centre for Cultural Studies, postcolonial criminology, and critical race studies. Nonetheless, the present scale of global movements of people, goods, and capital is introducing new dimensions that are radically transforming the contours of society. These developments, generated by globalization, have brought issues of citizenship to the forefront of numerous political and policy debates. As states reflect on such matters, punishment and the criminal justice system have become increasingly important mechanisms for guarding the gates of membership. The criminology of mobility is therefore a study of the contested and precarious nature of membership in a deeply divided global order, and the practices of policing of its (physical and symbolic) boundaries. As such, it relates to the traditional issues of race, gender, and class, which endure as migration pathways often connect to existing inequalities. For some, these developments raise questions about a developing global apartheid (see Bowling, Chapter 16 in this volume).

The challenge for the criminology of mobility lies in making sense of these continuities while also identifying new manifestations of membership, social solidarity, and belonging. The task is partly an empirical one. We simply have little evidence documenting the experiences and effects of migration control. What is it like to be detained indefinitely? How does it feel to face deportation? What are the challenges that mobility poses for police officers, prison guards, policy makers? However, the criminology of mobility seeks to do more than just fill in the gaps. Significant conceptual work also needs to be done. Many recent developments in migration and criminal justice cannot be fully captured and understood by the vocabulary of the past, nor can they be named and described by criminological and criminal justice concepts alone. Terms of art that have been so productive within criminology, such as legitimacy and (in)justice, alongside work on penalty and (human) rights, are called into question in a global frame. What is the relevance of borders (conceptual, empirical, identity) for the 'right to have rights' (Arendt 2004; Benhabib 2004)? Who is the subject of rights within a society and what is the relevance of the relationship between citizenship and criminal justice?

The book may be dipped into or read from cover to cover. Hindpal Singh Bhui's introduction and Ben Bowling's concluding remarks synthesize the volume's main arguments, while raising additional questions and issues for future consideration. The chapters in between are clustered around five central questions, which underpin much of criminal justice thinking and research: criminalization, policing, imprisonment, punishment, and social exclusion. Though seemingly familiar, contributors demonstrate how these traditional topics become transformed, taking on a new guise and adopting novel rationalities and modes of existence under conditions of mass mobility.

In the first section, Katja Franko Aas, Lucia Zedner, Juliet Stumpf, and Catherine Dauvergne explore how migration unsettles the traditional anchoring of justice and criminal law in the nation state and citizenship. Mobility, and its control, they argue, introduces new forms of illegality and criminalization, often undermining due process rights established within the criminal law. The chapters outline the multiple points of intersection between criminal law, immigration, and refugee law, as well as the eroding distinctions between internal and external aspects of sovereignty and between the process and punishment. As the traditional moorings of criminalization in (national) criminal law and membership begin to unsettle, a challenge arises of doing justice to non-citizens and those whose membership status is in question. Such developments, these chapters suggest, though typically overlooked by criminal lawyers and criminal justice scholars, require new frames of analysis.

The second section takes up the issue of policing. In it, Sharon Pickering and Leanne Weber, Darshan Vigneswaran, and Maggy Lee critically assess the transnational scope and nature of contemporary policing practices. While acknowledging the relevance of historically established practices of racial and colonial control, the authors demonstrate the salience of new ideas and rationalities in practices apparently designed to produce immobility in the form of closed borders and fortress continents. Termed by Weber and Pickering as 'transversal' logic, contemporary

policing transgresses traditional boundaries separating states, between inside and outside the society, and among various policing and administrative domains. In so doing, the police identify who must be immobilized as well as prevent, or in some cases, force movement across boundaries. As Zygmunt Bauman (1998) and others have pointed out (Aas 2007; Weber and Bowling 2008), in a world otherwise marked by transnationality and the freedom of movement, immobility has become a prime form of social exclusion. Under these conditions, the power of the police has shifted and been amplified.

Immobility remains an important theme in the third section of this volume, which considers the imprisonment and detention of foreign citizens. Here, chapters by Mary Bosworth, Emma Kaufman, and Thomas Ugelvik examine the transformation of the 'traditional' prison as well as the growth of special institutions of detention dedicated to the housing of the growing foreign populations. While resembling familiar institutions of confinement, such places, the authors argue, break with or fail to adhere to many of the key assumptions that justify restricting people's liberty. Foreign citizens, are, in short, held to different standards. In prisons and detention centres, states not only mark out a national identity based on exclusion, but reveal the limits of the liberal political ideal of inclusion.

The fourth section explores the corollary of forced immobility: expulsion. The section starts with the particular in a moving account by David Brotherton and Luis Barrios of the traumatic effects of deportation on a group of women and men sent back to the Dominican Republic. Then, while maintaining a focus on specific nation states—the United Kingdom and Sweden—chapters by Matthew Gibney and Vanessa Barker consider more generally the extent to which the established notions of citizenship, democracy, and belonging are being unsettled and transformed through banishment. Through their increasing reliance on deportation, nation states reinforce and redraw the political and legal boundaries of membership, thus raising, in all its complexity, the perennial question of who belongs in the community.

In the final section on the changing nature of social exclusion, Nicolay Johansen's chapter provides a detailed exploration of mechanisms—such as deprivation of welfare and medical aid—used to encourage failed asylum seekers in Norway to leave 'voluntarily'. While fascinated by the apparent novelty and complexity of the phenomena, the final chapter by Dario Melossi brings to our attention the historic antecedents of these developments as well as the persisting salience of the political economy in their formation.

Conclusion

The criminology of mobility introduces new, substantive topics and sites of research as well as transforming old ones with novel empirical and theoretical considerations. The focus of the discipline shifts, on the one hand, to the literal activities of border control, and, on the other hand, to punishment in its extended sense. The criminology of mobility therefore addresses not only issues pertaining to

mobility as such (which may seem to be situated at the outskirts of the social), but rather to those phenomena which are at the heart of contemporary debates about membership and social exclusion in our globalized and increasingly diverse societies. As Honig (2001) points out, foreigners—and the discourses about them—do a particular kind of work in terms of the political constitution of the society. Although generally seen as a threat to social unity and stable identity, foreigners—and the growing punitive regimes to which they are subjected—also serve as a conduit for the articulation of new forms of identity and belonging. This book does not aspire to do justice to the enormity of these topics, yet it is, we believe, a productive step on the way towards their understanding.

Drawing the border to the centre of criminological and penological concerns expands the imaginary of justice (Carlen 2008), by including into the discourse of justice new categories of people as well as some so far overlooked institutional arrangements and geographical locations. This is both a normative and an empirical task, since many of the phenomena in this collection have hitherto neither been adequately described nor named. As a result they have also not been regulated or subjected to scrutiny. At the most basic level, statistics on many of the issues considered in this volume are only inadequately kept. To some extent, the lack of evidence is inevitable. We simply cannot know for certain how many undocumented people are present. On the other hand, however, the government itself at times obscures the topic. In the United Kingdom, for instance, the government rarely publishes details about those held in prison under Immigration Act powers. Details about the make-up of the detained population beyond raw figures are also hard to come by. We know very little, in any country, of what happens to those who are removed or deported.

However, the invisibility pertains not only to the national context but also has global dimensions as it often results from the territorial scope of mobility control beyond the borders of the nation state. Several aspects of mobility control addressed in this volume take place outside respective national territories, or are conducted by non-state agents; for example the extra-territorial policing described by Aas and Weber and Pickering, the suffering of the deportees revealed by Brotherton and Barrios, and the practices of the international NGOs reported by Lee. These are by and large not policies and practices that are publically proposed, debated, democratically agreed, and scrutinized by the (national) media. They are often developed in an ad hoc fashion by individual institutional actors or they may arise through international cooperation. Rather than being delineated by the law, they thrive in its shadow or, what Barker aptly terms, 'no man's lands'. These cross-border activities thus also demand a 'de-bordering of national normative frames' (Sassen 2008: 63) and the formation of novel ethical and legal mechanisms of regulation. An expansion and de-bordering of criminology's analytical and imaginative space—one of the central features of the criminology of mobility—is therefore intrinsically connected with the transcendence of disciplinary boundaries and an expansion of normative and legal spaces. Several chapters, albeit with varying degrees of optimism, refer to human rights and the emerging humanitarian discourses as potential means of empowerment as well as an emerging technique of governance.

We consider this set of essays a first step, along with others, in carving out this new part of our discipline. As governments increasingly develop and apply their powers of exclusion, these issues should concern us all.

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List of Contributors

Editors

Katja Franko Aas is Professor of Criminology at the University of Oslo. She has published widely in globalization, borders, security, and surveillance of everyday life. She is the author of *Cosmopolitan Justice and Its Discontents* (co-edited with C. Baillet) (Routledge, 2011), *Technologies of Insecurity* (co-edited with H.M. Lomell and H.O. Gundhus) (Routledge-Cavendish, 2009), *Globalization and Crime* (Sage, 2007), and *Sentencing in the Age of Information: From Faust to Macintosh* (Routledge-Cavendish, 2005). She is currently heading an ERC Starter Grant project 'Crime Control in the Borderlands of Europe'.

Mary Bosworth is Reader in Criminology and Fellow of St Cross College at the University of Oxford and, concurrently, Professor of Criminology at Monash University, Australia. She has published widely on race, gender, and citizenship in prisons and immigration detention. Her books include *What is Criminology?* (co-edited with Carolyn Hoyle) (Oxford University Press, 2011), *Explaining US Imprisonment* (Sage, 2010), *Race, Gender and Punishment* (co-edited with Jeanne Flavin) (Rutgers University Press, 2007), *The US Federal Prison System* (Sage, 2002), and *Engendering Resistance* (Ashgate, 1999). She is currently (2012–2017) heading an ERC Starter Grant project 'Subjectivity, Identity and Penal Power: Incarceration in a Global Age'.

Contributors

Vanessa Barker is Associate Professor of Sociology at Stockholm University. Her research and teaching focus on globalization, border control, comparative penal sanctioning, and ethnicity. She is the author of *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (Oxford University Press, 2009) and has published in *Law and Society Review*, *Theoretical Criminology*, *Punishment and Society*, *Law and Social Inquiry*, and *Criminology and Public Policy*. She is currently working on a comparative analysis of global mobility and penal order.

Luis Barrios is a psychologist and a professor at John Jay College of Criminal Justice and a member of PhD faculties in social/personality psychology, Graduate Center-City University of New York. As an Episcopalian priest, Barrios was a missionary in the Dominican Republic for nine years, and in New York City he has been a leader in the city's Latino communities. In 1997, together with Dr David Brotherton, Barrios co-founded the Street Organization Project, which seeks to create dialogues among youth gang members, academic researchers, and community activists. Barrios co-authored *The Almighty Latin King and Queen Nation: Street Politics and the Transformation of a New York City Gang* (Columbia University Press, 2004) with Brotherton. He also co-edited *Gangs and Society: Alternative Perspectives* (with Louis Kontos and Brotherton) (Columbia University Press, 2003).

Hindpal Singh Bhui is an Inspection Team Leader at HM Inspectorate of Prisons where he heads inspection of the immigration detention estate in the United Kingdom. He has led major thematic reviews on Muslim prisoners (2010), foreign national prisoners (2006, 2007) and the quality and impact of immigration detention casework (2012). He was formerly a community probation officer, a prison-based foreign national specialist, and a visiting criminal justice lecturer. He was editor of the *Probation Journal* from 1997 to 2007. He has published a number of articles and chapters on prisons, probation, race issues, and foreign prisoners and, in 2009, an edited book, *Race and Criminal Justice* (Sage).

Ben Bowling is Professor of Criminology and Criminal Justice at King's College London School of Law where he teaches on LLB, LLM, and MA courses. His books include *Stop and Search: Police Power in Global Context* (with Leanne Weber) (Routledge, 2012), *Global Policing* (with James Sheptycki) (Sage 2012), *Policing the Caribbean: Transnational Security Cooperation in Practice* (Oxford University Press, 2010), *Racism, Crime and Justice* (with Coretta Phillips) (Longman, 2002), and *Violent Racism* (Oxford University Press, 1998).

David C. Brotherton is Professor and Co-Chair of Sociology at John Jay College of Criminal Justice and a member of PhD programmes in Criminal Justice, Sociology, and Urban Education at the Graduate Center, The City University of New York. Dr Brotherton has published widely on street gangs, schooling, immigration, and deportation and was named Critical Criminologist of the Year in 2011 by the American Society of Criminology. His recently co-authored or co-edited books include: *How Do They Got Away With It: White Collar Criminals and the Financial Meltdown* (2012); *Banished to the Homeland: Dominican Deportees and Their Stories of Exile* (2011); *Keeping Out The Other: A Critical Introduction to Immigration Control* (2009); *Globalizing the Streets: Cross-Cultural Perspectives on Youth, Marginalization and Resistance* (2008); and *The Almighty Latin King and Queen Nation: Street Politics and the Transformation of a New York City Gang* (2004), all published by Columbia University Press. Dr Brotherton's current projects include a comparative study of the occupy movements in Europe, the development of holistic policing strategies vis-à-vis gangs and organized crime in the European Union, and deportation as state performance in a theatre of cruelty.

Catherine Dauvergne is Professor of Law at the University of British Columbia. From 2002 to 2012 she held the Canada Research Chair in Migration Law. In October 2012, she was named a Fellow of Canada's Pierre Elliot Trudeau Foundation in recognition of her contributions to critical public issues in Canada. Dauvergne's most successful book to date is *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008). She has also published three other books, and more than 50 scholarly articles and book chapters over the past 15 years. Dauvergne is a lead investigator for nearly \$1 million in research funding. Dauvergne teaches immigration and refugee law and does pro bono legal work in these areas.

Matthew J. Gibney is Reader in Politics and Forced Migration at the University of Oxford, Official Fellow of Linacre College, and Deputy Director of the Refugee Studies Centre. He is a political scientist who has published many scholarly articles and books on issues relating to refugees, migration control, and citizenship from the perspectives of normative theory and comparative politics. His books include, which has been translated into Spanish and Italian, *The Political, Social and Historical Contours of Deportation* (with B. Anderson and E. Paoletti) (Springer, 2013), (with R. Hansen) a three-volume encyclopedia, *Immigration and Asylum: From 1900 to the Present* (ABC-Clio, 2005), and *The Ethics and Politics of Asylum* (Cambridge University Press, 2004), *Globalizing Rights* (Oxford University Press, 2003).

He is currently writing a book on the evolution of expulsion power entitled, *Unmaking Membership: Banishment, Denationalization, and Deportation in the Liberal State*.

Nicolay B. Johansen is a post-doctoral researcher at the Institute of Criminology and Sociology of Law, University of Oslo, Norway. He has published in a variety of criminological areas such as drug addiction, social control, violence, and classical sociology, as well as white-collar crime, urban life, and the foundations of social theory.

Emma Kaufman received her BA from Columbia University and her MPhil and DPhil from the University of Oxford, where she was a Marshall and Clarendon Scholar. She was a Guest Scholar at the University of California, San Diego's Center for Comparative Immigration Studies from 2011 to 2012 and now attends Yale Law School. Emma's doctoral research examined the treatment of foreign national prisoners in the British penal estate. She has published on American immigration imprisonment, gender and punishment, and British prison policy.

Maggy Lee is Associate Professor in the Department of Sociology at the University of Hong Kong and Visiting Fellow in the Department of Sociology at the University of Essex, United Kingdom. She is currently working on research projects on British lifestyle migration in Asia (funded by the ESRC/Hong Kong Research Grants Council) and female transnational migrants in Hong Kong (funded by the Hong Kong Research Grants Council). Her recent publications include *Trafficking and Global Crime Control* (Sage, 2011) and *Human Trafficking* (Willan, 2007).

Dario Melossi is Professor of Criminology in the School of Law of the University of Bologna. After having being conferred a law degree at this university, he went on to do a PhD in Sociology at the University of California, Santa Barbara. He was then Assistant and thereafter Associate Professor at the University of California, Davis, from 1986 to 1993. He has published most recently, *Travels of the Criminal Question: Cultural Embeddedness and Diffusion* (with Maximo Sozzo and Richard Sparks) (2011), *Controlling Crime, Controlling Society: Thinking about Crime in Europe and America* (2008), *The State of Social Control: A Sociological Study of Concepts of State and Social Control in the Making of Democracy* (1990), and *The Prison and the Factory: Origins of the Penitentiary System* (with Massimo Pavarini) (1981 [1977]). In 2003 he introduced the new Transaction Edition of Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (1939). He is one of the most prominent spokespersons for the so-called 'critical criminology' movement. He is the main editor of *Studi sulla questione criminale*, editor-in-chief of *Punishment and Society*, and member of the board of many other professional journals. His current research concerns the processes of construction of deviance and social control within the European Union, especially with regard to migration.

Sharon Pickering is Professor of Criminology at Monash University in Melbourne Australia. Pickering researches irregular border crossing and has written in the areas of refugees and trafficking with a focus on gender and human rights. She is an Australian Research Council Future Fellow on Border Policing and Director of the Border Crossing Observatory (<<http://www.borderobservatory.org>>). Her books include *Sex Work: Labour Mobility and Sexual Services* (with Maher and Gerard) (Routledge, 2012); *Borders and Crime* (with McCulloch) (2012); *Globalization and Borders: Deaths at the Global Frontier* (with Weber) (2011); *Gender, Borders and Violence* (Springer, 2011); *Sex Trafficking* (Willan, 2009) (with Segrave and Milivojevic) (Springer, 2011) *Counter-Terrorism Policing* (2008); *Borders, Mobilities and Technologies of Control* (2006) (with Weber); and *Refugees and State Crime* (2005).

Juliet P. Stumpf is Professor of Law at Lewis & Clark Law School in Portland, Oregon. Stumpf's research explores the intersection of immigration law with criminal law, constitutional law, civil rights, and employment law. She seeks to illuminate the study of immigration law with interdisciplinary insights from sociology, psychology, criminology, and political science. Representative publications include 'Getting to Work: Why Nobody Cares about E-Verify (and Why They Should)' (2012) 2 UC Irvine L Rev 381; 'Doing Time: Crimmigration Law and the Perils of Haste' (2011) 58 UCLA L Rev 1705; 'States of Confusion: the Rise of State and Local Power over Immigration' (2008) 86 NCL Rev 1557; and 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 Am UL Rev 367. Before joining the Lewis & Clark Law School faculty in 2005, Professor Stumpf was on the Lawyering Program faculty at the New York University School of Law. She clerked for the Honorable Richard A. Paez on the Ninth Circuit and served as a Senior Trial Attorney in the Civil Rights Division of the US Justice Department. She practised with the law firm of Morrison and Foerster.

Thomas Ugelvik is a post-doctoral research fellow at the Department of Criminology and Sociology of Law at the University of Oslo. He has published articles on different aspects of everyday life in prison, such as food-related resistance, imprisonment as masculinity challenge, and the narrative 'othering' of fellow prisoners common in prisoner culture. He is series co-editor (with Ben Crewe and Yvonne Jewkes) of the book series *Palgrave Studies on Prisons and Penology*. He is currently doing research on foreign prisoners in Norwegian welfare-oriented prisons, and the relationship between the prison and the immigration detention systems.

Darshan Vigneswaran is an Assistant Professor at the Centre for Urban Studies and Department of Political Science, University of Amsterdam and has held research posts at Oxford University, the Max Planck Institute for Religious and Ethnic Diversity, and the University of the Witwatersrand. He is the author of *Territory, Migration and the Evolution of the International System* (Palgrave, 2013) and co-editor of *Slavery, Migration and Contemporary Bondage in Africa* (Africa World Press, 2013). His research interests include political geography, state territoriality, migration, and urban segregation.

Leanne Weber is a Larkins Senior Research Fellow in the School of Political and Social Inquiry at Monash University, specializing in migration policing. She has studied and worked at the Institute of Criminology in Cambridge and the Human Rights Centre at Essex University; held research contracts at the Centre for Criminological Research at Oxford University; and taught criminology at the University of Western Sydney and the University of New South Wales. She is the co-author, with Sharon Pickering, of *Globalization and Borders: Death at the Global Frontier* (Palgrave, 2011) and the author of *Policing Non-Citizens* (forthcoming from Routledge).

Lucia Zedner is Professor of Criminal Justice in the Faculty of Law, Law Fellow at Corpus Christi College, and a member of the Centre for Criminology, University of Oxford. Since 2007 she has also held the position of Conjoint Professor in the Law Faculty at the University of New South Wales, Sydney, where she is a regular visitor. Her most recent publications include *Principles in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (co-edited with Julian Roberts) (Oxford University Press, 2012) and *Prevention and the Limits of the Criminal Law* (co-edited with Andrew Ashworth and Patrick Tomlin) (Oxford University Press, 2013).

List of Abbreviations

| | |
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| AFP | Australian Federal Police |
| ASEAN | Association of Southeast Asian Nations |
| AusAID | Australian Government Overseas Aid Programme |
| BID | Bail for Immigration Detainees |
| CBP | Customs and Border Protection (US) |
| DCO | detention custody officer |
| DFID | Department for International Development |
| DIAC | Department of Immigration and Citizenship (Australia) |
| EEA | European Economic Area |
| EFTA | European Free Trade Association |
| ERC | European Research Council |
| ESRC | Economic and Social Research Council |
| EUROSUR | European Border Surveillance System |
| FATF | The Financial Action Task Force |
| HMIP | Her Majesty's Inspectorate of Prisons |
| ICE | Immigration and Customs Enforcement (US) |
| ICIBI | Independent Chief Inspector of Borders and Immigration |
| ICMC | International Catholic Migration Commission |
| IIRIRA | Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (US) |
| IOM | International Organisation for Migration |
| IRC | Immigration removal centre |
| LPR | legal permanent resident |
| NAO | National Audit Office |
| NOMS | National Offender Management Service |
| RAN | Royal Australian Navy |
| RGC | Research Grants Council of Hong Kong |
| SIAC | Special Immigration Appeals Commission |
| STHF | short-term holding facility |
| TIP Report | Trafficking in Persons Report (US) |
| UAV | unmanned aerial vehicle |
| UKBA | UK Border Agency* |
| UNESCAP | United Nations Economic and Social Commission for Asia and Pacific |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNHCR | United Nations High Commissioner for Refugees |
| UNIAP | United Nations Inter-Agency Project in Human Trafficking |
| UNICEF | United Nations Children's Fund |
| UNIFEM | United Nations Development Fund for Women |
| USAID | United States Agency for International Development |
| VEVO | Visa Entitlement Verification On-line (Australia) |

* At the end of March 2013, the British Government announced that the UKBA was to be abolished, returning immigration and enforcement services to the Home Office and the direct control of ministers. Chapters in this collection refer to the UKBA, since they were written before the announcement was made.

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PART I: CRIMINALIZATION

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