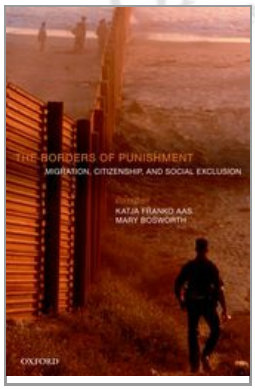

The Borders of Punishment: Migration, Citizenship, and Social Exclusion
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Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment

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[–] Abstract and Keywords

This chapter examines the place of the citizen in different conceptions of the criminal law, and explores the implications for those who are not citizens. It looks at debates in criminal law theory about the 'problem' of the non-citizen, which range from treating the non-citizen as a guest to whom hospitality is owed to treating him or her as a non-member of the legal community — an untrustworthy figure to whom lesser obligations are owed. It examines the tenets of *Feindstrafrecht* — a criminal law for enemies distinct from *Bürgerstrafrecht*, the criminal law only for citizens. It is argued that the centrality of citizenship to the criminal law and punishment poses intractable problems for those whose citizenship status is absent, in doubt, or irregular, and makes it possible to conceive of *Feindstrafrecht*, with all the adverse consequences that this entails.

Keywords: citizenship, criminal law, non-citizens, punishment, Feindstrafrecht, enemies, Bürgerstrafrecht

> It is a shame and bad taste to be an alien, and it is no use pretending otherwise. There is no way out of it. A criminal may improve and become a decent member of society. A foreigner cannot improve. Once a foreigner, always a foreigner. There is no way out for him.[2]

Introduction

Crimes of mobility, the policing of borders, and the carceral institutions of immigration detention and deportation are all relatively new objects of criminological enquiry. A developing convergence between criminology, migration, and refugee studies refocuses attention away from the study of domestic crime to borders and beyond, to examine the ways in which unlawful immigrants are policed long before they step on domestic soil. Scholars interested in the policing of borders are, perhaps predictably, chiefly interested in what happens at those borders and in the institutions of border control, wherever they are physically located (Aas 2012). This chapter suggests that understanding the borders of punishment might profit from closer attention to internal questions about the constitutional structures of the criminal law, its authority, and its scope. We need to address the question of border, in other words, from the inside out.

Competing accounts of what grounds the criminal law and what justifies punishment attach different weight to the importance of relations between state and citizen and to lateral relations among citizens—of which more anon. But they hold in common the view that citizenship is central in explaining the obligations **(p.41)** that individuals owe under the criminal law and in justifying the censure and sanction of those who transgress its norms.[3] Citizenship is also said to ground the obligations that the state owes to the accused, and it has been deployed very effectively to articulate a parsimonious account of the limits of justified punishment (Duff 2010a). This is all well and good if one is a citizen in receipt of the protections and party to the reciprocal obligations that attach to being a legal resident of one's country. But the grounding of criminal law and punishment in the person of the citizen leaves unanswered large questions about the ambiguous status of those who are not, or not yet, or no longer, legal citizens.[4]

This chapter examines the place of the citizen in differing conceptions of the criminal law, and explores the implications for those who are not citizens. It goes on to examine contemporary debates in criminal law theory about the 'problem' of the non-citizen. These range between, at best, treating the non-citizen as a guest to whom hospitality is owed, to, at worst, treating him or her as a non-member of the legal community, an untrustworthy figure to whom lesser obligations are owed. The chapter will suggest that the difficulties entailed by these accounts reveal the hazards of predicating the obligations of criminal law upon citizenship. Important too are changes in the architecture of offences and in criminal procedure. The trend toward status offences and recourse to civil-criminal hybrid preventive orders, designed to restrain and monitor those deemed untrustworthy, also has adverse implications for responses to the non-citizen.

Notwithstanding the fact that the criminal law is conventionally predicated on the figure of the citizen, the criminalization of the non-citizen for breaches of immigration laws proceeds apace. Aliverti reports that while 70 immigration offences were passed in the

UK from 1905 to 1996, 84 new immigration offences were created from 1997 to 2010 in six Acts passed by the Labour government. The Immigration and Asylum Act 1999 alone created 35 new immigration-related offences, including deception intended to circumvent immigration enforcement actions; false or dishonest representation by asylum claimants; failure by a sponsor to maintain claimants; and offences relating to the enforcement of discipline inside removal centres. The Nationality, Immigration and Asylum Act 2002 added further offences, including assisting unlawful immigration to a Member State by a non-EU citizen; helping an asylum seeker to enter the United Kingdom 'knowingly and for gain'; and assisting entry to the United Kingdom in breach of a deportation or exclusion order. Further offences were added by the Asylum and Immigration Act 2004 (which made failure to produce a passport and failure to **(p.42)** cooperate with deportation or removal procedures without a reasonable excuse crimes), as well as by the UK Border Agency Act 2007 and the Borders, Citizenship and Immigration Act 2009 (Aliverti 2012a; Aliverti 2012b). The phenomenon of 'crimmigration' has rightly attracted scholarly attention and concern.[5] Less attention has been paid to the fact that many immigration offences fail to satisfy basic principles of criminal law. This failure, and our acceptance of it, demands explanation. In seeking to explain these trends, the chapter will examine the tenets of *Feindstrafrecht*—a criminal law for enemies distinct from *Bürgerstrafrecht*, the criminal law only for citizens. According to Jakobs, *Feindstrafrecht* applies to those to whom the normal protections of the criminal law and criminal procedure do not and should not apply. This chapter will explore heated debates in Germany and elsewhere about the claims of *Feindstrafrecht*. It will suggest that the possibility of positing a separate, less favourable 'law for enemies' derives directly from the fact that the criminal law is predicated upon citizenship, since it is this that opens the way to differential, less favourable treatment of non-citizens. In short, this chapter will suggest that the centrality of citizenship to the criminal law and punishment poses intractable problems for those whose citizenship status is absent, in doubt, or irregular and makes it possible to conceive of *Feindstrafrecht*, with all the adverse consequences that this entails. The chapter concludes by suggesting some possible ways out of this impasse.

1. Criminal Law as Public Law

Domestic criminal law is an inherently bounded entity defined by reference to the collective interests it serves. It is a truism that what distinguishes the criminal law from tort actions between private parties is the public character of criminal wrongdoing. A wrong is identified as criminal because it is deemed a public wrong: that is to say it is 'a wrong against the polity as a whole, not just against the individual victim' (Duff 2007: 141). The idea of public wrong rests on the assumption that we have obligations to our fellow citizens that are transgressed by those forms of wrongdoing which go beyond personal injury to violate or threaten values that underpin the polity. It also requires that members of the public share a sufficient commitment to a set of common values (whatever they may be and even if there is disagreement about the values themselves) to ground a criminal law that articulates their boundaries. What those values are need not detain us here; the important point is rather that the definition of crime as a public wrong relies upon a notion of the public as a self-defined and finite entity. Duff argues that 'the "public" character of crime is therefore an implication, rather than a ground, of its

criminalizable character: the reasons that justify its criminalisation are the very reasons why it is "public"' (Duff 2007: 142). In short, the public nature of criminal **(p.43)** wrongdoing is built upon the idea of a polity that enjoys enough commonality to be able to specify its collective values and to enforce them.

The idea of crime as public wrong is central not only to the definition of offences but also to the 'public interest test' that must be satisfied if prosecution is to proceed. Only transgressions of public values—those held to be sufficiently important to the self-definition of the polity to require public condemnation of their breach—are prosecutable. In English law, for example, the Code for Crown Prosecutors requires the prosecutor to consider whether it is in the public interest to bring a prosecution or whether 'there are public interest factors tending against prosecution which outweigh those tending in favour'.[6] In Thorburn's view, the public interest decision derives from the fact that the criminal law is a branch of public law and officials acting upon it exercise public powers on behalf of the citizenry in the collective interest. He argues that state officials can therefore 'make a legitimate claim to be acting on behalf of us all' (Thorburn 2011: 42). However, the 'us' in 'us all' is not a universal 'us' but a bounded 'us'. The 'public' in both the public wrong requirement for criminalization and the public interest test for prosecution and the 'us' on behalf of whom the criminal law censures wrongdoing and sanctions wrongdoers is a restricted population of those who are citizens. To the extent that citizenship and the idea of the public underwrite the definition of what is a crime and what is prosecutable under domestic law, the criminal law is bordered, its territory is defined, and its audience limited to those who belong to that collective public, for and to whom it speaks.

2. State, Citizen, and the Authority of the Criminal Law

Just as the scope of domestic criminal law is bounded, so too are the bases of its authority. Competing accounts of the authority of the criminal law go to the very definition of the state, its powers, and its relationship to citizens. This is the stuff of jurisprudence and political theory, upon which sophisticated treatises have been elaborated and debated.[7] What follows is a brief and necessarily simplified overview of the two main camps of thought: liberalism and communitarianism (on which, see Mulhall and Swift 1996).

A classic liberal conception of the relationship between state and citizen focuses upon the obligations citizens owe to the state and the state owes to its citizens. The citizen's obligation to obey the law is explained variously by reference to tacit consent to its authority; ideas of benefit or gratitude to the state for the protection and services it provides; reciprocity or fair play to other citizens; or the consequentialist ground that, absent obedience to law, chaos or return to a Hobbesian state of nature would result. Even in respect of those crimes that do not tend toward disorder, the grounds for obligation are found in the desirability of coordination **(p.44)** and efficiency (for example, laws determining on which side of the road to drive). It is these collective values that underpin much *male prohibita* criminal law. The historically dominant account of the state as a sovereign who issues commands loyally obeyed by obedient subjects has been

overlaid by liberal democratic accounts of the relationship between state and citizen as based upon mutual agreement or contract. Variant theories of political authority share as a common core the idea that citizens consent to state authority in return for which the state undertakes 'to prevent people from mistreating others, and to safeguard good order and the basic means by which citizens can live good lives' (Ashworth and Zedner 2011: 280).[8] Questions about the nature and extent of state authority, the measure of liberty to be sacrificed in return for protection, and the scope of the public sphere are answered differently in different accounts of liberalism. Citizenship appears in many accounts, underpinning the idea that moral norms derive their force from a contract between state and citizen or among citizens in respect of the state.[9]

By contrast, and at the risk of further oversimplification, communitarianism questions the atomistic account of individual autonomy and the hierarchical relations between citizen and state suggested by liberalism. Communitarians place greater emphasis upon the relational links among citizens and upon their membership of community. They see obligations under the criminal law as being vested in the bonds of community; the values upheld by the criminal law as being those held in common; and its ability to communicate censure as being dependent on a linguistic and normative commonality (Duff 2001: 131). Communitarianism, too, is territorially bounded, though the borders are context specific to whatever community is at issue, whether familial, professional, local, or national. Antony Duff has developed a sophisticated communicative account of the criminal law and punishment which derives from communitarian thinking and which addresses people as citizens (Duff 2010a; Duff 2011). He distinguishes between citizens and subjects, arguing that 'if people are to be bound by the law as citizens, rather than merely as subjects, their law must be a "common" law…It must be addressed to them by the community, as members of that community' (Duff 1998b: 256). The role of citizenship in Duff's account is important because it is the citizen *to whom* the criminal law speaks, it is the community of citizens *by whom* the defendant is called to account, and it is the community *in answer to whom* the offender owes penance for breaching the criminal law. Authorship of the criminal law derives from the political community of citizens in a liberal democracy through their elected representatives. Its norms are those norms held in common by that community—it is this that makes 'the criminal law, a common law' (Duff 2007: 50). And its **(p.45)** addressee is the citizen who is made answerable (or, one might say, responsible) to fellow citizens for breach of those norms.

So important is this communitarian ideal to Duff's thinking that he is led to conclude that 'if we do not live in what can count as political communities, the legitimacy of criminal law is radically undermined, as is much else about the state' (Duff 2011: 141). Criminal law for communitarians like Duff is, therefore, a civic enterprise: it is based upon prior associative obligations, breaches of which are subject to criminalization. These associative obligations are owed not out of gratitude or consent to the authority of the state but by virtue of 'our shared membership of the polity' (Duff 2011: 140). Membership of a community and common bonds underpin mutual obligations and posit a horizontal basis for the authority of the criminal law that is distinct (though how distinct might be debated) from a hierarchical model of state sovereignty. There is, however, a latent sting in the

communitarian tail: namely its treatment of those who do not belong; who as the stranger, the alien, or the excluded, stand outside the bonds of membership and commonality.[10] Nor is there any guarantee that all those who enjoy citizenship will enjoy fair and equal treatment. Duff recognizes that 'communities can be, and all too often are, oppressive, illiberal, and unjust. They can also…be in various ways *exclusionary*: they can exclude from full membership or participation groups or individuals whom they (mis)perceive as alien, inferior, or "other"' (Duff 1998b: 257; Zedner 2010).

3. The Territory of the Criminal Law and the Problem of the Outsider

Sparse and inadequate as these sketches of liberal and communitarian accounts of citizenship are, they suffice to establish that in so far as the criminal law is predicated upon citizenship this sets sharp bounds to its remit. As Gibney has observed, 'citizenship is inherently exclusive. To define a state's citizenry is simultaneously to define who is not a citizen' (Gibney 2006: 2). Although 'by far the most common way for non-citizenship (or alienage) to be generated is through *boundary crossing*: moving out of a state in which one holds formal membership (nationality) into another sovereign state' (Gibney 2006: 3), citizenship may also be revoked, withdrawn, or lost through fundamental changes in the nature of the state (for example civil war, revolution, or the introduction of discriminatory citizenship-stripping regimes such as Nazism). Gibney (2006) observes that members of other groups, though they are formally citizens, may nonetheless be treated as second-class or 'stunted' citizens as a result of gender, ethnic, religious, or economic discrimination. It follows that attaching the protections of the criminal law to full citizenship and legal standing has the effect of limiting its scope and availability to those who do not belong or whose membership is in doubt. I have addressed the problem of the bounded nature of the criminal law elsewhere, arguing that:

> **(p.46)** insistence that all those subject to the criminal law must be citizens in the sense of being full members of the political community does not acknowledge that even to speak of community is, of necessity, to acknowledge its boundaries. A model of the criminal law predicated upon the idea of community presumes a bounded civic entity to which most will belong but from which, if community is to mean anything, some must by definition be excluded. (Zedner 2010: 400)

In what follows, I explore further how the criminal law should address those who as non-citizens stand beyond its borders, as well as those deemed second-class or stunted citizens whose enjoyment of its legal protections is limited by their subordinate standing.

The problem of boundaries and exclusion is not confined to communitarian accounts of the criminal law. The problem is no less pressing under liberalism, as Blake observes:

> Liberalism has difficulty with the fact of state borders. Liberals are, on the one hand, committed to moral equality, so that the simple fact of humanity is sufficient to motivate a demand for equal concern and respect. Liberal principles, on the other hand, are traditionally applied only within the context of the territorial state, which seems to place an arbitrary limit on the range within which liberal guarantees will apply. (Blake 2001: 257)

In both classical accounts of the power of the sovereign command over its subjects and in contractarian accounts of relations between state and citizens, the scope of domestic criminal law is also clearly bounded. It extends only to the borders of the sovereign realm or the limits of the nation state—the so-called 'principle of territoriality' (Duff 2007: 44; Aas 2011: 135).[11] The territorial aspect of domestic criminal law draws its authority not from its geographical limits but from the normative significance of the relations (sovereign/subject, contractarian, communitarian) that bind those within its borders. And it is this that creates the particular problem of the outsider.

Duff is alive to the territoriality of the domestic criminal law and the problem of the non-citizen. He advances an appealing, but not unproblematic, response to the problem by suggesting that we should think of non-citizens as temporary residents, as visitors, or, better still, as our guests. To posit non-citizens as guests presupposes that we assume the role of hosts and, with it, all the obligations of hospitality. It follows that not only should we treat our guests decently, with 'respect and concern', but, says Duff, we should afford them no less protection and support than we offer to full members of our community (Duff 2011: 141). In turn, this ethic of hospitality imposes reciprocal obligations upon those who come as guests to abide by our rules, if for no other reason than 'respect for the local values and attitudes' (Duff 2011: 142). Where the conduct of visitors is wrongful, whether or **(p.47)** not it would be a wrong elsewhere, it becomes *our* business by virtue of the fact that it is committed on our territory and the rightful object, therefore, of our attention as a polity.

Duff's account offers a more decent, civilized approach to the problem of the outsider and responds to important questions, which might otherwise appear to be without answer, about how the criminal law should speak to non-citizens. But it is more sanguine about the role of respect and concern in a civilized polity than seems consistent with what might realistically be expected of modern states in an era of mass migration that is said to test hospitality to its limits. It presupposes that the polity is indeed civilized or at least capable of civility, that we are willing to treat all who visit as our guests and extend to them our hospitality as hosts. The idea of hospitality might plausibly apply to those who come as tourists, visitors, or temporary residents, but in practice it is strained in the case of those who enter as long-term economic migrants, asylum seekers, or refugees. The antagonistic, often exclusionary, and at times xenophobic tenor of contemporary immigration politics stands in direction tension with the idea of hospitality (Fekete and Webber 2009). It is further undermined by the fact that governments increasingly impose penalties upon hosts such as transportation companies, employers, and landlords for failing to uphold immigration laws.[12] The result is that far from acting as hosts, these groups are co-opted into the role of law enforcement agents, obliged to report undocumented entrants to the authorities if they are to avoid penalties themselves (see Pickering and Weber, Chapter 5 in this volume).

Political realism aside, the concept of hospitality might be thought to set up a dependent relationship between host and guest. If hospitality, concern, or protection is not to be a matter of largesse on which the welfare of the guest depends, then we need a more

developed normative conception of what hospitality entails and what duties it places upon the host. More problematic are the obligations placed upon non-citizens as guests, which seem too closely akin to the obligations owed by subjects to the sovereign to fit well with modern liberal democratic accounts of the criminal law.

Since non-citizens are by definition not citizens, it may be argued that there is nothing wrong or inconsistent with them being treated as such. But in so far as we have independent concerns about treating people who are bound by law as subjects, then to regard non-citizens as *subject* to law is problematic. To do so brings all the dangers of addressing non-citizen defendants not as members of a normative community but as subjects upon whom legal obligations are imposed despite the fact that, as non-citizens, they have no right to share in the authorship or amendment of our common norms and they enjoy reduced protections under our laws. Inasmuch as the criminal law is predicated upon the reciprocity of citizenship, a criminal law that is addressed to non-citizens as guests also raises questions about our standing, as hosts, to call non-citizens to account. Duff observes that 'unless a **(p.48)** person is addressed…by the law of a community of which he is a member, he cannot be bound by that law as a citizen' (Duff 1998b: 257), yet this leaves open the question of how and upon what basis the non-citizen is then bound.

In a time of mass migration, refugees, asylum seekers, and illegal immigrants are more often perceived, at best, as uninvited guests, at worst as threatening intruders. The public's willingness to trust those whose provenance is unknown or whose values and world view may differ radically from their own makes the extension of hospitality appear to many as an act of altruism too far. As Waldron observes in respect of foreign nationals suspected of involvement in terrorism, all too often '"the individual" in question is not really thought of as a member of the community at all: he is an alien, a foreigner' (Waldron 2010: 35).

4. Some Hazards of Criminal Law at the Border

All this begins to explain why we have difficulty in addressing the non-citizen as a full member of our community and why, in practice, we may find it problematic to extend the hospitality owed to a guest. It does not follow, however, that the non-citizen should be treated with hostility. So the increasing trend toward exclusion and expulsion, made manifest in the growth of immigration offences, the extraordinary increase in foreign national prisoners, and in deportation of non-citizens, requires explanation (Bosworth 2008; Bosworth 2011; Bosworth and Kaufman 2011). The bounded nature of domestic criminal law is made toxic by an exclusionary turn in contemporary penal politics that is prone to identify 'monsters and aliens', not only on our borders but also in our midst (Hudson 2006: 237). The antisocial youth, the sex offender, and the would-be terrorist, through their proclivities or conduct, are seen to have breached civic trust and, in so doing, to have placed themselves outside civil society. As such, they are deemed to be legitimate objects of monitoring, restraint, or even exile (Zedner 2010: 389). Non-citizens, as outsiders par excellence, are objects of suspicion to be stopped, searched, and interrogated even before they reach the border. Those whose ethnicity, appearance,

or documentation fails to provide countervailing reassurance are liable to be turned back, detained, or criminalized.

The tendency to social exclusion, which draws bright lines between 'them' and 'us', is a topic much discussed in criminological literature[13] but its focus has, until recently, been principally upon the drivers, practices, and consequences of exclusion within society. The implications of these trends for the ways in which we think about those who were never members of our society, and for whom *re*integration is not a possibility, merit further attention (though see Hudson 2006: 237–241). They raise questions about how far the valorization of community and the tendency toward social exclusion bleeds into our treatment of the non-citizen. As Hudson observes, 'The other figure at the borders of community is the *alien.* **(p.49)** Unlike monsters, the alien is a figure we have not yet judged…The alien is not-yet-classified, the *undecided* who has yet to persuade that she is friend not foe' (Hudson 2006: 239).

The role of trust is particularly relevant here. Ramsay has identified, as an important characteristic of contemporary penal politics, the emphasis placed upon the vulnerability of citizens, the consequent popular demand for reassurance, and the intolerance of those who by virtue of their conduct fail to reassure (Ramsay 2009; Ramsay 2010: 724). Ramsay's chief object of inquiry is the antisocial offender, but his analysis extends no less plausibly (one might say even more plausibly) to the serial sex offender, to the would-be terrorist, or persistent offender whose conduct places their fidelity to the criminal law in question. Ohana invites us to consider the role of trust and distrust in our construction of offenders who, by breaching the norms of the criminal law, are deemed to fail in fulfilment of their duties as loyal citizens and who, in so doing, disappoint 'the expectations of fellow members of the polity' (Ohana 2010: 724). Whereas these offenders have, through their conduct, provided positive grounds for distrust, the outsider has yet to prove his or her trustworthiness. While trust can be established relatively easily by those in receipt of the requisite papers, bank balance, and bona fide travel plans, undocumented or irregular aliens are quickly categorized as objects of distrust by the state, all the more profound because, as outsiders, they owe no loyalty to the polity.[14]

These questions of trust and distrust lie at the heart of a heated contemporary debate in European legal scholarship[15] prompted by the work of the German criminal law scholar Günther Jakobs, who infamously developed the concept of *Feindstrafrecht* (enemy criminal law) (Jakobs 1985). *Feindstrafrecht* is advocated by Jakobs as a distinct branch of criminal law distinguishable from the norms of criminal law for citizens (*Bürgerstrafrecht*) so as to preserve the integrity of that law by providing grounds for departing from its fundamental precepts and principled constraints. *Feindstrafrecht* is directed principally at the disloyal citizen who by dint of persistent and unrepentant offending is deemed to foreclose the possibility of his or her reintegration into society and restoration to full citizenship. It thus promises security for loyal citizens against those deemed dangerous or irredeemably defiant. Trenchant criticisms have been mounted at the assumptions underpinning Jakobs' account: namely that it levers the claims of public security to justify overly extensive preventive measures; that it strait-jackets the borders of the citizens'

criminal law by confining its audience to supposedly 'loyal' citizens; and that, by privileging communitarian values and group identity, it exacerbates the exclusionary turn of contemporary penal politics (Ohana 2010: 729–730). As Ohana observes, 'the logic of *Feindstrafrecht*…marks actors who cannot be trusted to abide by the law on their own and subjects them to special restrictions for the sake of protecting the **(p.50)** public' (Ohana 2010: 741). This implication has not been overlooked by the Far Right in Germany who seized upon Jakobs' ideas to argue that foreigners, who were in fact non-citizens, should be treated differently to German citizens 'on the grounds that their lack of affiliation to the nation posed a grave threat to Germany and justified their classification as "criminal enemies"' (Fekete and Webber 2009: 5).

For all the criticism fairly levelled at Jakobs' theory as a normative account of the criminal law, there remains explanatory value in his identification of the precepts and attributes of *Feindstrafrecht* to illuminate key attributes of contemporary penal politics. Its explanatory value extends beyond our treatment of those who can be deemed to have demonstrated their disloyalty by dint of their conduct (and thus rendered themselves outsiders or enemies), to our responses to those who are deemed untrustworthy by virtue of their status *as* outsiders. Furthermore, attributes, positively condoned by Jakobs as central precepts of *Feindstrafrecht*, correspond to parallel trends in the contemporary overextension of criminalization to immigration. Both seek to punish pre-emptively to prevent harms before they occur; both license the imposition of disproportionate sanctions, indefinite detention, or even exile in the name of security; and both license departure from the fundamental procedural protections of the criminal law on the grounds that those outside citizenship do not deserve such protection. These trends can be observed in the criminalization of immigration. Criminal liability is extended back in time to encompass inchoate and even pre-inchoate liability, for example criminalizing at the point of departure or before the border is even attained (Aas 2012). New laws expand participatory liability for crimes of association, for example in respect of illegal immigration and trafficking. And criminal liability is attached to what were once regulatory requirements of immigration law but which are now recast as criminal offences.[16]

5. The Criminalization of Immigration and the Limits of the Criminal Law

This leads to our final observations on the status of immigration offence within criminal law and some worrying aspects of those offences that transgress the legitimate limits of criminal liability. Much has been written on the trend toward criminalizing breaches of immigration law (eg Stumpf 2007; Chacon 2009). Less has been said about the ways in which that trend results in the creation of offences that breach fundamental principles of the criminal law (though see Stumpf, Chapter 3 in this volume). A full treatment of this question is beyond the scope **(p.51)** of this chapter,[17] yet it can be argued that core principles of the criminal law are imperilled by many immigration offences.

First, a basic requirement of the criminal law is fair warning. Although ignorance of the law is no defence and visitors to a country are bound by the laws of land, it could be said that the creation of immigration offences risks breaching the requirement of fair warning, that people should be given adequate notice of any legal requirement, so that they can

reasonably adjust their conduct to accord with it. Notices now proliferate in the crowded arrivals halls of major airports which, in lengthy, minute script, enumerate just some of the many immigration offences. Whether this suffices to satisfy the requirements of fair warning merits further consideration, especially given the difficulty, to which any traveller will attest, of ensuring that one accords with the minutiae of local immigration requirements.

A second objection is that many immigration offences lack a sufficient culpability requirement or are offences of strict liability. Indeed, one of the classic cases of strict liability is the immigration case of *Larsonneur* (1933) in which a French woman was found guilty of no more than being 'an alien' illegally landed, through no fault of her own, on English soil.[18] Many modern immigration offences render would-be immigrants or refugees liable for serious offences in respect of which liability is satisfied by limited knowledge requirements or by strict liability alone. For example, one of the most commonly prosecuted of immigration offences is section 2 of the Asylum and Immigration Act 2004, the strict liability offence of failure to produce a passport (Aliverti 2012a: 103).

The third and perhaps most important objection is that it is questionable whether immigration offences satisfy the basic requirements of JS Mill's harm principle, namely that 'that the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others' (Mill 1859/1979: 68). A necessary condition of criminalization is that some non-trivial harm is risked or caused by the offender (Simester and von Hirsch 2011: Ch 3; Ashworth and Zedner 2012). Yet in respect of many immigration offences it is unclear what the harm, or putative harm, is. Given that most immigration offences are crimes of strict liability, neither can it be said that they impose a wrongfulness criterion. Taken together these lapses raise profound questions about the justifiability of criminalizing illegalities by immigrants where these do not meet the basic precepts of criminalization.

The question remains why we are so willing to depart from adherence to ordinary principles of criminalization in respect of immigration. Enough has been said about the centrality of citizenship to suggest that our understanding of the criminal law derives its authority from and addresses itself to citizens. This provides a licence for the standards applied to non-citizens to be reduced, compromised, or dispensed with altogether. In theory, if not always in practice, citizens in a democratic polity share the privileges of a fundamental right to be presumed **(p.52)** free from harmful intentions; they enjoy common authorship, through an elected legislature, of the criminal law; and they benefit from the security of due process protections from unwarranted state interference in their lives. By contrast the non-citizen is more often a figure of mistrust and, in many respects, offered lesser protections. In so far as criminalization rests on the idea that citizens are responsible agents responsive to reasons and that those reasons are ones the individual can fairly be expected to understand by dint of his or her shared membership of law's community, the very basis for criminal responsibility is attenuated in the case of the non-citizen. Perhaps we should not be surprised, therefore, by the apparent readiness to erode ordinary standards in respect of those to whom no such

civic trust is owed and whose very membership of the polity is denied or in doubt.

6. Concluding Thoughts

This chapter has explored the contention that we cannot understand the borders of punishment, still less what is happening at the borders of states, unless we attend first to internal questions about the scope, authority, and territory of domestic criminal law. It has examined the centrality of the citizen as the subject to whom the criminal law speaks, and has examined the importance of law's community in constituting the normative authority by whom the citizen is called to account. In so doing it has suggested that the non-citizen, as an outsider, poses particular problems for the criminal law and especially for policing of immigration. The chapter has identified important lapses in adherence to basic principles of criminalization in respect of immigration offences and has suggested that failure to observe these principles derives in no small part from the subordinate standing accorded to non-citizens.

All this leaves unanswered questions about the grounds upon which the protections of criminal justice might be extended to those who are not citizens. This chapter has raised some doubts about the ethics of hospitality and has probed the plausibility of the idea that non-citizens be treated as our guests. It has questioned the idea of basing our penal practices upon our capacity for empathy, our ability to embrace difference, or our acceptance of the stranger at our gate. As has been made clear, present practice suggests a worrying tendency to regard non-citizens as untrustworthy and unworthy, therefore, of the full protections ordinarily accorded by the criminal law to citizens. Whether working towards a cosmopolitan conception of community grounded in our common humanity would have any greater chance of changing attitudes in the medium term remains open to question.

The plight of the non-citizen is not a matter of easy resolution. What follows are no more than tentative avenues of enquiry that seek to address the problems identified in this chapter. One approach might be to question whether we should allow citizenship to do so much work in our thinking about responsible agency and the role of the criminal law. Given the evident hazards entailed in predicating our criminal law upon citizenship, might we do better to explore how far ideas of autonomy and of responsibility that underpin the ways in which we address and **(p.53)** respond to citizens can be extended to non-citizens?[19] Another possible way of overcoming the citizen/non-citizen binary is the idea of 'denizenship' (Hammar 1990). Denizenship recognizes the hybrid status of those with long-standing or permanent residence who possess many legal and social rights but lack full political citizenship. Also important is the argument that citizenship should not be a predicate for basic rights and that in a liberal democracy the protections of the criminal law, criminal process and just punishment apply to all irrespective of citizenship. As Cole insists, 'basic protections of liberty…are not, and should not be, deemed privileges or rights of citizenship' (Cole 2003; Cole 2007; see also discussion in Zedner 2010: 392–393). An important feature of human rights law is that it provides safeguards for persons by virtue of their status as humans and out of respect for humanity, regardless of whether or not they are citizens. Article 6 ECHR rights to a fair trial, for example, apply

equally to the foreigner and to the stateless person and Article 3 shields immigrants from being deported to countries where they face torture, or inhuman or degrading treatment.

The dangers posed by the evident willingness of governments to resort to criminalization at the border raises further questions about how best to delimit the phenomenon of 'crimmigration'. A first step might be to require that immigration offences satisfy basic principles of criminalization and, where they do not, to mark those offences as suitable candidates for decriminalization. Only by comprehensive review of existing offences and careful pre-legislative scrutiny of proposed offences might the over-readiness to criminalize breaches of immigration law be forestalled. So doing would serve to check the exercise of the police power over non-citizens by limiting immigration offences to those that are fairly labelled, clearly wrongful, and entail harms of a sufficient gravity to merit criminalization. A second step would be to scrutinize more closely the coercive and otherwise burdensome qualities of immigration measures and practices outside the criminal law. Proceedings in civil or hybrid civil-criminal channels are an increasingly common feature of contemporary crime control, attractive to the authorities because they sidestep the requirements of the criminal process (Zedner 2007; Stumpf, Chapter 3 in this volume). Yet, where civil procedures impose burdens akin to punishment, they are clearly detrimental precisely because they deny criminal process protections to those who are subject to them (Ashworth and Zedner 2010). Where proceedings and measures result in burdens of a severity comparable to punishment—immigration detention springs to mind as an obvious example—the process protections and standard of proof should surely be akin to those applied in criminal proceedings (Ashworth and Zedner 2010: 75).

This latter step may overcome the dilution of procedural protections inherent in many aspects of border policing and immigration, not least in the workings of the UK Special Immigration Appeals Commission (SIAC), an appeal court in which **(p.54)** the controversial office of the special advocate was first introduced.[20] The use of the special advocate is much criticized because it flouts the right of the individual to know the case against him or her—a basic principle that applies in criminal but no longer, it would seem, in civil hearings.[21] In similar vein, Bosworth's detailed empirical studies of immigration detention suggest that the bigger problem is not so much that detention centres look like prisons but that they do not. The absence of rights, adequate legal protections, and legal representation are all salient features of a dismal regime that leaves detainees in a legal limbo that can last for months or even years (Bosworth 2012). Looking beyond criminal or civil law labels to focus on the potential severity of the consequences of proceedings is an established way of importing appropriate due process protections such as an adequate standard of proof.[22] It might be extended to ensure access to legal advice, guarantees of legal representation, and fair and open hearings in civil proceedings just as in criminal ones. In place of profiling, often on dubious religious and racial grounds, and the adoption of targeted and discriminatory practices by immigration officials, we might insist upon the uniform application of the law and on fair and equal treatment. In place of protracted detention in the no-man's-land of the immigration detention or deportation

centre, we might seek to ensure that detention is time-limited and that, as a minimum, conditions approximate to the standards laid down in international prison rules. Perhaps this importation of standards and protections relies upon an idealized account of the criminal law and process, but it does suggest some powerful reasons why we should be slow to conclude that the criminal law is only for citizens.

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Notes:

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([2]) Mikes 1946: 8. This gem of a book was given to my father, a *Kindertransport* child, on the occasion of his naturalization—of which process Mikes wryly observes, 'before you are admitted to British citizenship you are not even considered a natural human being' (Mikes 1946: 82).

([3]) Beyond the scope of this chapter is the question of how far this conception of the criminal law is challenged by the development of international policing and arrest provisions, international extradition, and international criminal law. The establishment of the International Criminal Court raises further questions about the normative community to which international criminal law is addressed and what grounds its authority.

([4]) To speak of legal citizens leaves open a further ambiguity about the standing, duties of, and obligations owed to those who are de facto citizens but who do not enjoy that legal status—but that is beyond the scope of this chapter. See further Norrie 2009. An extended analysis of the varieties of citizenship is to be found in the classic work of Marshall 1950.

([5]) Stumpf 2007; Stumpf 2008: 1587–1600; Legomsky 2007. For a more historically grounded account, see Aliverti 2012a.

([6]) CPS 2010: 10 at ⟨http://www.cps.gov.uk/publications/docs/code2010english.pdf⟩.

See discussion in Ashworth and Redmayne 2010: 204–206.

([7]) For helpful introductions, see Knowles 2010; Swift 2006.

([8]) For further discussion, see 'Contractarianism' and 'Contractualism' in the *Stanford Encylopedia of Philosophy* at ⟨http://plato.stanford.edu/entries/contractarianism/⟩ and ⟨http://plato.stanford.edu/entries/contractualism/⟩.

([9]) For an overview of this literature, see 'Citizenship' at ⟨http://plato.stanford.edu/entries/citizenship/⟩.

For an alternate view, grounded in ideas of autonomy, which does not distinguish between citizen and foreigner in the same way, see Blake 2001. Also important is the substantial literature on liberal cosmopolitanism.

([10]) To be clear this is an issue to which Duff attends directly and upon which he has much of interest to say, not least in Duff 1998a; Duff 1998b; Duff 2011: 141–148.

([11]) Duff acknowledges that in the case of serious and wide-reaching wrongs the demands of justice require that domestic courts recognize the standing of the courts of other jurisdictions and of an international court, like the International Criminal Court, whose authority derives not from the nexus of community but which acts in the name of humanity, as a moral (though not a political) community (Duff 2010b: 596). Human rights law and international criminal law are increasingly important in this regard.

([12]) So, for example, the Immigration, Asylum and Nationality Act 2006 introduced financial penalties for knowingly employing adults who are subject to immigration control (Aliverti 2012a: 90–93).

([13]) See, for example, Simon 1998; Young 1999; Garland 2001: 131–137.

([14]) Although of course employers and the economy as a whole rely heavily on undocumented workers. Indeed, economists argue that modern labour markets create a structural demand for unskilled immigrant labour to do low-paid, undesirable jobs that citizens will not fill.

([15]) See, for example, the discussion in Gomez-Jara Diez 2008; Heinrich 2009: 96; Ohana 2010: 727–730.

([16]) Although the criminalization of immigration in Britain can be traced back to the early nineteenth century, it was expanded considerably under the Labour government. See discussion in Aliverti 2012a: 85, 102, 103; Aliverti 2012b.

([17]) Such a treatment is proposed by my Italian colleague Alessandro Spena, University of Palermo (personal communication).

([18]) *R v Larsonneur* (1933) 24 Cr App R 74.

([19]) See, for example, the discussions in Lee 2011 and Aas 2011. An alternate account of an 'impartial liberalism' might allow that responsible agency is grounded in the 'autonomous agency of us all' and so is equally applicable to non-citizens (Blake 2001: 259).

([20]) See ⟨http://www.justice.gov.uk/tribunals/special-immigration-appeals-commission⟩ and ⟨http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf⟩.

For critical commentary, see Kavanagh 2010; Tomkins 2011. Special advocates are lawyers with security clearance to view secret or closed documents from the intelligence services but who are not permitted to speak to suspects once they have seen this material.

([21]) The proposal in the Justice and Security Bill (2013) to extend the role of special advocates to wider civil proceedings is hugely controversial, which only highlights the fact that it was not seen to be similarly problematic when introduced in respect of immigration appeals by non-citizens. See Cabinet Office 2011 at ⟨http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf⟩.

([22]) *Engel v Netherlands* (1976) 1 EHRR 647; *Clingham v Royal Borough of Kensington and Chelsea*; *R (on behalf of McCann) v Crown Court of Manchester* [2003] 1 AC 787.