
Securing Borders



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Anna Pratt

Securing Borders
Detention and Deportation in Canada



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For Lucas

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Acronyms

AFIS	Automated Fingerprint Identification System
API/PNR	Advanced Passenger Information and Passenger Name Recognition Systems
CAVEAT	Canadians against Violence Everywhere Advocating Its Termination
CBA	Canadian Bar Association
CBSA	Canada Border Services Agency
CCC	<i>Criminal Code of Canada</i>
CCRA	Canada Customs and Revenue Agency
CDSA	<i>Controlled Drug and Substances Act</i>
CEIU	Canada Employment and Immigration Union
CEUDA	Customs Excise Union Douanes Accise
CFIA	Canadian Food Inspection Agency
CFSEU	Combined Forces Special Enforcement Unit
CIC	Citizenship and Immigration Canada
CMB	Case Management Branch (CIC)
CPIC	Canadian Police Information Centre
CPO	Case Presenting Officer
CSIS	Canadian Security Intelligence Service
CUSP	Canada-United States Partnership
EDO	Enforcement Detention Officer
EIC	Employment and Immigration Commission
EU	European Union
FAST	Fast and Secure Trade program
FCC	Federal Court of Canada
FCTD	Federal Court Trial Division
FOSS	Field Operational Support System
IAB	Immigration Appeal Board
IBETs	Integrated Border Enforcement Teams
IPC	Immigration, Passport and Citizenship Program (RCMP)

IRB	Immigration and Refugee Board (of Canada)
<i>IRPA</i>	<i>Immigration and Refugee Protection Act (2002)</i>
ITF	Immigration Task Force (RCMP)
IWRC	Immigration Warrant Response Centre
JPAUs	Joint Passenger Analysis Units
LRAG	Legislative Review Advisory Group (Immigration)
LTTE	Liberation Tigers of Tamil Eelam
MADD	Mothers against Drunk Driving
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NCMS	National Case Management System
NDP	New Democratic Party
OCU	Organized Crime Unit
PASS	Passenger Accelerated Service Systems
PIP	Partners in Protection
PRRA	Pre-Removal Risk Assessment
RCMP	Royal Canadian Mounted Police
SCC	Supreme Court of Canada
SIO	Senior immigration officer
SIRC	Security Intelligence Review Committee
TRAC	Toronto Refugee Affairs Council
UCRCC	Undocumented Convention Refugees in Canada Class
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
<i>USA PATRIOT</i>	<i>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001)</i>
USINS	United States Immigration and Naturalization Service
WTM	World Tamil Movement

Securing Borders

1

Overview and Orientations

It is not a brand-new world. The denigration and distrust of refugee claimants, heightened anxieties about crime, security, and fraud, and efforts to fortify the border and deflect risky outsiders have been prominent features of Canadian border control, refugee policy, and immigration enforcement for decades.

These preoccupations fuel and are fuelled by the endless quest for security – of borders, of the nation, and of the public. The multiple and intersecting authorities, technologies, forms of knowledge, and modes of rule engaged in and defined by this quest constitute an “immigration penalty.” Immigration penalty is heterogeneous and diverse; it includes but is not limited to legal regimes or formal institutions of government. Detention and deportation are the two most extreme and bodily sanctions of this immigration penalty, which constitutes and enforces borders, polices non-citizens, identifies those deemed dangerous, diseased, deceitful, or destitute, and refuses them entry or casts them out. As such, detention and deportation and the borders that they sustain are also key technologies in the continuous processes that “make up” citizens and govern populations.

This book maps the transitions in the governance of immigration penalty over the past fifty years and explores the relationships between Canadian policies and practices of detention and deportation and the transitions from welfare liberal to neoliberal regimes of government. I do not provide a general or total history of this field or a detailed institutional analysis of the development of Canadian immigration and refugee law and policy. Neither do I engage in a comprehensive critical analysis of Canadian detention and deportation law, policy, and practice. Rather, I engage in a close study of the shifting and historically specific discursive formations, transformations, and technologies of power that have surrounded the development and promotion of detention and deportation in Canada. While not explicitly prescriptive, this study is not merely descriptive. Although I do not provide a specific

set of policy recommendations, by making visible the less visible dimensions of immigration penalty and border control this study demonstrates the need to unsettle and accept less readily the taken-for-granted myths and truths that shape policies and practices in this domain.

Over the past fifty years, as human rights doctrine became more consequential and legal “rights talk” more established, explicitly racist, moralistic, and ideological grounds for exclusion were delegitimized. Instead, the categories of crime and criminality proliferated and merged with a reconfigured and expanded understanding of national security. Over the past three decades in particular, the very category of security has come to include an increasing number of criminal threats to the population that are judged to have a significant international dimension. This expansion contrasts sharply with the formerly dominant conception of security, primarily concerned with threats posed by a variety of subversives to the “political state.” This crime-security nexus coupled with distinctly neoliberal preoccupations with certain kinds of fraud and system abuse has produced a powerful hybrid rationale for the policies and practices of border control and immigration penalty. By the twenty-first century, immigration penalty in general and the practices of detention and deportation in particular had come to be governed through crime-security. What followed 11 September 2001 was a major refocusing on international terrorism in the context of a trend toward governing through crime that was already well entrenched.¹

The crime-security nexus and linked preoccupations with risk and fraud have converged upon refugees in particular and troubling ways. A process has taken place in which the primary importance of identifying and protecting the refugee, the deserving victim “at risk,” has been deemphasized and made contingent in the first instance on identifying and excluding the undeserving, possibly deceitful, and likely criminal “risky” refugee claimant.

Technologies of border control and immigration penalty, including both “hard technologies” and “innovations in social practices,”² manifest the effort to tame uncertainty and to know the unknowable. The intense preoccupation with certain kinds of fraud – welfare claims, refugee claims, documentation, identity – has become intertwined with guiding concerns about crime-security. The spectre of fraud and related concerns about identity are also consistent with a construction of dangerousness that is constituted by criminality and the unpredictable and therefore unmanageable risks linked with “unknowability.” As observed by John Pratt in relation to the dangerous classes of the 1800s, “the shifting identities of these criminals also made the risks they posed all the more incalculable. Their very rootlessness, their ability to shrug off one identity as it suited them and then assume another rendering them, as it were, ‘unknowable,’ confirmed their status as dangerous.”³ Just as dangerous offenders in the 1800s were dangerous and ungovernable because of their criminality, unknowability, and unpredictability,

so too are refugees: their “real” identities presumed unknown, their credibility always suspect, and their links with criminality, security, and fraud continually reconstituted. Refugees have become the “folk devils” of the twenty-first century.⁴ In the EU as in North America, the mobilization of these folk devils provides the occasion and the justification for stricter border controls and the intensification of immigration enforcement.

The Canadian Context: “Closing the Back Door”

On 6 April 2000, when the twin towers of New York City’s World Trade Center were still standing, then Minister of Citizenship and Immigration Elinor Caplan tabled new legislation (Bill C-31) to replace the 1976 *Immigration Act*.⁵ In February 2001, a slightly revised version of this bill was reintroduced (Bill C-11), it received royal assent in November 2001, and in June 2002 the new *Immigration and Refugee Protection Act (IRPA)* came into effect.⁶ When this legislation was first contemplated, its exclusionary concerns were animated by the linked threats posed to national security by crime and fraud (“criminal abuse”) in the shape of organized crime. After the tragic events of 11 September 2001, this focus on organized crime was supplemented by the reinvigorated threat of terrorism.

The preoccupation with criminality, security, and fraud and the heavy emphasis on enforcement measures that pervade *IRPA* evidence the degree to which crime-security and fraud had already become the dominant justifications for the policies and practices of national exclusions prior to September 11th. That Bill C-11, prepared well before September 11th, was already embedded in these discourses enabled its representation after that date as an almost clairvoyant, cutting-edge response to the new terrorist threat. The proposed reforms were quickly promoted as an important part of Canada’s much-needed antiterrorist, national security arsenal. The government, far from countering the fear-laced expressions of anti-immigrant, anti-refugee sentiments that followed the attacks, thus mobilized and affirmed this fear, further entrenching the associations between crime-security and fraud and new immigrants and refugees.

September 11th gave new life to long-standing domestic and American concerns about Canada’s immigration and refugee determination systems. Facing hyperbolic criticisms that Canada is a “haven for terrorists” because of its allegedly porous borders and its lax immigration and refugee determination systems, the Canadian government responded in December 2001 with sweeping new legislation targeting the terrorist threat within. Bill C-36, the *Anti-Terrorism Act*, dramatically expanded the powers of law enforcement and national security agents to target, monitor, arrest, and detain without warrant Canadian citizens on the basis of suspicions relating to terrorist activity.⁷ As promoted by the Canadian Department of Justice, this act “creates measures to *deter, disable, identify, prosecute, convict and punish*

terrorist groups ... [and] provides *new investigative tools* to law enforcement and national security agencies."⁸ The *IRPA* and the *Anti-Terrorism Act* were promoted as Canada's hard-hitting, two-pronged contribution to the post-September 11th "War against Terrorism."

Canada has long been involved in a host of national and transnational border security, interdiction, and prevention initiatives. While many of these originated prior to 11 September 2001, a number were formalized and widely publicized after September 11th, including the widely proclaimed thirty-point "Canada-US Smart Border Accord" and the "Joint Statement on Cooperation and Regional Migration Issues" signed with much fanfare on 3 December 2001 by the Canadian solicitor general and minister of citizenship and immigration and the attorney general of the United States.⁹ These measures have received unprecedented support and have been pursued by the governments of Canada and the United States with vigour. This support has been framed and fuelled by the interaction of two quite different justifications: the protection of national security and public safety and the economic necessity of ensuring that the free flow of goods and services across the border is not significantly impaired. These political and economic imperatives, operating in the shadow of the crime-security nexus, the spectre of fraud, and a pervasive culture of fear, effectively overpowered the cautionary voices of civil libertarians, legal critics, nongovernmental advocates for new immigrants and refugees, and those anxious to preserve independent Canadian immigration and refugee policies and Canadian sovereignty more generally.

Nevertheless, *IRPA* was by no means universally welcomed. Not only was it criticized by those who thought that it did not go far enough in the enforcement direction, but it was also roundly criticized by those who objected to its negative stereotyping of new immigrants and refugees and its heavy enforcement emphasis, which, for example, expanded inadmissibility and exclusion provisions as well as powers of detention. The framework approach of the legislation leaves most of the details to extensive regulations that can be changed without the involvement of Parliament. Concerns were raised that *IRPA* has the effect of placing limits on the discretion of frontline officers while significantly expanding the discretion of bureaucrats. This concern is of interest in that the former legislation had been criticized for delegating *too much* discretion to frontline officers.¹⁰ While the legislation does include more prominent references to Canada's human rights obligations than the former legislation, it also expands the categories of people who are to be denied these protections. By excluding those deemed to be "serious criminals, terrorists, traffickers and security risks," there is, as cautioned by Amnesty International, "a real danger of sending some of them back to face serious human rights violations such as torture."¹¹ The bill had originally provided for a new independent appeal for denied refugee claims,

a provision that had to a certain degree assuaged some of the concerns of its critics. However, as of March 2005, this appeal had yet to be implemented.

Despite its title, *IRPA* is not primarily about protecting refugees. What guides this legislation is the protection of the Canadian public, nation, borders, and integrity of Canada's administrative systems. It is Canadians who need to be protected from the threats posed by "foreign nationals" – the manifestly alienating term used in the legislation to refer to prospective immigrants and refugees who are noncitizens of Canada. The needs of refugees for protection and for a place to live are very much in second place.

To the extent that this legislation affords protection to refugees, it is simply assumed that this inclusionary humanitarian aim will be addressed more or less automatically by more extensive enforcement-oriented provisions to detect, detain, and deport "criminal abusers" that will free up the system to deal with those who are truly in need of protection. This effect is captured by the analogy of closing and opening doors, as offered by the minister of citizenship and immigration: "Closing the back door to those who would abuse the system allows us to ensure that the front door will remain open both to genuine refugees and to the immigrants our country will need to grow and prosper in the years ahead."¹² The closure of the back door, and the removal of "undesirables" who have managed to sneak through it, are to be achieved through tough proactive measures included in the legislation. However, other than closing the back door, relatively few measures are offered in the legislation that would enable refugees to reach, let alone enter through, the front door. Instead, the Canadian government, along with the rest of the Western world, has simultaneously bolstered prevention and interdiction policies that have precisely the opposite effect.

Europe, Australia, and the United States: Building Fortresses

Canada is not alone in these preoccupations. Over the past decade, Australia, the United States, and many countries in Western Europe have been engaged in sustained efforts to deflect refugees and undesirable migrants from their borders.

On 18 June 1990, the *Schengen Convention* was signed in the European Union (EU).¹³ It commits its members to the elimination of internal border checks, permitting free movement between participating countries, to the harmonization of visa policies, and to the strengthening and standardization of external border controls. Schengen countries have access to an integrated security information system (the Schengen Information System), and there are close links and networks between different law enforcement and judicial authorities. Member states have also committed to joint efforts to combat drug and other threats. The 1990 *Dublin Convention* created standardized criteria for determining in which country refugees had to make their claims. These criteria are based largely on assigning cases to the country of first

arrival.¹⁴ This convention entered into force for all fifteen EU member states in 1995.¹⁵

European countries had already been strengthening border enforcement and implementing stricter immigration and refugee controls for some time. A few examples. In 1993, Germany amended its *Asylum Law*, making access to German asylum procedures much more difficult and facilitating the removal of, as put by the German Embassy, “bogus refugees.” It instituted “safe third country” and “safe country of origin” amendments and enhanced border checks and patrols. The law designated all of the countries that border Germany as safe third countries, with the result that all asylum seekers who travel overland to Germany are denied the right to apply for asylum and may be turned back by border guards. The effects of these changes were immediate. In 2001, there were 88,000 asylum applications, down from 104,353 the year before.¹⁶

In response to September 11th, Germany quickly passed antiterrorist legislation. It extends substantially the powers of state authorities to carry out security checks on noncitizens and to monitor them while they are in the country. In addition, the new legislation excludes more varieties of criminals and security threats from asylum procedures and facilitates detention and deportation procedures.¹⁷

In France, under the 1992 and 1994 “Waiting Zone” legislation, noncitizens who have been refused admission and asylum seekers may be held (or, if refugee claimants in transit from a safe third country, will be held) in waiting zones (*zones d’attentes*) for up to twenty days, provided judicial permission is obtained after four days. Asylum seekers have no access to their files, and access to interpreters is reportedly poor. They also have no legal status and do not receive any financial or other assistance while their claims are pending.¹⁸ France has been particularly concerned to prevent undocumented asylum seekers from entering France via the Eurotunnel from England, just as England has been concerned to prevent undocumented asylum seekers from entering England through the same route. The 2001 Anglo-French Agreement posted French police officers at the British point of departure to remove undocumented people from trains destined for France, and later the same year the two countries agreed again to toughen up enforcement practices at the tunnel.¹⁹

A series of enforcement-oriented and increasingly restrictive reforms to British immigration legislation was introduced over the 1990s. The *Asylum and Immigration Appeals Act* of 1993, the 1996 *Asylum and Immigration Act*, and the 1999 *Immigration and Asylum Act* all introduced increasingly tough and restrictive measures to crack down on system abuse and false refugee claims and, more generally, to “stem the flow” of migrants and asylum seekers to the United Kingdom.²⁰ In 2002, the government passed yet another tough

piece of legislation, the *Nationality, Immigration, and Asylum Act*, which restricted the right to deportation appeals, introduced new border control measures and technologies to identify those using false identities, introduced new criminal offences for assisting illegal immigration and harbouring unlawful immigrants, and enhanced powers of detention.²¹ Barely a year later, the government introduced the *Asylum and Immigration Bill 2003*, which further removes legal safeguards for refugee claimants, restricts access to appeals, facilitates removals based on safe third country provisions, and removes support for unsuccessful asylum seekers.²²

In the same year, the UK government made plans to relocate refugee claimants to “Asylum Transit Camps” to be located outside the EU. It also proposed the establishment of “Regional Protection Centres” or “Zones of Protection” in regions close to the world’s “trouble spots” for those seeking refuge, arguing that this way the refugees would be much closer to their countries of origin, making their return that much easier and more convenient. Both proposals were greeted with strong opposition from human rights and advocacy groups as efforts to put refugees “out of sight, out of mind,”²³ and to shift “responsibility for asylum seekers and refugees to some of the poorest countries in the world.”²⁴ While this effort to deflect refugees from Europe received support from Denmark, Austria, and the Netherlands, in the face of opposition and the lack of support from other European countries, the government subsequently announced that it was no longer considering establishing the transit camps.²⁵

Australia has an exceptionally punitive approach to immigration, refugee, and border-related issues. Its “Pacific Solution” intercepts ships carrying undocumented migrants and asylum seekers and sends them to Australian-funded detention facilities located in Nauru, Papua New Guinea, and Australia’s Christmas Island.²⁶ Australia’s navy and coast guard monitor surrounding waters to prevent vessels carrying asylum seekers from landing.²⁷

Australia’s inland detention facilities are bulging as a result of its long-standing policy of automatic detention of all asylum seekers. Under the 1958 *Migration Act* and the 1994 *Migration Regulations*, all noncitizens who “unlawfully” enter Australia are detained. Those who claim asylum are usually detained for the duration of the adjudication process, which can take months or even years.²⁸ Many of the detention facilities are located in isolated and remote areas, including the now-closed notorious camp at Woomera.²⁹

In 1996, the United States passed the *Illegal Immigration Reform and Immigrant Responsibility Act*. It introduced tough new criminal sanctions for immigration offences, increasing the number of enforcement personnel and posting more Immigration and Naturalization Service (INS) enforcement officers at the border. Like British reforms, the act also restricted eligibility

for benefits and imposed tougher requirements relating to sponsorship.³⁰ INS officers are required to detain virtually all noncitizens who are the subjects of removal proceedings as well as “all asylum seekers in the expedited removal process until the claimants have established a credible fear of persecution; all arriving aliens who appear inadmissible; and all persons who have been ordered removed for at least 90 days following the order.”³¹ According to the US Committee for Refugees in 2001, an average of 20,000 individuals were in immigration detention each day, including 3,000 asylum seekers.³²

The 1996 legislation introduced the expedited removal process for “inadmissible aliens” seeking entry to the United States. Under this process, an INS officer may summarily order the immediate removal of a noncitizen (“alien”) if the officer concludes that the person in question is undocumented or improperly documented, unless that person makes a refugee claim. If a claim is made, the case is referred to an asylum officer, who determines if the claim has a “credible basis.” If no such basis is found, the officer may order the immediate removal of that individual “without further hearing or review.” There are no appeals of expedited removal decisions.³³

Since September 11th, the US has introduced additional and extreme enforcement measures. The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT)* of 2001 expands the definitions of terrorist-related threats and creates new measures to facilitate the detention and deportation of those identified as terrorists. New rules were also introduced that provide for the indefinite detention of noncitizens for reasons of national security.³⁴ In perhaps the most extreme move, President George Bush issued an order that allows military tribunals to try noncitizens charged with terrorism. This order gives the tribunals the authority to develop their own trial procedures, the trials may be held anywhere in the world, and the proceedings are secret. The tribunals require only a two-thirds majority to convict and impose sentence, and they are empowered to impose the death penalty. Under the order, there is no right to appeal a decision to any other court.³⁵

The developments sketched here rest upon and reproduce the discursive associations between security, criminality, and fraud that have converged upon “foreigners” in general and refugee claimants in particular. These efforts do not provide protection or find safe and enduring solutions for refugees; rather, they have the effect of deflecting people in need, people attempting to escape poverty or famine or drought or war, people fleeing persecution, people looking for a safe place to live.³⁶

While not a novel observation, it is nonetheless remarkable that, at the same time as Western, industrialized countries have been pursuing interdiction with such vigour, the same states have urged the breaking down of national economic borders to facilitate the free flow of capital. Just as

transnational efforts to achieve a borderless global economy have taken place, so too have national efforts to fortify and secure territorial borders against “undesirable” outsiders through the intensification and proliferation of technologies of control and enforcement. These developments and their associated emphases on rooting out fraud and identifying who is and who is not a citizen may also be indicative of what John Torpey has termed the state monopolization of the legitimate means of movement, a historically contingent process that contributes to the continual constitution of nation-states and “their” citizens.³⁷ William Walters has identified these and related developments as part of the international police of population. From this perspective, the “allocation of subjects to their proper sovereigns ... serves to sustain the image of a world divided into ‘national’ populations and territories, domiciled in terms of state membership.”³⁸ Understood in this broader context, Canadian efforts to crack down on “criminals and others who would abuse Canada’s openness and generosity”³⁹ are thus neither new nor exceptional.

A Few Conceptual Notes

While this study is not in any strict sense a “governmentality study,” I am nonetheless guided in this work by a number of insights that derive from the work of Michel Foucault and from the analytics of government that his work has inspired.

Penalty, Power, and the State

Foucault urged that systems of punishment, penalty, be analyzed as social phenomena with a variety of effects rather than as merely the consequence of legal theory.⁴⁰ The material and political dimensions of the subjugation of human bodies should be attended to, as should the discourses, the ways of thinking and acting upon social relations, which turn these bodies into objects of knowledge. Discourses neither reflect nor disguise “true” social realities. As explained by Alan Hunt and Gary Wickham, discourse “constitutes social subjects, the subjectivities and identities of persons, their relations and the field in which they exist, but only within a context of institutional practices.”⁴¹

Immigration penalty and the borders that it sustains may be understood as an assemblage, as a historically constituted regime of practices “composed of heterogeneous elements having diverse historical trajectories, as polymorphous in their internal and external relations, and as bearing upon a multiple and a wide range of problems and issues.”⁴² Formal institutions of government and the law play but a part in their operations; neither immigration penalty nor the border is reducible to “the state” or law. Foucault was expressly concerned to decentre the state as the locus of power and of law as its instrument: “I don’t want to say that the state isn’t important;

what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the state."⁴³

Following Foucault, the focus shifts from the state to a conception of government that is not limited to formal institutions but understood more broadly as "all endeavours to shape, guide, direct the conduct of others."⁴⁴ Government also includes how we are urged, incited, educated to govern ourselves. It thus involves a plurality of aims and means that are not reducible to the unified state, to the sovereign, or to juridical law. It is, as explained by Nikolas Rose and Peter Miller, "the historically constituted matrix within which are articulated all those dreams, schemes, strategies and manoeuvres of authorities that seek to shape the beliefs and conduct of others in desired directions by acting upon their will, their circumstances or their environment."⁴⁵ Often the more general term "governance" is used to connote this decentred understanding of government as the conduct of conduct.

The force of Foucault's critique of conventional state-centred analyses of power does not, however, preclude the application of Foucauldian tools to a domain that does coincide with the formal institutions of government, that is governed by law, and that clearly does display negative and interdictory qualities. Such analyses, however, must be particularly sensitive to the heterogeneity and complexity of governing programs, discourses, forms of knowledge, authorities, and technologies that are at play.⁴⁶

Power is not something that is owned or wielded by the powerful against the powerless. It is ubiquitous and dispersed. Foucault directs attention not to the source of power but to its techniques, strategies, and effects. His rejection of state-centred analyses is supplemented by his rejection of the view that power is exclusively negative, interdictory, and repressive. Relations of power are also and directly productive: "We must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals.' In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production."⁴⁷ Thus, attention to the negative and coercive effects of border practices and immigration penalty should not obscure their productive and positive effects. Indeed, immigration penalty actively produces historically specific conceptions of "the border," national identity, citizenship, and the desirable/undesirable citizen.

Contemporary developments in the domain of border control and security, including "deterritorialization," "securitization," the proliferation of hard and soft border control technologies, the expansion of networks and alliances between national and international agencies, and the expansion of the very category of "security," have been addressed in a variety of ways.⁴⁸

In this study, the border is regarded as at once, but not simply, a physical, built environment, a line on a map, a sociolegal construct, a political invention, and a mechanism of inclusion/exclusion. The border is a contingent and artful accomplishment. It is continuously constituted and reconstituted at a variety of sites through an assemblage of intersecting authorities, technologies, forms of knowledge, and regimes of rule. Furthermore, the border is a flexible and elastic sociolegal construct that plays a central part in the ongoing constitution and regulation of identities (refugees, citizens, criminals, victims, deportees, etc.) and the welfare of the population. The Canadian “border” is constituted by diverse practices that effectively decide who and who may not enter the country. It defines both insiders and outsiders. It is a historically specific creation erected through shifting state and extra-state rationales and practices of governance. Yet this sociotechnological complexity of the border has been obscured by its self-evidence. It has been, to borrow from Bruno Latour, “black boxed.”⁴⁹ This study begins in a preliminary way to pry open the black box of the border and unsettle its self-evidence.

Sovereignty, Discipline, and Governmentality

The traveller glanced casually at the man, who, when pointed at by the officer, had kept his head lowered and now seemed to be all ears, trying to catch something. But the movements of his pressed, pouting lips made it obvious that he could understand nothing. The traveller had wanted to put various questions to the officer, but at the sight of the condemned man, asked only: “Does he know his judgement?”

“No,” said the officer, about to continue his explanations; but the traveller broke in: “He doesn’t know his own judgement?”

“No,” the officer repeated, pausing for an instant as if demanding a more detailed explanation of the question. The officer then said: “It would be no use informing him. He’s going to experience it on his body anyway.”⁵⁰

As Foucault famously demonstrated, sovereign punishments were bodily, bloody, and spectacular. They literally and painfully inscribed the “judgment,” the power of the king, on the bodies of the condemned. Sovereign punishments were occasioned by transgressions of sovereign authority and sought “spectacularly, spasmodically and violently”⁵¹ to reestablish the authority of the sovereign over his territory and subjects in the face of such transgressions. The sovereign mode of punishment, characteristic of premodern and early modern times, aimed to reaffirm “the dissymmetry between the subject who has dared to violate the law and the all powerful sovereign who displays his strength.”⁵²

The sovereign could also withhold punishment, “suspend law and vengeance,”⁵³ “decide on the exception.”⁵⁴ Giorgio Agamben explores the power to rule on the exception as a key feature of sovereign power. He explores “the camp” as a liminal zone of “bare life,” neither outside nor inside the polity. It is at this “threshold of indistinction” that exceptional measures become the norm,⁵⁵ where “violence passes over into law and law passes over into violence.”⁵⁶ The detention centre, like the camp, is a zone of exclusion that manifests this sovereign power to decide on the exception.⁵⁷ It is a liminal and exceptional space governed by exceptional measures operating outside the usual parameters of juridical rule. The constituent features of sovereign power thus include negative and bodily punishments, the capacity to decide the exception, the defence or control of territory, and an affinity for spectacle.⁵⁸

Foucault proposed that the sovereign mode of power characteristic of premodern and early modern feudal societies had been reconfigured by the emergence of disciplinary and governmental regimes.⁵⁹ Whereas sovereignty is characterized by the discontinuous exercise of power through spectacle, by law as command, and by sanctions as negative, bodily, and deductive, disciplinary regimes feature “the continuous exercise of power through surveillance, individualization and normalization.”⁶⁰ Disciplinary regimes in modern prisons, as in factories, schools, and asylums, “worked to instil obedience and social utility in their inmates by encouraging them to internalize methods of self-scrutiny and control. No longer merely an enemy of the king’s peace, the criminal in this historical period came to represent a deviation from a social norm to be corrected and restored.”⁶¹ Thus, in the modern period, there emerged a “higher aim” of punishment: to transform or “normalize” offenders through the gentler techniques of discipline and surveillance. This aim was linked with the development of new knowledges in the emergent human sciences and with the rise of a new conception of political rule as distinct from sovereign rule.⁶² Discipline is a distinct form of power that entails a range of governing techniques that do not rest upon force or coercion and that thus contrast sharply with the “majestic rituals of sovereignty.”⁶³

Foucault draws attention to new forms of governmentalities (governing mentalities) that became more important than sovereignty in the eighteenth and nineteenth centuries. Unlike the negative and deductive power of sovereignty, which from the Middle Ages is characterized by the “transcendent singularity”⁶⁴ of the authority of the sovereign over his territory and subjects with the law as its “singular instrument,”⁶⁵ the art of government, also referred to as governmentality, that flourished in the eighteenth century follows a “productive logic.”⁶⁶ Governmental rule seeks to shape and guide the conduct of citizens in the name of the health, wealth, happiness, and

welfare of the population.⁶⁷ The economy, formerly conceived as “the correct manner of managing individuals, goods and wealth within the family,” is introduced “into the management of the state.”⁶⁸

Governmental rule is linked to the emergence of “apparatuses of security,” which include “the use of standing armies, police forces, diplomatic corps, intelligence services and spies” but also “health, education and social welfare systems and the mechanisms of the management of the national economy.”⁶⁹ Governmental rule is also linked to the development of statistics as a science of government and to the new science of political economy. It entails the development of complex and vast administrative state apparatuses to achieve these diverse aims.

Foucault cautions against understanding the growth of the administrative state in terms of ever-expanding state domination of society; rather, he characterizes the process as the “governmentalization of the state.”⁷⁰ More specifically, this refers to the rise of the administrative state, the process through which “the discursive, legislative, fiscal, organizational and other resources of the public powers have come to be linked in varying ways into networks of rule. Mobile divisions and relations have been established between political rule and other projects and techniques for the calculated administration of life.”⁷¹ Governmentality has not replaced sovereignty or discipline; rather, it has rearticulated them “within this concern for the population and its optimization.”⁷²

The domain of immigration is multidimensional and expansive, coercive and enabling, harsh and humanitarian. While inclusionary and enabling governmental technologies certainly act upon those deemed worthy of citizenship who are ushered into “zones of inclusion,” coercive and despotic practices persist in relation to those deemed unworthy and who are confined within “zones of exclusion” and ultimately expelled from the nation. Sovereign power is thus not merely a “fiction” or an “archaic residue of the past.” Indeed, it is a distinctly sovereign regime that is paramount in the governance of the particular sites and practices of immigration detention and deportation. No efforts are needed to transform “deficient” outsiders into desirable, governable citizen-subjects.⁷³ Those deemed unwanted are physically confined and forcefully expelled. In this zone of exclusion, rules, not norms, are the central feature of the regimes that govern this site, and it is the bodies, not the souls, habits, or risks, of noncitizens that are directly targeted.

Still, contemporary regimes of sovereign power are more complicated than the mode that Foucault described. The spectacle of punishment has been reconfigured. Detention in an airport motel is a far cry from the scaffold in the town square. While detention at the Celebrity Inn immigration detention centre in Mississauga, Ontario, is rather low-profile and out of sight,

there are occasional broadcasts of widely publicized, high-profile detentions and deportations that have become more frequent as deterrence and prevention objectives have become more entrenched. One such spectacle surrounded the high-profile interception, detention, and subsequent deportation of 599 Chinese nationals from Fujian, China, who arrived on the West Coast of Canada in four boats in the summer of 1999. After those who arrived on the first boat disappeared after being released once bond was posted, immigration officials detained the remainder of the arrivals as flight risks, most in correctional facilities.⁷⁴ The massive media coverage of this event provided frequent images of the migrants being subjected to various criminal justice technologies: barbed wire, shackles, guard dogs, prison uniforms, and guards. Despite being identified as victims of people smugglers, they were simultaneously represented in popular and political discourse as system abusers, queue jumpers, bogus refugees, and even criminals. Most of the migrants were eventually deported with similar fanfare and sensationalized media coverage. While the numbers of those targeted were more concentrated than usual, they were not exceptionally large. This event demonstrates not only the easy slippage between the categories of refugees, frauds and criminals, victims and offenders, but also speaks to the continued, albeit modified, operations of spectacle in the application of sovereign power in this field.

It is nonetheless the case that detention and deportation cannot be understood exclusively in terms of sovereignty; they lie at the intersection of sovereignty and governmentality.⁷⁵ Indeed, even in the context of these seemingly straightforward sites of negative, coercive, and interdictory sovereign practices, there is still the coexistence and commingling of different authorities, regimes, and technologies. For example, while not new, the role of third parties, “partners,” and community members in the governance of immigration penalty has become more prominent.⁷⁶ Indeed, when one considers the domain of immigration penalty and border control more broadly, the interpenetration of sovereign and governmental technologies is much in evidence. This multiplicity and intersectionality of state, quasi-state, and “community” players and the diversity of practices and technologies at work display one way in which detention and deportation have become “governmentalized.”

Furthermore, if one examines the changes over time in the grounds for and justifications surrounding detention and deportation, another dimension of the governmentalization of detention and deportation becomes apparent. Certainly, while political enemies of the state have long been and continue to be the targets of detention and deportation, the categories of those to be excluded or expelled have expanded dramatically over the past century to encompass a variety of potential threats to the economy and the

welfare of the population.⁷⁷ As documented in the chapters that follow, even as racist, moralistic, and otherwise discriminatory grounds for exclusion were delegitimized, the grounds for exclusion based on criminal threats posed to the population proliferated in Canada. Moreover, the very category of security, once associated in virtually singular relation with the protection of the political state from the threats posed by subversion, treason, and espionage, has been reconfigured to include an expanding roster of criminal threats to the public. Public safety, economic security, and system integrity are key constituents of contemporary concerns for the safety and welfare of the population that surround the programs and practices of immigration penalty and border control.

Liberalism, Law, and Discretion

Liberalism takes on a slightly different meaning within the perspective of governmentality. Rather than being understood as a theory, a juridical or political philosophy, an ideology or a set of policies, liberalism is understood as a political rationality: “the changing discursive field within which the exercise of power is conceptualized, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors.”⁷⁸ Put differently, liberalism is a broad historical discourse that rationalizes and systematizes specific governmental programs and policies for the ordering of social life in particular, historically specific ways. Rationalities and programs depend upon the existence of governmental technologies (strategies, techniques, devices, and procedures) that give them practical effect. As explained by Rose, “a technology of government, then, is an assemblage of forms of practical knowledge, with modes of perception, practices of calculation, vocabularies, types of authority, forms of judgement, architectural forms, human capacities, non-human objects and devices, inscription techniques and so forth, traversed and transected by aspirations to achieve certain outcomes in terms of the conduct of the governed.”⁷⁹

Liberal rationality sets out the limits of state powers, the freedom of rights-bearing subjects under the law, and carves out private domains of social life that lie outside the appropriate reach of direct political interference and control. Liberalism is thus characterized by indirect rule – “governing at a distance.” As explained by Rose and Miller, it “identifies a domain outside of politics and seeks to manage it without destroying its existence and autonomy” through independent agents and alliances.⁸⁰ Liberalism is also characterized by the foundational problematic of security and liberty linked to the exercise of rights. As emphasized by Kevin Stenson, “liberalism has involved a difficult balance between a recognition of the need to promote

freedom and diversity, yet impose a secure, unified field of state and juridical authority."⁸¹

While the specific practices of border control and immigration penalty are perhaps less creatures of liberalism than they are of sovereignty,⁸² they have nonetheless had to accommodate liberal political discourses relating to autonomy, accountability, the social contract, and the limits of state rule as well as related liberal legal doctrines of rights, the rule of law, and due process. These discourses have served to democratize sovereignty, to legitimize coercive practices, and have themselves played a central part in facilitating the emergence of new forms of disciplinary power.⁸³ Even noncitizens are rights-bearing subjects, in Canada at any rate, and their treatment must, to a certain degree, negotiate the political and legal dictates of liberal government.

Under liberalism, law is no longer the singular instrument of the sovereign; the elected parliament assumes the "mantle of sovereignty."⁸⁴ Liberal forms of legality (liberal legality) are constituted by the ideals of the rule of law, the separation of powers, and related conceptions of individual autonomy and free will. As put by George Pavlich, "liberal legality presumes the primordial existence of free, rational individuals – the bearers of its rights, duties and freedoms. This implies that such individuals exist naturally and merely require political structures to vindicate their natural form."⁸⁵

Furthermore, rather than seeing law as an autonomous system of orders backed up by coercive sanctions that operates as an instrument of negative and oppressive power, scholars such as Alan Hunt have encouraged the view of law as one of many intersecting modes of regulation. In this view, law and social relations are mutually constitutive. The regulation approach encourages attention to both the positive and the negative dimensions of power – regulation makes possible and facilitates certain forms of social relations while discouraging and disadvantaging others.⁸⁶

These observations about "law" should not be read to imply that there is a single, monolithic, and homogeneous body of law. Indeed, pluralistic analyses of law have effectively unsettled such a view, urging recognition that there is no totalizing unity to the "complex of written codes, judgments, institutions and agents and techniques of judgement that make up 'the law.'"⁸⁷ The diversity and historically specific context of law must be taken seriously.

Liberal legality may be understood as a metanarrative that construes law in terms of "universal principles grounded in the dictates of reason deemed intrinsic to all human subjects."⁸⁸ Under the conditions of liberal legality, administrative discretion becomes a key governmental technology that carves out a domain of freedom that negotiates or "accommodates" the apparent contradiction between the universality and particularity of liberal law and that reconciles the gap between law and equity.⁸⁹

In the context of immigration penalty and border control, the practices of classifying and filtering the high from the low risk, the undeserving and undesirable from the deserving and desirable, produce borders and “make up” citizens. Just as the moralizing categorization of the deserving and undeserving poor legitimizes differential treatment on the basis of these categories, so too do the distinctions between the deserving and undeserving refugee and the desirable and undesirable immigrant. As explained by Hunt, the moral element of these categories “involves any normative judgment that some conduct is intrinsically bad, wrong or immoral. It is an important supplement that moralising discourses frequently invoke some utilitarian consideration linking the immoral practice to some form of harm.”⁹⁰ These “dividing practices” are given practical effect through the operations of discretion under liberal legal regimes of government.⁹¹

Welfare Liberalism, Neoliberalism, and Technologies of Risk

Government is a problematizing activity that “poses the obligations of rulers in terms of the problems they seek to address.”⁹² Welfare liberalism as a political rationality conceptualizes and acts upon social problems that are understood in terms of the population and the economy – the declining birthrate, delinquency, the dysfunctional family, ill health, and so on. It is centrally linked to “the social” as a basis for thinking about and acting upon the population. The form of social government dominant from the late nineteenth century to the mid-twentieth century seeks to foster and enhance social solidarity through a variety of programs and objectives: social order, social welfare, social insurance, social security, social justice, social citizenship. Welfare liberalism emphasizes the collective rights and duties of citizenship and privileges social notions of risk management and risk sharing.⁹³ As put by Rose, it “seeks to encourage national growth and wellbeing through the promotion of social responsibility and the mutuality of social risk.”⁹⁴ The mutuality of social risk refers to practices of nationwide risk pooling that provide all individuals with some measure of security in the event of loss or interruption of income so long as the misfortune that occasions this need, whether it be sickness, unemployment, injury, or disability, is experienced “through no fault of their own.” At the same time, individuals are stitched into a relation of mutual obligation and social responsibility; “individuals are constituted as citizens bound into a system of social solidarity and mutual interdependency.”⁹⁵ Welfare liberalism entrenches moralistic distinctions between earned and unearned benefits, between the deserving and the undeserving poor. It teaches citizens moral lessons about thrift, hard work, responsibility, and obligation.

In contrast, neoliberal forms of government recast social responsibility and mutual obligation as dependency and passive citizenship.⁹⁶ The primacy accorded to social solidarity and the social citizen is displaced by the

constitution of the independent, active, and entrepreneurial citizen. The state is judged to be too large, too intrusive, and too costly. Its role should be limited to maintaining law and order and to empowering “entrepreneurial subjects of choice in their quest for self-realization.”⁹⁷ The role of individual citizens, on the other hand, is to actively promote their own well-being through ceaseless enterprise, responsible choices, and individual risk management techniques. Under neoliberal forms of rule, the “social state” gives way to the “enabling state.” Individuals, families, organizations, schools, et cetera become “partners” who take on responsibility for their own well-being.⁹⁸ As defined by Rose, risk management involves “the identification, assessment, elimination or reduction of the possibility of incurring misfortunes or loss.”⁹⁹ Neoliberal risk management technologies are individualized rather than social. In place of nation-wide risk pools, much smaller, differentiated risk pools have emerged. As observed by Jacques Donzelot, this modified conception of risk “shifts the emphasis from the principle of collective indemnification of ills and injuries attendant on life in society, towards a greater stress on the individual’s civic obligation to moderate the burden of risk which he or she imposes on society.”¹⁰⁰

The “decline of the social” and the rise of neoliberalism have inflected the development and promotion of the laws, policies, and practices of immigration penalty and border control in a variety of ways. For example, the rights-bearing claimant of social benefits, in the context of refugee claims, just as in the context of welfare claims, has been unsettled and rendered always and already suspect. Rather than being received as an entrepreneurial, self-governing, risk-taking potential citizen, the deserving figure of the refugee “at risk” has been widely recast as the “risky” refugee. As pointed out by Rose, “while social notions of risk were universalizing, these risk agencies focus upon ‘the usual suspects’ – the poor, the welfare recipients, the petty criminals” – who, along with refugees, are now constituted as actually or potentially “risky” individuals.¹⁰¹ And the manifestly neoliberal spectre of fraud has come to occupy a central place in the exercise of government in the domains of welfare, refugee determination, and border control. In the same domains, as in that of criminal justice, increasingly punitive laws and policies are promoted according to the neoclassical logics of deterrence and desert.

The “risk society” thesis¹⁰² has generated considerable scholarly interest in risk “as a way of thinking about and trying to order our world.”¹⁰³ Risk technologies are forward looking; “the centre of risk consciousness lies not in the present but *in the future* ... In risk society, the past loses the power to determine the present. Its place is taken by the future ... We become active today in order to prevent, alleviate or take precautions against the crises and problems of tomorrow and the day after tomorrow.”¹⁰⁴ Scholars working in a variety of disciplines have investigated the content and practical

uses of risk knowledges and risk management strategies in various settings.¹⁰⁵ Some, for example, have suggested the contemporary emergence of a “new penology” in which actuarial regimes of risk management have become more prominent than disciplinary regimes of “correction.”¹⁰⁶ Robert Castel explains that “a risk does not arise from the presence of particular precise danger embodied in a concrete individual or group. It is the effect of a combination of abstract factors which render more or less probable the occurrence of undesirable modes of behaviour.”¹⁰⁷ It is revealing to note that in the mid-1960s national exclusions that were formerly based on the dangers thought to inhere in certain subjects (prostitutes, homosexuals, criminals, beggars, chronic alcoholics) came to be justified instead on the basis of their “associated risks.” While meaningful conclusions about the variety of uses and forms of risk knowledges and practices in the domain of border control and immigration penalty remain a question for empirical investigation,¹⁰⁸ this study certainly points to the prominence of risk management technologies in the development and justification of contemporary practices of border control and immigration penalty.

Governing through Crime

As observed by Jonathan Simon, “we govern through crime to the extent to which crime and punishment become the occasions and the institutional contexts in which we undertake to guide the conduct of others (or even of ourselves).”¹⁰⁹ Crime and punishment have become increasingly prominent themes in the promotion and justification of a broad range of law and social policy. Immigration penalty has not been immune to this. The threats constituted by the crime-security nexus, blended with concerns about fraud and “system abuse” (“criminal abuse”), have become the primary occasion and justification for the development and application of increasingly enforcement-oriented immigration law and policy reforms and practices. Immigration penalty and border control have been reconstituted under the banner of crime.

Governing through crime is linked to the decline of the social and the rise of neoliberal regimes of rule. On a broad level, it can be read as reflecting the emergent neoliberal view of law and order as the last remaining legitimate domain of interventionist state authority. It may also be read as a technique for the exclusion of those who are regarded as ungovernable, as unable or unwilling to “enterprise their lives or manage their own risk, incapable of exercising responsible self government, attached to no moral community or to a community of anti-morality.”¹¹⁰ Governing through crime is part of the construction and exclusion of a criminal population consisting of the poor, the dispossessed, the unemployed, and welfare recipients.¹¹¹ With the governance of immigration penalty through crime, marginalized migrants and refugees are similarly targeted.

Chapter Outline

So easily accepted is the official rhetoric that the detention and deportation of noncitizens is not punishment that the first task of this book is to make visible the material conditions, concrete practices, and punitive dimensions of the detention and expulsion of undesirable, undeserving noncitizens. Chapter 2 provides a detailed examination of the carceral conditions and penal practices of immigration detention in the “Celebrity Budget Inn” in Mississauga, Ontario, near Pearson International Airport. This microstudy reveals that, while a sovereign regime of coercive, negative, and bodily power predominates at this liminal zone, there is nonetheless a multiplicity of authorities and technologies involved in its day-to-day administration.

Discretion has always been central to the operation of immigration penalty in Canada. A guiding concern of this work is the shifting roles of law and discretion in national exclusions. The conventional legal view of law/discretion as a zero-sum game is an inadequate frame for thinking about the operations of power in this field. I therefore consider in some detail in Chapter 3 the limits imposed by this conventional view of law versus discretion and seek to avoid these limits by considering discretion as an *active* form of governmental power rather than a residual space created by law.

In Chapter 4, I document the way that, as previously legitimate grounds for exclusion – race, morality, political ideology – were socially, politically, and legally delegitimized over the postwar period, the crime-security nexus articulated through the language of risk emerged as the guiding logic of border control and immigration penalty. While the waning of the Cold War undermined the legitimacy of exclusions justified by a strictly political conception of “the state,” the logic of national security expanded to include an ever-widening roster of criminal threats to the population. This reconfiguration of national security, along with broad tracts of discretionary power dedicated to its protection, reveal the transition from a sovereign construction of the state to one that is more strongly associated with governmental concerns for public safety and the economic welfare and protection of the population.

The production and inclusion of the desirable immigrant (the independent, talented, entrepreneurial, and skilled newcomer with high economic “establishment potential”) and the deserving refugee (the credible and genuine victim of persecution “through no fault of their own”) only become possible through the criminalization, repression, and exclusion of undesirable, undeserving new immigrants and refugees. Alongside the figure of the genuinely deserving refugee emerged that of the unscrupulous, fraudulent, risky, and even downright criminal refugee claimant – each produced and maintained in contradistinction to the other, the latter excluded in the name of the former. Chapter 5 details this emergence of the “bogus

refugee” over the 1980s and the forging of its association with that of the “criminal foreigner.”

The protection of rights-bearing and deserving (genuine) refugees has become contingent upon the identification and exclusion of dangerous criminals, security threats, and opportunistic system abusers. Neoliberal preoccupations with fraud, also evident in the domain of social services, are seen to converge with crime-security to produce a powerful new threat, “the fraudulent criminal refugee.” The corollary concern for victims and victim rights that has become more and more prominent in most areas of public policy has had no echo in relation to refugees and migrants. Instead, it has been the state, state systems, and the public that have been constructed as the victims of unscrupulous, criminal, and otherwise risky refugees. In Chapter 6, I examine this redefinition of refugees from being “at risk” to being “risky” through a mini case study of the Somali community in Toronto, Ontario.

In Chapter 7, I return to the specific question of discretion and examine the legal construction of dangers to the public and threats to national security. In 1995, those deemed a danger to the public joined those deemed threats to national security as the only two categories of people denied access to the usual processes of deportation appeal. The implications of these crime-security-based national exclusions are examined through analysis of the 2002 Supreme Court of Canada (SCC) *Suresh* decision. The articulation and resolution of issues relating to serious criminality/national security, international human rights, and national sovereignty in the Canadian courts are found to be thoroughly embedded in and shaped by the powerful binaries of law versus discretion, liberty versus security, and freedom versus authority.

Immigration enforcement, border control, and the policies and practices of detention and deportation have been reshaped under the banner of crime. In Chapter 8, I review the prominent national and transnational crime-security threats that have animated immigration penalty over the past decade and the proliferation of national and international initiatives to counter these threats.

In Chapter 9, I begin to pry open the “black box” of the border. I explore the range of intersecting and diverse authorities, networks, and technologies that are engaged in immigration penalty and that both control the border and continually constitute it. Border control and immigration penalty more generally are situated in relation to the endless quest for security, and I pay particular attention to the prominence of risk management strategies in this quest.

Finally, I conclude the book with reflections on a number of conceptual and empirical issues that emerge from this study: the centrality of discretion and dividing practices in systems of liberal rule and in the operations

of immigration penalty; the relationship of immigration penalty with transitions from welfare liberal to neoliberal forms of governance; the continuing importance of sovereign power and its intersections with governmental, risk-based strategies of rule in the domain of immigration penalty and the regulation of borders; and the emergence of criminality and punishment (detention and deportation) as central to the promotion and development of border control and immigration penalty.