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Racial Criminalization of Migrants in the 21st Century

Edited by

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The Construction of Migrants as a Risk Category in the Spanish Penal System
José Ángel Brandariz García and Cristina Fernández Bessa

The proliferation of migration into Spain during the early years of this century has grown, in a short space of time, into one of the most pressing subjects of our contemporary social reality; so a no less urgent preoccupation with the characteristics of the phenomenon in terms of its repercussions for security and social order has brought about a significant change in the penal system. Anxiety on the part of the media, society and the political establishment regarding migrant criminality, reforms in the juridical precedent approach to such situations, and the ways in which that model has been tied in with migration policy generally, particularly in terms of administrative sanctions, are just some of the areas in which the impact of this situation can be seen.

What is intended in this chapter, specifically, is to deal with a small number of questions that are fundamental to understanding crime policy in regard to migrants. The first of these relates to the social conditions and perceptions which make the construction of migrants as a risk category possible; it is hardly a trivial point to consider how it is that the migrant subject should, in a short space of time, have become the main target of the penal system, in a recast version of what in the old days were referred to as the 'dangerous classes'.

A second question focuses on the repercussions a constructed category of risk subjects has for the Spanish penal system. Analysis will show that our current crime policy model exhibits high levels of ‘hybridation’ between two extremes – guarantees of inclusion (rehabilitation) and the imposed conditions of exclusion (neutralization) – which give rise to mixed solutions, such as selective exclusion and subordinated inclusion. This last point raises further issues in relation to what has become known as the ‘political economy of penalty’ (or of punishment), a trans-disciplinary approach that may well offer new insight into the aforementioned hybridation process.

Offending Migrants: Constructing a Category of Risk Subjects

To say that the penal system operates on a selective basis today seems almost a cliché of criminological thinking – a given, as it were – but one that is often overlooked for that very reason. Research based on theories such as ‘symbolic
interactionism' and 'labelling approach' has demonstrated that the penal system consistently combines within itself a number of different social dynamics, as a result of which only a small segment of all subjects who break the law ever actually receive the prescribed judicial response to their crime (Anitua 2005: 363–6; Cid Moliné and Larrauri Pijoan 2001: 202–5; García-Pablos de Molina 1999: 792–4).

This selective tendency is inserted in the context of the crime policy strategies promoted by so-called 'actuarial' modes of thinking.1 At a time when, in line with the doxa of actuarialism, any meaningful reduction in criminality is assumed de facto to be almost impossible and the focus falls instead on accommodating feasible objectives to an economy of always limited resources, it seems inevitable that responsibility for social control and defending against criminality should fall to certain groups and sectors of society. It comes as no surprise, therefore, to find that actuarial philosophy, itself designed to manage and redistribute the risks associated with criminality, argues the need to identify the most dangerous groups and to target regulatory and surveillance resources against those sectors of society specifically (Anitua 2005: 509).

In this way, actuarial logic consolidates the focus on certain social subjects as number one targets of the penal system. In this context, one of the least important variables is the individual subject’s actual propensity to crime (Portilla Contreras 2005: 61–2, 78).

For much of the period of the last few decades the top spot on the penal system’s list of prime targets (the equivalent, in a way, of what at the turn of the twentieth century were known as the ‘dangerous classes’) was occupied by drug addicts, especially heroin addicts (Christie 2004: 62; Miró Miquel 2005: 307–8; Rodríguez 2003: 118–19). During that period drug addicts entered the penitentiary system circuit en masse, slaves to an illegal market that generated utterly exorbitant prices which in turn saw them compelled to an existence of either constant petty theft or low-level illegal drug trafficking (Ruggiero 2000: 15–17). While not its principal objective, the massive internment of drug-addicts in this way was one of the outcomes of the so-called ‘War on Drugs’, the guiding vector of official crime policy for many Western countries during the final decades of the twentieth century.

However, the predominance of drug addicts in the Spanish system has found itself being challenged in the last decade or so. The percentage of illegal substance users and drug addicts among the prisoner population and the number of inmates condemned for crimes relating to drug addiction still remains high.2 Nevertheless, the past predominance of the category is now declining, owing, in part, to the changing nature of drug use itself and its related effects. The high mortality rates caused by the AIDS crisis, and the sustained decrease in heroin consumption, have gradually succeeded in moderating the once prominent position of drug addicts among the prisoner population.

The new prime target of the penal system, the paradigmatic subject of its current clientele, is the migrant. If we accept that the heroin crisis was related above all to poor life expectancy, and an element of nihilism also, among the first (home-grown) generation of the Fordist ‘welfarist’ transformation (Rodríguez 2003: 119) the migrant’s rise to prominence has come about as a result of the steady consolidation worldwide of a post-Fordist system founded upon a labour force which is not regulated according to a dual system – as described in the classical theses of Piore (Castel 1999: 658–61, 715–17) – but to a model of general precariousness. The predominance of migrant subjects is not just or particularly quantitative, but rather qualitative. This is demonstrated in a number of ways: a) in the area of production, in how the composition and regulation of the labour force are affected; b) in the composition of society, where the trend is one of growing complexity; c) in the area of social control, to the extent that the formal juridical management of migrants prefigures a profile which could have repercussions for the future development of systems of control and sanctions (De Giorgi 2000: 17–20 and 2002: 114–15, 131, Rodríguez 2003: 131–2).

The growing primacy of (non-EU nationals) migrants on the list of penal system targets is obvious in a number of ways. The process has been going on for a long time in the U.S., a country which has experienced intense waves of migration throughout its history and where, as a result, there is a long tradition of social (and academic) preoccupation on the issue of migrant criminality. In more recent times, this primacy has reached the countries of the EU. Although its progress and character have varied from state to state – owing, among other circumstances, to the different stages at which migrations have been received – an analysis of the predominance of migrants in the penal system in relation to the new phase in migration policy entered upon in Europe at the start of the 1970s seems appropriate (Melossi 2002: 266).

1 The ‘actuarial’ approach, that was initially known as ‘New Penology’, was developed after the founding works of the American scholars Feeley and Simon (1992 and 1994).

2 According to the figures in Aebi and Del Grande (2009: 58), in 2007 the percentage of inmates in Spanish penitentiaries for drug trafficking crimes was 27.8 per cent, while the figure for those sentenced for crimes against property was 43.3 per cent. Perhaps what is most significant about these figures is that the corresponding averages for the rest of the European Council states were 17.7 per cent and 31.9 per cent.

3 Melossi (2002: 263–5) draws attention to the long-standing preoccupation in U.S. criminology with the question, dating back to the time of the Chicago School. He points out that it was a century ago in the U.S. that something which has now become almost a commonplace of criminological thinking was first adverted to (and, one could add, to which some consideration should be given in relation to the situation in Spain today): the finding that the crime rate among first-generation migrants is usually lower than that of the native population; it is among the second generation that the problems begin to appear, with the emergence of a certain cultural conflict and related criminal behaviour. See also Pérez Cepeda (2006: 232), who argues that in Spain criminality among regularized migrants is lower than among the native population.
Racial Criminalization of Migrants in the 21st Century

The phenomenon began to emerge in Spain in the early years of the new millennium, as prison figures show. Among the data, there are a few which are particularly revealing: a) in November 2009 the proportion of foreign inmates in Spanish prisons was 35.2 per cent, nearly more than three times their demographic weight; b) 60.5 per cent of the growth in the prison population for the period 2000–2008 was due to foreign inmates, a statistic which is perhaps the strongest single indicator of the centrality of migrants in the Spanish prison system currently; c) in September 2007 the proportion of foreign nationals on preventive detention was 53.9 per cent. Data such as these, especially when combined with the discourse employed by the media and politicians, serve to strengthen the claim that migrant criminality is one of the main crime policy issues in Spain today.

If we are to assume, then, that the controls and sanctions being used against migrants are an indication of the form current – and future – formal control structures are likely to take a brief analysis of some of the key features of that risk management system is surely in order.

Philosophy behind the Construction of Migrants as a Risk Subject Category: The Significance of Juridical Status

Migrants, owing to various circumstances but in particular to their high social visibility and limited interaction with the native population, are easy to cast as a group marked out by otherness (Melossi 2002: 263, Silveira Gorski 1996: 141). The construction of migrants as a distinct sector of society makes it much easier to identify them as the group responsible for much of the current disorder and insecurity, as potentially key players in a narrative of social risk (Dal Lago 2004: 44, Garland 2005: 228–31, 300–302).

It should be pointed out that the social construction in question is also the result of the actual involvement of a certain segment of migrants in criminal circles. Notwithstanding, that involvement has also been determined by both a prohibitionist migration policy that has made normal mobility next to impossible; and a social developmental model which, rather than encouraging the stable insertion of migrants, actually promotes social exclusion and criminalization; not to mention the demand created by part of our society for certain services available in this context of illegality (Melossi 2002: 267–8, Mosconi 2005: 147–65). What emerges, then, is that, just as organized crime has always thrived under prohibition of whatever kind, so prohibitionist migration policies have given rise to the social exclusion of migrants today, and to their criminalization and self-criminalization, with the effects being felt by young migrants in particular (Palidda 2001: 214–16).

Still on this point, there is also the point that the classification of migrants as a risk category relates to factors that go entirely beyond a notion of otherness based purely on physical or cultural characteristics. A more important consideration is the issue of their legal status, as that determines the social meaning assigned to them as a group. To put it simply, the juridical status assigned to migrants (that is, non-EU migrants, or migrants from the South and East) attributes them the permanent risk of illegality, setting them from the start in a grey area verging on the criminal (Guild and Bigo 2005: 67, Dal Lago 2004: 49–50, 138, De Lucía 2005: 217, Márquez Lepe 2005: 209, Melossi 2002: 273, Montúor Masó 2005: 331), thus making their classification as a risk category all but a foregone conclusion. The constant suspicion of illegality is an important factor in the construction of a risk category based on ontological profiles: an a priori principle for the purposes of creating a broad-based policy on crime (control strategies, security policies), that will ignore as largely irrelevant the detail of whether the migrant has actually committed an offence or not. After all, as has been shown already, in selecting a particular risk group to fit the preventive logic of actuarial thinking, individual circumstances and a person’s actual criminal record barely come into it.

Aside from the connection with criminality, there is also the issue of the migrant’s juridical status, which reduces the subject to his or her condition as a worker, in the sense that it is only possible for the subject to remain within the sphere of legality as long as he or she is engaged in some kind of employment and provided that employment is regular. In terms of the issues being examined here, and so laying aside the obvious decline in the availability of stable regular work in comparison with the myriad alternative forms of involvement in the labour market, this blatant constriction of migrants to a defined social function makes them an ideal target for certain control practices (De Giorgi 2000: 60–1, Rodríguez 2003: 112).

The migrant status is surely no longer one which can be glassed simply as non-citizen. Indeed, if – as noted by Dal Lago (2004) – we are to take for granted that a person is more than the mere compendium of philosophical reflections, that the person is, in fact, the product of his or her insertion in a given context of positive norms (that is, in a legal system); understanding, thus, that it is citizens alone – increasingly – who invest the human being with a social personality; this being the case, we would have to reconsider this ‘non-person’ category (Dal Lago 2004: 223–6) highlights the consideration of immigration as a crime de facto, and connects this juridical status with police abuses in relation to migrants.

4 Data taken from the official statistics of the Secretaría General de Instituciones Penitenciarias (2010). Older figures, that showed the evolution of these data, can bee seen in the data of the Ministerio del Interior (2009: 252ff.).
5 According to the data of the Ministerio del Interior (2009: 252–3), in Spain during the period 1996–2008 the native prison population increased 31.1 per cent, whilst the foreign one had growth of 291.4 per cent.
6 In the midst of all the media rhetoric surrounding the issue, it is not hard to see how artificial surges of social alarm over migrant criminality have been orchestrated (see Fuentes Osorio 2005: 17–18, Pérez Cepeda 2006: 223–4, Rechea Alberola, Fernández Molina, Benítez Jiménez 2005: 9, 18–20).

7 In this sense, Palidda (2000: 233–6) highlights the consideration of immigration as a crime de facto, and connects this juridical status with police abuses in relation to migrants.
2004: 205–8, De Lucas 2005: 205–7, Mezzadra 2005: 94–106) as the product of a system founded upon the logic of exceptionality (Rodríguez 2003: 132, Agamben 1998: 212–15, 221–2, Pérez Cepeda 2006: 232). One last point to note on this idea of the non-person is that migrants are different in this respect from other social subjects in – or in danger of being in – situations of exclusion (homeless people, drug addicts, the poor etc.), as the latter conserve, theoretically at least, a small array of rights from which migrants find themselves cut off.

The issue is much more than a mere difference in juridical status. In the construction of migrants, the crucial factor becomes lack of citizenship; their social image is no longer one simply of otherness, but of permanent potential illegality. It is worth examining what aspects of the juridical regime are most responsible for this.

Firstly, the rigid border controls put in place to prevent entry into a given territory (Articles 25ff. O.L. 4/2000 (11 January) on the rights and freedoms of foreigners in Spain and their social integration). In regard to this aspect, what has been interesting in recent times has been the growing tendency to distance border lines away from the state, placing them in some cases in the migrant’s actual country of origin, a policy which has been termed “externalization of borders” (Andrijasevic 2006a: 8–17, Dal Lago 2004: 153, 271, Saint-Saëns 2004: 62–5). The process, which is beginning to cause major changes in the morphology of control measures against unregulated migration, has been formally promoted within the EU since the end of 2004 (Andrijasevic 2006a: 8–17, 2006b: 150–1, Rigo 2007) and occurs there in different forms. The most obvious of these is externalization in the geographical sense, in other words, the tendency mentioned already by reception-states to establish their controls near border lines, or even along non-fund borders, in territory belonging to the migrant groups’ states of origin or the states they pass through. A specific feature of geographical externalization has been the construction of internment centres for migrants in their countries of origin or transit, which has, in turn, given rise to the criminalization of, not just entry into, but also unregulated departure from those states.

8 According to data from the Ministerio del Interior (2010), in 2009 a total of 12,625 subjects were sent back to their country of origin from Spain, representing a 32.6 per cent decrease on the figures for the previous year. Meanwhile, the Spanish government carried out 13,278 expulsions in 2009, a 25 per cent increase in relation to 2008.

9 Gil Araújo (2005: 131) identifies three different ways in which border controls can be externalized or moved: vertical displacement above (EU) or below (regional and local authorities) the state authorities; geographical displacement towards a different control area (other countries’ borders); and externalization of responsibility onto the private sector (transport companies) and the government of the countries of origin.

10 Indeed, perhaps one of the most significant aspects of this process is how it has restricted freedom of movement, not just in relation to entering a country, but by preventing the subject from leaving (e.g. in Moroccan law, Articles 50 ff. L. 2/2003 (11 November), which establish a prison sentence of 1–6 months for anybody attempting to leave the country illegally; for those involved in smuggling people out of the country, the penalty rises to

11 According to Pretel (2006: 55–9) in Western societies this can lead to the creation of internal borders, in the form of: a) police harassment and the power to impose controls on public transport; b) lack of workers’ rights; c) serious difficulties finding housing; d) emergence of racist or xenophobic attitudes.


14 In this sense, Monclús Masó (2005: 335) highlights how this confusion between ‘illegality’ and criminality is affected by having expulsion as both a legal administrative and a penal provision. The double provision of just another example of the intersection already
to understand how, for some migrants, expulsion rather than prison might seem by far the more grievous sanction, despite the latter’s being, in theory, the most serious sanction contemplated by the legal systems in Europe.

In addition to all the issues highlighted already, however, there is a fourth affecting the construction of the migrant as a risk subject: the increasingly common view of migration phenomena as conditions under which subservive or terrorist activities are likely to emerge, which, in turn, has been used to justify their institutionalization as priority social control areas (Bigo 2005: 76, Gil Araújo 2005: 114, Ruiz Rodríguez 2006: 184–6, Saint-Saëns 2004: 62). Yet, while such an attitude may have been strengthened by the events of 2001 (and, in Spain, by those of March 2004), its history actually goes back further than that.

For over a decade, irregular migration has been defined as an international security problem, a status only shared by organized crime and terrorism (Gil Araújo 2005: 114, 120, Moulier Boutang 2002: 144–5).

meanwhile, have evidence to suggest that in the last few months of 2005, 1,200–1,700 people may have lost their lives while trying to reach the Canary Islands from the coast of Mauritania (on this subject, see El Mundo, 20 March 2006, quoting the CARIM website, http://www.carim.org/index.php?callContent=1). For the first eight months of 2006, the estimated number of deaths on the same route, according to the Red Cross, was somewhere between 2,000 and 3,000 (see El País, 1 September 2006). The Asociación Pro Derechos Humanos de Andalucía (APDH) has reported the death of 1,167 persons in 2006 and 921 in 2007 during their migratory journey towards Spain but they estimate that at least 7,000 persons died in 2006 and 3,500 in 2007 as a consequence of European border controls (2008: 33–5). Another particularly deplorable example of this occurred between the end of August and the beginning of October 2005, when massive attempts were made to get across the Spanish border at the autonomous cities of Ceuta and Melilla. At least 14 irregular migrants lost their lives in the course of those attempts, the majority of them as a result of shots fired by border police (see El País, 30 September 2005, 7 October 2005, and Aibre 2006). The scenes were repeated in July 2006, when three migrants died while attempting to jump the border fences at Melilla, most likely as a result of shots fired by border security forces (see El País, 4 July 2006).

Some authors quoted in this text meanwhile, point out that this circumstance tends to combine in the migrant the roles of the internal enemy and of the external enemy. A specific expression of this linking between migration and terrorism can be seen in artificially constructed sources in autumn 2004 focusing on the alleged existence of Islamic networks in Spanish prisons. See the editions of El Mundo for 23 September, 8 October, 24 October, 27 October and 2 November 2004.

Meanwhile, Bigo (2005: 76–7), underlines the primacy of migration matters in the international police activities.
The Function of Risk Category: Social Cohesion, Managed Exclusion and Subordinated Inclusion

There is the need created by an actuarial approach to security to identify specific risk groups, as the focus shifts away from guaranteeing security in general terms towards targeting restricted resources to tackle specific risks arising out of defined sectors of the population. The particular control of migrants, according to this logic of managing and distributing risk, is a key aspect of the whole system’s raison d’être.21

At a time characterized by the breakdown of traditional (modern) identity markers (Beck 1998: 95–9, Matthews 2003: 163–5, 316–20, Young 2003: 32, 159–62) and ever-increasing individualism, the negative definition of what certain criminologists have termed suitable enemies,22 also has an obvious role to play in offsetting the lack of social cohesion and coordination (Bauman 2005: 105–13, Dal Lago 2004: 46–7, Portilla Contreras 2005: 77). Thus the group definition of irregular migrants as a category based on a powerful sense of the subjects’ otherness fulfills the essential function of creating cohesion within a society that finds itself in crisis (Dal Lago 2004: 11, 44–50, 237–45, Márquez Lepe 2005: 210, Palidda 2000: 25). Historically – though perhaps with greater urgency nowadays – society has used the characterization of a social subject as requiring control and being logically responsible for the dysfunctions and conflicts within the community as a potent mechanism of social cohesion (Young 2003: 177–9, Žižek 2005: 89).

A number of additional, no less important uses are also apparent. In order to understand these properly, however, we must first of all be aware of the clash created within the regime of sanctions for irregular migrants between exclusion objectives and aims of insertion.

Just as the principle upon which the juridical status of migrants seems to be founded is one of potential exclusion, so the most extreme juridical implications for irregular migrants as contemplated by the (penal and administrative) Spanish regime of sanctions (i.e., expulsion, internment, or imprisonment with a view to expulsion and no possibility of getting the sentence suspended) would appear to have incapacitation as their primary objective (Pérez Cepeda 2006: 237). By the same token, any rehabilitationary considerations in this regard are conspicuously absent. That said, in order to understand the full purpose of this migration policy and the crime policy philosophy behind a mechanism like expulsion (as established by Article 89 Spanish Penal Code), a vital point to realize is that what all this provides for is selective incapacitation (De Giorgi 2000: 73–4). Put another way, internment and expulsion (including imprisonment, or not, depending on the case) are not enacted against all those who should, in theory, qualify to be so dealt with. In fact, the data available to us indicate that, over the last few years, the proportion of expulsions in Spain that have actually been carried out is only just over 25 per cent of those agreed.25 There are, of course, different reasons for this: juridical (absence of repatriation agreements with different countries of origin); informational (failure to identify the nationality of a particular migrant, or refusal on the part of particular state to acknowledge a migrant as a national of the same); and, above all, material (lack of means required to execute the totality of expulsions) (De Genova 2002: 209). Nevertheless, a further factor to take into consideration must surely be the lack of political will to enforce the full rigour of the expulsion system in the knowledge that such a scrupulous approach would risk blocking or dramatically reducing the stream of irregular migrants into the country where their diverse economic and social contribution is one of the utmost importance (De Genova 2002: 209). In parallel with the kinds of functions outlined above, there is also: the effect the sector has on what is a rapidly aging population pyramid;26 its outstanding contribution to economic growth;27 and its

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21 See Baier (2003: 64) identifies some of the specific functions of these migration management practices: to dissuade future irregular migrants; to transmit messages to society that may help to conjure up a sense of insecurity; even to justify existing public (and private) security apparatuses.

22 This expression is commonly used by Christie (1986: 42–5), but it is usually employed also by other scholars (e.g., see Wacquant 1999: 215–18).

25 See El País, 20 July 2004, which reported that between 2002 and early 2004 the Spanish government carried out only 27.8 per cent of agreed expulsions. See also further data supplied by Silveira Gorskii (2003: 540–56), which show that figures for executed expulsion orders remained more or less around these levels. See also Andrijašević (2006: 152) – who report, in the Italian case, figures around 50 per cent.

26 The study Oficina económica del Presidente (2006: 3–5) shows that the spectacular growth in immigration has caused the Spanish population to rise by 3 million in the period 2000–2005, representing a growth rate of 1.5 per cent annually, the highest since the statistical register began. To put it another way, of the 4.1 million new members of Spanish society in the years 1996–2005, 3.6 million of them were migrants. Based on these figures, for the period 2000–2005, Spain was the country in the OECD with the highest percentage growth of its migrant population: 7.1 per cent.

27 A report produced by the Servicio de Estudios de Caixa Catalunya (2006), shows that, without migration, Spanish income per capita would have fallen in the period 1995–2005 at a rate of 0.6 per cent per annum, representing a decrease similar to or greater than that of other European countries: Germany (1.5 per cent), Italy (1.1 per cent), Sweden (0.7 per cent), Portugal (0.6 per cent), Greece (0.6 per cent). The study Oficina económica del Presidente (2006: 14–16) highlights that the massive influx of migrants into the Spanish market has not caused a rise in unemployment, but rather a sharp reduction instead. Migrants are also shown to have a higher rate of activity than native workers (79 per cent against 68.2 per cent in 2005). The study also indicates that the level of temporary contracts among migrant workers is 61.4 per cent and that their salaries are 30 per cent lower than those of native workers. The paper adds that migrants accounted for 51 per cent of GDP growth for the period 2001–2005. As an indirect effect, it estimates that 30 per cent of the growth in female economic activity among 1996–2005 was due to the presence of migrants. The study highlights that the fall in unemployment was an effect of the increased flexibility which migrants introduce into the labour market, since they tend to be focused in sectors in which native labour is scarce, their geographic mobility is greater and their salaries are lower.
no less outstanding role in improving the public finances\(^{28}\) (one of the fundamental considerations of successive regularization processes).

It might be assumed, therefore, that a migration policy aimed less at putting a stop to the flow of migrants than at managing it\(^{29}\) (as evinced by a distinct official reluctance to clamp down on the black labour market) was always destined to encourage the massive-scale employment of migrant labour in conditions of maximum flexibility and exploitation, in keeping with the demands of an increasingly post-Fordist system of production. Likewise, a system of control that targets irregular migrants – in particular, measures such as internment and expulsion – also has a normalizing objective that is (neo-)disciplinary in nature (though not in the least way rehabilitatory, as it focuses, not on the individual subject, but on the collective social group\(^{30}\)), and aimed at binding migrants to a scheme of employment that pigeonholes them into jobs that are every bit as precarious and exploitative as they are economically essential (Fuentes Osorio 2005: 20, Guillén and Vallés 2003: 318, Dal Lago 2004: 48, 235, 255, 267–9, Palidda 2001: 207–14, Rodríguez 2003: 76–7). What this means, in short, is that migrants are left to feel the full severity of a new ‘workfare’ regime\(^{11}\) according to which the labour market is segmented along ethnic lines, with middle to high value-added occupations being reserved, by and large, for the native workers (Dal Lago 2004: 130, 267–70, Rodríguez 2003: 77, 118–22).

\(^{28}\) In relation to the public finances, the study Oficina económica del Presidente (2006: 14–16), shows that in 2005 migrants generated 6.6 per cent of the state’s income, but received only 5.4 per cent of its expenditure, thus contributing 48 per cent of the surplus in the public finances for that year. Figures relating to the importance of contributions made by migrant workers to the financial sustainability of the Spanish social security system can be also found in El País, 29 October 2006.

\(^{29}\) In as far as the prevailing ideology behind migration policies is one of ‘border management’ and ‘migration management’, based on the principle of productivity, the ‘Fortress Europe’ metaphor does not reflect the full complex nature of the how the EU controls the migration process. A further indication of the metaphor’s unsuitability is the already mentioned dissemination of the idea of borders –and the controls traditionally associated with them– across the social terrain, with the aim of maintaining constant control over the lives of irregular migrants (see Guild and Bigo 2005: 39, Mezzadra 2005: 148, Various Authors 2006).

\(^{30}\) Using the distinction, suggested by Foucault, between disciplinary measures and government biopolitical measures, it is possible to conclude that the normalizing, neodesciplinary principle operating in this situation does not do so individually, with reference to each separate migrant (with a view to individual rehabilitation), but collectively as a risk group.


There can surely be no question but that the harsh juridical status of irregular migrants, which makes it next to impossible for them to escape from the cycle of illegal residency and black economy labour, translates into their coercive relegation to the lowest levels of the production system, circumstances characterized by exceptionally poor employment regulation and the implications of that in terms of the virtual non-existence of workers’ rights (De Giorgi 2000: 54–5, Rodríguez 2003: 77, Silveira Gorski 2003: 563). Thus irregular migrant workers, subordinated to a process of over-exploitation, end up consigned to the lowest rung of a universally precarious labour regime.\(^{32}\)

The situation cannot be read as one of simple dysfunction, as it might have in an age of Keynesian ‘welfarism’. On the contrary, in a post-Fordist regime of production in which high levels of flexibility and adaptability are required of the workforce, it becomes not just expedient but utterly essential that sections of that workforce should be subject to the conditions of extreme precariousness described above. Viewed from this perspective, the whole concept of juridical irregular migrant status, including its control aspects, seems a most extraordinary instrument of subordination, aimed above all else at coactively subjecting groups of that description to highly undesirable labour conditions. Even the exclusionary, segregationist aspects of the juridical regime are constructed as crucial elements of a greater scheme of thinking: that of enforcing disciplined subordination to the kind of labour practices demanded by our present system of accumulating capital (Bielot 2003: 64–6, Mezzadra 2005: 148, Rodríguez 2003: 77, 118–22, De Giorgi 2000: 55, Dal Lago 2004: 142). It should also be noted, of course, that acts of exclusion are also deployed to avoid the influx of migrants on such a scale as would make it impossible for them to be absorbed, even taking into account the demand for labour. However, to use the language of the experts in the field of governmentality studies, as first investigated in his day by Foucault (1995 and 2000), one might say that the ‘control society’, as a hybrid, conflictive, changing social management model, also reveals aspects of the disciplinary logic of normalization (Bielot 2003: 58–64, Deleuze 1995: 273–5, De Giorgi 2000: 24, 48, 96–107, Rodríguez 2003: 124–6).

The Repercussions of Risk Category: The Discriminatory Operation of the Spanish Penal System in Relation to Migrants

The penalties meted out to migrant subjects are a clear demonstration of the tensions and limits of a sanctionary regime which, while designed from the perspective of an abstract subject type (the citizen), in practice operates according

\(^{32}\) By way of an illustration, at the public presentation of the study Pereda, Actis and De Prada (2005), it was pointed out that the average salary for a migrant at that time was €870 a month, compared with the €1,741 a month earned by a native worker. On this subject, see La Voz de Galicia, 17 February 2005.
to a patently selective and differential system of punishment. At a minimum, in relation to how prison sentences are implemented, the evidence should compel some reconsideration of the existing objective parameters for measuring progress in the area of rehabilitation; analysing these in relation to the actual status of irregular migrants in general, typically what emerges is that outside of the native prisoner population those parameters are largely unworkable.

To start with, the 'typical' criminality of migrants as a group is exaggerated by Spanish crime statistics owing both to the priority targeting of resources against them (Harcourt 2007: 156)—for example, in relation to street crime—and to the ease with which their crimes are typically detected, investigated and demonstrated. The high rate of detection observed in such cases is also a function of the high social visibility of migrants, combined with the perversion and effectiveness of Spanish police stereotypes (Fuentes Osorio 2005: 20; Dal Lago 2004: 30; Melossi 2002: 267–89; Pavarini 2002: 171–2, Rodriguez 2003: 121–39), as illustrated by various data relating to arrests and identity checks. Stereotypes of this kind are merely a reflection, however, of public opinion generally (Melossi 2002: 279–81, Mosconi 2005: 157), social attitudes also mirrored to an extent in the whole Spanish penal system approach to migrant criminality (Mosconi 2005: 157; Tonry 2004: 209–10).

Secondly, as the statistics would seem to show, a migrant offender is much more likely than his or her native counterpart to suffer preventive detention in Spain (García España and Pérez Jiménez 2005: 92, De Giorgi 2000: 71–3, Pavarini 2002: 170–1) – a factor, it should be remembered, that usually prejudices the subject at sentencing when it comes to deciding between imprisonment and a sanction of a different type (Tonry 2004: 225). Looking at how preventive detention is regulated in Spain, there would appear to have been at least two legal bases for this circumstance (Ruiz Rodriguez 2006: 188–9). The first of these is the greater social alarm, fomented by media representations, which illegal acts by migrants tend to generate among the public; this popular anxiety was already recognized under Article 503.2 of the Spanish Criminal Procedural Law, the so-called Ley de Enjuiciamiento Criminal – LECrim – prior to the reform introduced by O.L. 13/2003 (24 October), as adequate grounds for remanding an individual to preventive custody. The second is the suspicion, based on the subject’s social circumstances (possible lack of fixed address, failure of identity documents, precarious employment, lack of income etc.), that he or she represents a flight risk (Art. 503.1.3 LECrim).

A third aspect of the selectivity issue is how, in relation to sentencing, the uncertainty surrounding the social situation of migrants makes it more difficult to implement either non-custodial alternatives or the mechanisms for substituting or conditionally suspending a sentence (García España and Pérez Jiménez 2005: 92, De Giorgi 2000: 71–3, Dal Lago 2004: 31, Pavarini, 2002: 170–1, Melossi 2002: 267, 274–7). In Spain, the use of substitution or suspension mechanisms in cases involving irregular migrants is not officially permitted under current expulsion regulations (Art. 89.1 Penal Code).

Fourthly, conditions discussed earlier, such as precariousness of employment, weak family ties or irregular status, frequently obstruct subjects in the final phases of a prison sentence from gaining access to the different forms of parole (Aguilera Rejia 2005: 268, Re 2006: 192, Ruiz Rodriguez 2006: 187–9). In Spain, the access of migrants to such alternatives is again denied under Article 89.1 Penal Code which establishes expulsion across the board, thus excluding any possibility of gaining parole or conditional release.

However, having a criminal record removes any chance he or she may have of regularizing his or her status, leaving the subject with all the negative consequences that situation entails; signally, the permanent threat of expulsion and the lack of any alternative but to seek a living outside of regular paid work (Aguilera Rejia 2005: 267–9, Ruiz Rodriguez 2006: 192). One final point to note in this context, during the period of a prison sentence, migrants are denied any possibility whatsoever of receiving a release permit, on the grounds that they are considered a flight risk; this is despite the fact that there has still been no empirical research produced to back up such a theory (Ruiz Rodriguez 2006:189–90).

A fifth and final aspect of the experience of migrants in the Spanish penal system is that theirs tends to be more punishing than the average, owing as much to the lack of external human support as to the subjects’ limited understanding of how the system operates (Matthews 2003: 290–300, Re 2006: 130–1).
All of which goes to illustrate a point on which to conclude this brief analysis: the juridical status of migrants and their definition as a dangerous group are not merely risk management responses to the actions and behaviour of migrants. The symbolic exclusionary rationale behind them and the specific practices that go with it also play a part in creating the risk in the first place. In an example of the Mertonian self-fulfilling prophecy, migrant criminality may actually be a result of the way the juridical system operates (De Giorgi 2000: 71–3, Harcourt 2007: 36, 154–6, Rodriguez 2003: 120, 130, Melossi 2002: 267–8, Mosconi 2005: 147, 153, 165).

Chapter 13
The Italian Crime Deal
Salvatore Palidda

The Italian case is similar to others, but it may be emblematic of the raising to extreme levels of prohibitionist and securitarian practices, of their societal effects and of their combination with racist criminalization (as recently reported by the European commissioner for human rights, Hammarberg1). This is also why Italy appears to resemble neoconservative America more than other European countries, due to the particular blend of the less noble aspects that have traditionally been present in the country (consider the underground economy, and the hybridization between legal, informal, and criminal economies). Referring to the recent literature analysing the various aspects of the social construction of the condition of immigrants in Italy and racism in depth,2 I hereby summarize what is essential:

a. More than other European countries, Italy is the country in which a heightened uncertainty about immigration law perpetuates itself; discretion if not utter arbitrariness in the interpretation of norms (rarely in a sense that benefits the immigrant) are commonplace and strengthened by laws that grant disproportionate power to the police and the other authorities in charge of managing the various stages of the migration process; from the application for a visa to the request of asylum, up until obtaining a residence permit and/or asking for its renewal, Italian norms and practices de facto ensure the reproduction of irregularity, which only to a small extent results from entries into the country that are actually irregular.3

b. Over thirty years, Italian prohibitionism has contributed to the death of thousands of migrants as they attempted to eer Italy territory, to

1 His report, in English and French, is available online: https://wed.coe.int/ViewDoc.jsp?id=1428427&Site=CommDH&BackColorInternet=FFC65B&BackColorIntranet=FFC65B&BackColorLogged=FFC679 and was cited by several daily newspapers on 16 April 2009.

2 Insofar as legal aspects are concerned, I refer to various essays published in the magazines and on the websites of ASGI and Magistratura Democratica: http://www.asgi.it/, http://magistraturademocratica.it/ For research in social sciences, the literature is quite vast and widely cited in different chapters of this volume.