Abstract

Australia's detention-deportation regime is setting the agenda for New Zealand's domestic criminal justice system, with implications for criminological understandings of 'crimmigration' and 'bordered penality'. In response to recent changes in Australian migration law which have seen an increased number of deportations to Aotearoa New Zealand, the New Zealand government introduced legislation, the Returning Offenders (Management and Information) ("ROMI") Act 2015, which created a monitoring regime for citizens returned to New Zealand following a criminal conviction in an overseas jurisdiction. While ostensibly modelled from domestic parole arrangements for people released from prison in New Zealand, in practice the regime entails a greater level of restriction while offering less in the way of legal protection. That the ROMI Act has for the most part escaped criminological attention is a gap in the literature which this essay begins to fill. The analysis draws together political discourse, policy documents, court cases and legislation to arrive at an understanding of the Act as an extension of the Australian regime. The sentence an individual is subject to in Australia is extended, both geographically and temporally, creating multiple punishments for this particular group of offenders. The women and men entangled in this cross-border penality are not only banished from Australia but experience ongoing social and political marginalisation upon their return to New Zealand, where they access only a conditional citizenship because of their uncertain membership as both "criminals" and de facto "aliens". By treating returning New Zealanders as threatening outsiders to be contained, rather than vulnerable people to be supported, the New Zealand state also extends the risk logics underpinning the Australian regime, revealing a new dimension to the nexus between borders, crime and citizenship. Although the ROMI Act is novel, the regime conforms to the racialised patterns of exclusion and criminalisation which have persisted in Aotearoa New Zealand since colonisation.

Cases

Belcher v Chief Executive of the Department of Corrections [2007] NZLR 507 (CA)

Kenneth Morley v New Zealand Police [2018] NZHC 1103 (HC)

New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA)

New Zealand Maori Council v Attorney-General [1993] 3 NZLR 140 (CA)

R v Pora [2000] NZLR 37 (CA)

R v Poumako [2000] NZLR 695 (CA)

Legislation

New Zealand Bill of Rights Act 1990

Parole (Extended Supervision Orders) Amendment Act 2014

Returning Offenders (Management and Information) Act 2015

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Mark: *See I don't understand this probation and that because I didn't come over here on parole or anything like that—when I come here, I come as a free man. I've served every day of my sentence … I'm square with the house and then I come here, and I get put on a 12-month probation. I feel like that in itself is another sentence.*

Probation officer: *I guess you do understand where we're coming from, too. We don't really know much about you. Coming into New Zealand, all we're given is your criminal history, judges sentencing notes … with that probation oversight maybe we can obviously keep in contact with you every so often, making sure you're in the right track, so eventually when you do transition over to coming off sentence, hopefully things will be successful for you.*

Mark: *It's a hassle mate, I've got police knocking on my door, asking me how I'm going and stuff like that. Fuck man, I just want to get on with my life.*

(Māori Television 2018 at 27:24)

Introduction

Days before a plane of deportees was due to land in Aotearoa New Zealand, Parliament rushed through legislation on 18 November 2015 establishing a new monitoring regime for so-called "returning offenders". One MP, David Shearer, described the eleventh-hour policymaking as 'a disgrace, when this Government knew last year, on 14 December, that Australia had changed its laws' (NZHR 2015c). While Australia has a long history of deporting non-citizens on criminal grounds (Nicholls 2007), recent changes to Australian law have considerably extended the scope of the practice. Mandatory visa cancellation has been introduced for those who fail a 'character test' on account of their criminal offending or suspected gang involvement. Visa cancellation is triggered by a 12-month prison sentence, including cumulative sentences. As Grewcock (2014: 128) notes, this 'exposes relatively minor offenders to deportation'.[*] Following the policy's introduction, in December 2014, the number of visa cancellations for reasons of 'bad character' increased by 1,400 percent (Billings 2019).

The impact of this policy has been disproportionately felt by New Zealanders; under the new powers, more New Zealanders have had their visas cancelled than the next nine nationalities combined (Department of Home Affairs 2019). New Zealanders are now the largest group in Australia's immigration detention centres, whereas before the legal changes they were not even in the top ten (Department of Home Affairs 2019; O'Regan 2018). Between January 2015 and March 2020, more than 2,000 people were returned to New Zealand (New Zealand Police 2020). Within the New Zealand cohort, the majority of deportees (60%) are Māori or Pasifika peoples (New Zealand Police 2020). Deportations to

[*] Between July 2018 and June 2019, drug offences were the most common reason for visa cancellation under the character test (Department of Home Affairs 2019).

New Zealand are also highly gendered, with 95 percent of deportees identified as men (Department of Corrections 2017: 119).

Criminal deportation imposes 'a far greater punishment than a period of imprisonment … Deportation means having to start again in a society which was left years ago, or sometimes never known' (Fekete and Webber 2010: 5). The Australian authorities regularly deport people who have lived in Australia for nearly all of their lives and have little or no connection to New Zealand (Billings 2019). The first time Brian, a 70-year-old grandfather, had set foot in New Zealand in 40 years was when he was deported in July 2019: 'I was just so petrified. They just plonk you on a plane and fire you across the ditch' (Roy 2019). In 2015, a 56-year-old tetraplegic, who had spent most of his life in Australia, was deported to New Zealand following a conviction for self-medicating with controlled painkillers. He described feeling 'like I've just been dumped—away from all my family and friends. I have nothing here' (Plumb 2015). Lisa, who moved to Australia when she was a one year old, left behind her three children, her partner and her sick, elderly mother when she was returned to New Zealand (Roy 2019).

Australia's deportation policy has been the subject of much critical attention (Billings 2019; Grewcock 2014; Stanley 2018; Weber and Powell 2020). The focus of this essay is an unusual piece of legislation the receiving state of New Zealand introduced in response to Australian policy. The Returning Offenders (Management and Information) ("ROMI") Act 2015 creates a monitoring regime for offenders returned to New Zealand following a criminal conviction in an overseas jurisdiction (overwhelmingly Australia). As Stanley (2018) points out, if Australia's detention-deportation regime imposes a triple punishment for non-citizens convicted of criminal offending, then the New Zealand legislation slathers on yet another

punitive layer, creating what amounts to a quadruple punishment: imprisonment, detention, deportation, and now ongoing monitoring and supervision in New Zealand.

For the most part, the ROMI Act has evaded scholarly attention (but see Stanley 2018). This is surprising, not least because there appears to be no other legislation quite like it. But the Act is not merely an aberrant; we can locate it within a wider trend toward mobilising citizenship as a tool for governing unwanted and "risky" outsiders (Bosworth and Guild 2008; Zedner 2010). Having been exiled from Australia, the returning New Zealander once again finds herself cast in the role of "criminal alien"—a "risky" body to be identified and managed. In Australia, her alienage was established by reference to her lack of formal citizenship; in New Zealand, it is by reference to her social and moral nonbelonging. I submit that the receiving state of New Zealand is motivated by ambitions similar to the deporting state: sovereign power's reassertion and the reinforcement of membership boundaries within the community. Accordingly, I situate my analysis within the broader literature on deportation and the intersections between borders and penality.

Two groups are dealt with by the legislation: "returning offenders" and "returning prisoners" (a sub-group of returning offenders). The broader category of returning offender is defined as being any person convicted overseas for conduct that is imprisonable in New Zealand. This group is made subject to a regime for collecting information, such as photographs, biographical details and fingerprints. A returning prisoner is a person the New Zealand police determine to have been sentenced overseas to more than one year in prison for conduct that would be an imprisonable offence in New Zealand and who is returning within 6 months of release from overseas custody. All returning prisoners are automatically subject to standard release conditions for a period dependent on their length of imprisonment in the overseas jurisdiction, with a minimum duration of six months and a

maximum of five years. The conditions are the same as applied to domestic offenders released on parole: for example, giving notice of an address change and allowing biometric information to be collected. In addition to standard conditions, the returning prisoner may be made subject to special conditions, which entail a greater level of restriction.

The stated rationale for the ROMI legislation is that returning offenders present a risk to public safety and so need to be placed under supervision in the same way as those released from New Zealand prisons. Having set out to mimic domestic parole arrangements, however, the ROMI Act is being implemented in a way that is more restrictive than the regime for domestic offenders while offering a weaker standard of legal protection. Almost all returning prisoners are made subject to the additional special conditions, and because ROMI measures exist under the civil regime, offenders do not enjoy access to the usual legal protections. I demonstrate ROMI conditions to amount to a punitive measure, so the state is sidestepping the criminal process by relabelling them as nonpunitive. I also suggest that the punitive quality of ROMI orders, in light of the disproportionate number of Māori people made subject to them, constitutes a violation of the principles of New Zealand's founding document, Te Tiriti o Waitangi ("the Treaty").

The following analysis is divided into two streams of discussion. First, I review some of the due process concerns raised by the design and implementation of the ROMI Act. The legislation allows for an unjustifiable infringement on individual liberties; by circumventing due process protections, the New Zealand authorities are free to impose special conditions on all returnees as a matter of precaution. In doing so, they make a presumption of dangerousness across the returning population. This observation informs the second stream of my discussion, where I address the normative question of why the government would pursue a punitive response, as opposed to one which emphasises support. I demonstrate the

harsh treatment of returning offenders to hold symbolic value within a context of 'cross-border securitization' as policymakers scramble 'to market their ability to protect' against these "risky" outsiders (Stanley 2018: 520). The construction of the "risky" outsider occurs symbiotically: by responding with its own securitisation campaign, New Zealand not only adopts the deporting state's risk logics, but actually endorses and extends them. This dynamic evokes the long and troubled histories of white settler colonialism in Australia and Aotearoa New Zealand, and 'make[s] visible global dimensions of penal power and its colonial history and reiterations' (Bosworth et al., 2018: 43).

Besides a handful of accounts drawn from media, I do not set out the perspectives of people entangled within the ROMI regime—that is beyond the scope of this essay. Their voices need to be recorded: no government review has sought input from those subject to ROMI powers, nor has any research documented the experiences of deportees once they have arrived in New Zealand. My analysis is limited to an examination of official attitudes, and only to what can be gleaned from political discourse, legislation, policy documents and a number of Official Information Act ("OIA") requests. As an early effort to understand the logic, substance and consequences of this peculiar regime, the following analysis is purely exploratory, and many research gaps remain.

Literature Review

Under conditions of globalisation, deepening and multiplying cross-border flows of people and capital are giving rise to new forms of criminality and modes of criminalisation (Aas 2013). State sovereignty—the power of a state to govern its territory—is transforming, with profound implications for 'understandings of identity, community and justice' (Bosworth and Guild 2008: 704). The risks—real and imagined—associated with mass mobility have been met with strategies of criminalisation, detention and deportation which corrode the boundaries between criminal and immigration law (Aas 2013; Weber and McCulloch 2019). The concept of "crimmigration" captures the melding of these traditionally distinct fields of law (Stumpf 2006). They converge as expressions of state sovereignty and strategies of selective exclusion (Hernández 2016; Stumpf 2006). The transformation of punishment's substantive breadth and form is being matched by an erosion of the procedural safeguards that were formerly fundamental to its imposition (Zedner 2016).

What is occurring is more than a mere merger of immigration law and criminal law. Aas (2014: 525) argues that we are also witnessing an institutionalisation of 'differentiation': the creation of 'a parallel penal system' with different standards of rights, institutional arrangements and procedural norms. People are subjected to this 'abnormal justice' when they lack formal membership in society (Aas 2014). An example of the 'more exclusionary penal culture' (Aas 2014: 520) of abnormal justice is deportation following a criminal conviction—a sanction reserved for non-citizens (Anderson et al. 2011). Deportation is characteristic of the phenomenon Aas (2014) terms 'bordered penality'. In contrast to normal justice, which 'is imagined and practiced territorially, as a domestic relation among fellow citizens', bordered penality traverses the realms of the domestic and the international (2014: 522).

In the broader literature, scholars analyse border control through prisms of sovereignty (Bosworth and Guild 2008; Weber and Pickering 2011), citizenship and race (Barker 2013; Bosworth et al. 2018), and risk and security (Pratt 2005; Zedner 2010). Analysis through these interlaying themes has concentrated on interactions within the confines of nation states. Less has been written on the ways in which ideas around sovereignty, citizenship and risk are being challenged and recast by the spread of crimmigration strategies across borders. In her article on the detention-deportation of New Zealand citizens from Australia, Stanley (2018) draws our attention to this research gap by identifying an element of 'contagion' in the New Zealand government's response. She notes that, 'within a context of cross-border securitization, the receiving state of NZ has also sustained a performance of crimmigration' (2018: 520). This essay follows and extends Stanley's argument in order to assess the ROMI Act as a symptom of the 'contagion of crimmigration' (2018: 519). In doing so it draws upon 'the growing body of scholarship on how the global is situated in and transforming everyday penal practices in national and local settings' (Bosworth et al. 2018: 35).

Sovereignty

The rapidly increasing uptake of deportation across the global north in response to unwanted mobility is distinctive of the crimmigration trend (Anderson et al. 2011; Gibney 2008). The territorial exclusion of non-citizens is generally considered a "legitimate" exercise of sovereign power; it is, as Macklin (2001: 389) notes, 'the ultimate prerogative of sovereignty'. This prerogative is understood to encompass both exclusion and expulsion: the right to deny aliens entry and the right to expel those already inside, as occurs through deportation (Anderson et al. 2011). The exclusion of 'undesirable' people and surplus populations 'recurs

throughout history' (Bhui 2018: 198) and is frequently justified on the grounds of the state's *raison d'être* of securing the conditions of security and good order for its citizens (Anderson et al. 2011; Lazarus 2007; Zedner 2009). Despite being rationalised in terms of security, the control of borders can 'substitute for the production of genuine and universal human security' (Weber and Bowling 2008: 359). This is particularly true 'in times of turmoil' when institutions of economic and social order are weakened, as is so under globalisation's conditions (2008: 359).

The punitiveness exhibited by neoliberal penal systems is paired with logics of selective exclusion. These drive a futile search for security and order through campaigns of incarceration and incapacitation targeted against a growing number of 'undesirable' subjects (Feeley and Simon 1992; Garland 2001; Wacquant 2009). As Garland (1996; 2001) documents in the field of crime control, when states lack capacity to provide genuine security, or when their sovereign power is under threat, penal maximisation can restage political authority. Aas (2007: 287) proposes that Garland's (2001) 'sovereign state strategy' is now guiding efforts at intensifying border controls as a means of 'providing protection from threatening and undesirable mobilities'. As with domestic "law and order" tactics, 'defending the border and protecting the nation from contamination by foreign elements also carries enormous political and symbolic capital' (Aas 2007: 292). Bosworth and Guild (2008: 711) suggest that the politicisation of cross-border mobilities and the primacy afforded to 'the appearance of control' at the border betrays the popular punitivism animating many western border regimes.

The control of cross-border mobility is a way to cut corners on dealing with globalisation's complex challenges to arrive at simple, yet politically salient, "solutions" (Bosworth and Guild 2008). The border is a potent symbol of sovereign strength for states

'stripped of a large part of their sovereign prerogatives and capacities by globalization forces which they are impotent to resist, let alone to control' (Bauman 2004, in Bosworth 2008: 211). Border controls 're-inscribe the state at the precise moment that national borders appear less and less relevant' (Bosworth and Guild 2008: 714). Indeed, the power to control borders, Weber and Bowling (2004: 197) argue, 'is one of the few remaining prerogatives of the declining nation-state'. As Bosworth et al. (2018: 45) remind us, however, border controls 'may look like articulations of hyper-sovereignty but are actually often compensating for its loss'. This pantomime of sovereign strength is unmasked by the futility of state's efforts to enforce their borders and suppress mobilities (Bosworth 2008, 2011).

The border is simultaneously a symbol of sovereign power and the site where its limitations are laid bare (Bosworth 2008). Cross-border mobility unsettles the boundaries between the "inside" and "outside" and between "us" and "them"—the ballast of the sovereign nation state (Barker 2013). In an effort to resolve this tension, deportation places an individual 'in the global mobility regime' so that they may be returned to their 'proper sovereign' (Aas 2014: 531). Cornelisse (2010: 101) characterises deportation as a 'litmus test' for territoriality, the ideology linking 'political power with clearly demarcated territory'. Not only does deportation reassert sovereign power; it also reaffirms the foundational myth of the modern nation state: 'distinct populations belong to distinct states' (Cornelisse 2010: 103). Cornelisse's observation raises the question of how performances of territoriality are experienced by states on the receiving end of deportation: is one state's show of sovereign power another state's reckoning with sovereign impotence?

Citizenship and race

The 'natural order of place and people' which deportation strives to "restore" is a vision of political community hinging on citizenship and formal membership, as opposed to 'a more inclusionary concept of shared community based on humanity' (Barker 2013: 242). Bounded by 'territory and membership', democracies, Barker (2013: 238) argues, are 'inherently exclusionary entities'. With membership constructed as a binary of citizen/non-citizen, an individual's 'socially and personally experienced forms of belonging' are rendered immaterial to their formal citizenship status (Aas 2014: 531). Deportation becomes a vehicle for 'reconfiguring established members of the community as aliens' (Grewcock 2014: 124). For this reason, Anderson et al. (2011: 556) argue, deportation highlights 'the gap between citizenship and belonging, between legal status and normative value'. This gap emerges from the rigid 'boundaries of membership' within the political community (Aas 2014: 530). Deportation is a mechanism for enforcing these boundaries: it both establishes legal non-citizens and it constructs who is '*unfit* for citizenship' in line with the normative ideals of membership (Anderson et al. 2011: 555). Deportation is, as Walters (2002: 67) suggests, 'constitutive of citizenship'.

Deportation acts as a stark reminder of the precarious nature of a non-citizen's membership within the political community; lack of formal membership shifts 'the nature of penal intervention from reintegration into the society towards territorial exclusion' (Aas 2014: 521). When directed against non-citizens, penal power is 'directed outwards, beyond state territory, rather than inwards, back into the social' (Bosworth et al. 2018: 43). In contrast to Foucault's (1977) panoptic 'training of souls', this bordered form of penality is distinguished by a 'ban-optic' rationality geared toward banishment and territorial exclusion (Bigo 2008). The threat of the "deviant immigrant"—the embodiment of 'the polluting

element, the quintessential Other' (Aas 2007: 288)—stimulates 'the movement from the Panopticon to the Banopticon' (Bosworth et al. 2018: 43). As Khosravi (2009: 52) submits, through the removal of 'the bodily pollution of an anti-citizen' deportation performs 'a worship of nationhood or a celebration of citizenship'. This underscores deportation's symbolic function in an era of mass mobility: fostering national cohesion and reassuring anxious publics as the space between "us" and "them" grows ever slimmer (Bhui 2018; Bosworth 2008; Mehta 2016).

Striving to defend the boundaries of membership, bordered penality weaves 'intricate connections between citizenship, penal power and social exclusion' (Bosworth et al. 2018: 46). As we shall see, both citizens and non-citizens find themselves entangled within this governance net (Bosworth and Guild 2008; Zedner 2010, 2013). Criminal deportation, especially when used against long-term residents, advances a conception of citizenship as an earned right (Grewcock 2014). It is a blunt instrument for reaffirming the non-citizen's standing as an 'eternal guest' whose residence is contingent on certain standards of behaviour and character (Kanstroom 2007). For transgressing the community's moral codes, the non-citizen is judged 'not simply a foreigner, but an expelled, banished, criminal foreigner—as complete an outcast as one can imagine' (Kanstroom 2007: 20). Of particular interest for our discussion is Zedner's (2013: 48) observation that 'the drivers, practices, and consequences' of exclusion for those who 'were never members of our society, and for whom *re*integration is not a possibility, merit further attention.' These individuals present a problem for liberal theories of criminal law grounded on a territorial understanding of justice as a sovereign/subject relationship which plays out within the 'geographical, moral and cognitive' boundaries of the community (Hudson 2006: 237; Zedner 2013).

The non-citizen and the "irregular citizen"—the persistent offender, the suspected terrorist (Zedner 2010)—exist at 'the borders of community' (Hudson 2006: 237). Shadowy figures on society's margins, they are easy targets for a populist penal politics advocating public protection and rebalancing of criminal law in favour of the "law-abiding majority" (Zedner 2010: 390). While subject to criminal law's obligations, as outsiders from the community, neither enjoys access to its full protections (Zedner 2010). This conditional and precarious status is the consequence of their failure to satisfy 'an increasingly complex set of norms and requirements of responsible citizenship' (Zedner 2010: 402-3). Immigration statutes detail these requirements for non-citizens. For irregular citizens within the domestic polity, the conditions of citizenship are 'set out in a growing array of civil preventive orders, regulatory and contractual measures, and diluted procedures' (2010: 403). Most relevant to this essay are civil preventive orders. These impose significant restrictions on an individual's freedoms, and are underpinned by the threat of criminal sanction, but are associated with lower evidentiary standards and weaker due process protections (Ashworth and Zedner 2014).

The use of criminal law to render conditional and precarious the membership of non- and irregular citizens conforms to highly racialised patterns of exclusion, as well as being influenced by class and gender (De Genova 2018; Parmar 2018; Zedner 2010). Gibney (2006) notes that although formally citizens, those from subordinated groups may, de facto, only access 'stunted' citizenship because of their marginalised identities. Border controls 'reproduce racism and exclusionary policies by marking racialised others as unworthy of inclusion' (Turnbull 2017: 156). By extending penal regimes across geographic borders, racialised, gendered and classed constructions of "insiders" and "outsiders" assume a global significance through deportation (Dauvergne 2008). Scholars have demonstrated

contemporary patterns of criminalisation and exclusion to be closely tied to the continuing legacies of colonialism; indeed, many forms of racism were engineered through colonial ideologies of race constructed with the intent of legitimising colonial power and oppression (Aliverti 2013; Bhui 2016). Any analysis of mobility and criminalisation therefore demands the study of racial and colonial legacies and an appreciation of their influence over domestic and transnational projects of governance and citizenship.

Security and risk

Concerns over cross-border mobility communicate anxieties about 'certain bodies *en masse*' threatening the nation state's social and economic security (Garner 2007, in Turnbull 2017: 156). Aas (2007: 288) characterises the border as a kind of 'purifying filter' protecting the nation state from 'threatening foreign elements.' Boundary reinforcement is, therefore, tied up with the production of security; by crystallising the distinction between citizens and non-citizens, the state identifies the former as the proper referents for security and the latter 'as a source of potential risks' (Bosworth and Guild 2008: 711). Contemporary political discourse supports this process: promises to control the border are routinely coupled with rhetoric which casts the non-citizen as 'not just unwanted, but dangerous' (Bosworth and Guild 2008: 703). This resonates with Hudson's (2006) description of the "alien"—a figure who is dangerous because she is unknown and unclassified. By 'crossing the borders of our community, she has forced an encounter and we need to classify in order to render her predictable, to assess and manage the risk she may pose' (2006: 239). The threat of the outsider is perhaps most salient in representations of the "criminal alien", for whom 'the otherness of the stranger and the otherness of the deviant are collapsed' (Melossi 2003: 376).

The potentially threatening outsider inspires 'a general hypervigilance' and 'suspicion' as states become absorbed in the work of transforming 'unknown, unruly and risky bodies … into known, manageable ones' (Hall 2010: 889-90). Contemporary practices of exclusion can be contextualised by heightened sensitivity to risk and penality's departure from ideals of rehabilitation and correction in favour of actuarial techniques designed 'to identify, classify, and manage groupings sorted by dangerousness' (Feeley and Simon 1992: 452). Actuarial techniques are distinctive of what Feeley and Simon (1992) term the 'new penology'. Above all else, the new penology is concerned with the control and containment of high-risk populations for whom integration and treatment are presumed futile. These individuals 'must be managed for the protection of the larger society' (1992: 192). Preventive orders are one element within a broader shift toward a criminal justice system 'where the possibility of forestalling risks competes with and even takes precedence over responding to wrongs done' (Zedner 2007: 261). To this end, non- and irregular citizens are being made subject to novel criminal laws and security measures 'deployed to define status, impose surveillance, and enforce obligations designed variously to control, restrict, or exclude' (Zedner 2010: 396).

Associated with these developments is the ascendance of 'precautionary logic' in criminal justice policy and practice (McCulloch and Wilson 2017; Zedner 2007). The precautionary principle holds that 'uncertainty about risk is not a reason not to take action' (Ramsay 2013: 202). Faced with 'a high degree of uncertainty regarding the accuracy of any risk prediction' (2013: 200), criminal justice practitioners may act to prevent future harms, even in the absence of actuarial knowledge. In doing so, the burden of proof and risk of error is shifted onto the offender, reflecting a belief that to err on the side of caution is to protect abstract victims from hypothetical future harms, as opposed to the criminal justice rights of concrete subjects. A presumption of dangerousness justifies precautionary action taken

against the offender who presents the uncertain risk: 'he is the one who would introduce the risk of harm into the environment … his dangerousness is the moral basis for placing the onus on him' (Ramsay 2013: 200). As McCulloch and Wilson (2017: 46) suggest, precautionary justice is a 'highly selective' enterprise which targets those 'risky individuals and suspect communities' already constructed as dangerous within the social and political imagination.

Dominant risk rationalities are underpinned by an assumption that ensuring safety necessarily requires some curtailment of liberty for those believed to embody risk (Waldron 2003). As Zedner (2010: 394) argues, in public protection's name and in reaction to the presumed threat from non- and irregular citizens, states 'assert the rights of the many (to live in safety) against the loss of the rights of the few (who are deemed to threaten).' The risk reduction imperative sustains the development and deployment of those strategies of surveillance and exclusion which comprise the ban-opticon (Bigo 2008; Weber and Powell 2020). Indeed, the ban-opticon itself can be approached 'as an essentially transnational strategy for the exporting of risk' (Weber and Pickering 2013: 111). Risk is (re)produced through bordered penality. An individual's criminal status is qualified by reference to their nationality, producing 'various forms of 'foreign criminal' (Grewcock 2014: 134). Their 'alien status is central to defining the illegitimacy of their presence and the risk they are deemed to pose' (2014: 134).

Risk is not only relocated transnationally through bordered penality—it is also shifted away from the deporting state and onto the deportee (Weber and Pickering 2013). Physical, psychological and emotional harms are created through the deportation process, and they may also emerge 'once a deportee arrives at their destination' (2013: 120). Deportation, Weber and Pickering (2013: 120) note, 'inevitably has transnational effects, which can include alienation from both societies.' Khosravi (2009) reminds us that deported individuals will

often be leaving, rather than going, to a "home"—a place many, most especially those who left as children, will not know and may not even remember. Return is experienced as exile to a land in which they are treated with suspicion or as foreigners. As Weber and Gelsthorpe (2000: 93) report one UK immigration officer as asking: 'what happens to these people when they get back to their countries?'

Due process concerns

During the Parliamentary debate on the Returning Offenders (Management and Information) ("ROMI") Bill, the Minister of Justice, Amy Adams, defended the legislative changes on the grounds that 'criminals being returned to New Zealand should be subject to the same sort of oversight as offenders who have served a similar prison sentence in New Zealand' (NZHR 2015c). Fellow National Party* MP Jacqui Dean was also eager to portray the ROMI mechanism as being analogous to the existing system; there were 'no extra parole conditions, no extended supervision conditions, no extra conditions being promulgated'—the legislation was simply 'expanding the net' to include otherwise unsupervised offenders (NZHR 2015c). For this reason, Dean described herself as being 'a little sceptical about the objections … around the fact that this bill is passing through all stages under urgency.' Implicit here is the assumption that the new regime is acceptable because it mimics established arrangements for New Zealand offenders. But in endeavouring to achieve consistency in oversight, the ROMI Act 'creates an inconsistency in treatment between New Zealand offenders and overseas offenders' (NZLS 2018: 3).

Some women and men released from prison in New Zealand are subject to parole conditions, but these are integrated within the New Zealand criminal justice system. By contrast, the ROMI Act imposes conditions through a civil process. As a consequence, the returning offender is afforded a weaker standard of legal protection than the domestic offender. By circumventing the criminal process, the Act allows for the harsher treatment of this particular group of offenders. Moreover, because the regime imposes punitive measures as an add-on to the criminal process an individual is subject to prior to their return to New

* New Zealand has a mixed-member political system dominated by two parties: the centre-right National Party, in power when the ROMI Act was legislated, and the centre-left Labour Party, currently in power.

Zealand, the Act might contravene section 26 of the New Zealand Bill of Rights Act, which relates to retroactive penalties and double jeopardy.[*]

Retroactive penalties

The Ministry of Justice (2015b) recognised that ROMI conditions would amount to a retroactive penalty, if attached to offending which occurred prior to the Bill becoming law. Meanwhile, Gledhill (2016: 29) identifies a problem of retrospectivity in the fact that a ROMI order can be triggered by an overseas sentence which has 'completely expired', including any parole period. This, he argues, 'amounts to an extension of the penalty imposed in Australia on a retrospective basis' (2016: 29). Gledhill's (2016) observation is especially pertinent in light of the prolonged length of time many New Zealanders spend in Australian immigration detention while awaiting deportation (Stanley 2018).[†] Under the ROMI Act, conditions are automatically imposed on any returning offender released within the last six months from custody in a prison, *or* an immigration detention facility following release from prison (s 17). Accordingly, an offender who spends six months outside of prison custody before returning to New Zealand would not be subject to release conditions—unless those six months were spent in a detention facility. The New Zealand Law Society ("NZLS") (2018: 3) notes:

> if someone received a 15-month sentence in Australia, served half of that and was then held in immigration detention for eight months … he or she would still be a returning prisoner and subject to a further six-month period of supervision in New Zealand.

[*] See also: *R v Poumako* [2000] NZLR 695 (CA); *R v Pora* [2000] NZLR 37 (CA); *Belcher v Chief Executive of the Department of Corrections* [2007] NZLR 507 (CA)

[†] The average length of time a person is held in Australian immigration detention is 478 days (Australian Border Force 2017).

The initial injustice of being detained in Australian immigration detention is prolonged by the ROMI regime; not only do people lose their liberties for longer, but they will be monitored for longer as a consequence.

Double jeopardy

The Law Society (NZLS 2018: 3) offer an alternative argument which holds ROMI orders to be problematic because they impose an additional penalty for the same conduct, and this 'may have an element of double jeopardy'. The issue of double jeopardy is particularly relevant to the use of special conditions. On top of standard conditions, a returning prisoner may be made subject to special conditions imposed by a court where there is believed to be a particular risk or need. During the debate in Parliament, the Minister of Justice, Amy Adams, argued that 'some offenders will require a more directive, more restrictive set of conditions' (NZHR 2015c). Prior to an individual's arrival in New Zealand, and where it is deemed 'immediately necessary', a court may also impose interim special conditions (s 27 at para 1).

While not limited by the Act, special conditions can include a requirement for residence, association restrictions, electronic monitoring and adherence to curfews (ss 26 and 27). The Attorney-General's (2015: 3) report on the ROMI Bill acknowledged the potential for special conditions to involve a 'significant limitation on the freedoms of movement and residence and association' but concluded that this did not constitute double jeopardy. The conditions, it was argued, do not have a punitive character; rather than punish, their main purpose is to reduce the risk of re-offending. That special conditions can only be imposed by a court was believed to be 'a further safeguard against any risk of a punitive measure being imposed' (2015: 4).

Punitive outcomes

There are two problems with the Attorney-General's assessment. Firstly, while punishment is not the formal purpose of the orders, they may nonetheless be punitive in effect (Zedner 2016). Preventive measures like ROMI orders involve a deprivation of liberty which 'is inevitably accompanied by pain', making them 'punitive in terms of subjective experience' (Ginneken 2019: 23, 24). The ROMI regime recalls Zedner's (2016: 8) description of 'quasi-punitive power' which blurs the lines between formal and informal penalties. These coercive measures emerge from a growing 'frustration with the criminal process' which has seen governments abandon adherence to criminal justice principles in favour of efficiency and economy (2016: 8). While 'not formally designated as punishment', they are experienced as no less burdensome by those subject to them (2016: 8).

We can ground the argument for ROMI orders being treated as punitive measures in New Zealand case law by drawing a parallel between special conditions and the extended supervision order ("ESO"). The ESO, which involves further supervision at the end of a sentence, was introduced in 2003 for those convicted of sexual offences against children and was extended in 2014 to include sexual offending against adults as well as some serious violent offending. The Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* (2007) held ESOs to amount to criminal punishment. The Attorney-General (2014: 3) agreed, concluding that ESOs trigger double jeopardy 'because the restrictive conditions add a further penalty to the sentence the offender has already served.' The Attorney-General (2014) noted that ESOs are embedded within the criminal process: they are activated by a criminal conviction, are made by a sentencing court, and are imposed on "offenders". All this is true of ROMI orders, so it is curious that the Attorney-General's understanding of what constitutes punishment differed in this context.

While accepting the judgement in *Belcher* that when 'additional punitive measures are applied after a person is sentenced, it can amount to double jeopardy', the Attorney-General (2015: 3) rejected its applicability to the ROMI Bill—the non-punitive intent of ROMI orders was believed to preclude punitive outcomes. This is inconsistent with the Court's argument in *Belcher* that it is not 'decisive that the aim of the ESO is to reduce offending … The same is true (or partly true) of many criminal law sanctions … which are nonetheless plainly penalties' (2007, at para 48). The Justice Committee (2019: 4), in its review of the implementation of ROMI Act, reiterated the Attorney-General's argument that there could be no double jeopardy because 'a main purpose of the supervision regime is to reduce the likelihood of a returning offender committing an offence after their return to New Zealand.' Such reasoning speaks to Zedner's (2016: 4) observation that '[s]tates have been quick to claim that if a coercive measure … is *for* prevention or regulation or administrative convenience it is not, by definition, punishment.' The privileging of purpose over effect, Zedner (2016: 4) argues, 'is often nothing less than a cynical subversion of the criminal process and its human rights protections.'

There is one key distinction between the ESO and the ROMI order: while the ESO operates under the criminal regime (Law and Order Committee 2014), the ROMI order is under the civil (Ministry of Justice 2017). This legal distinction might explain why the Attorney-General was reluctant to acknowledge ROMI orders as formal punishments. If true, then the Attorney-General neglects two important details: civil preventive orders can bring criminal consequences and, as has already been suggested, the orders may be experienced as punitive in themselves, irrespective of any criminal consequence.

Breach of a ROMI condition is a criminal offence, punishable by up to one years' imprisonment (s 31). Failing to comply with the directions of a police officer who is taking

information on the basis that someone is a returning offender carries a sentence of 6 months' imprisonment (s 13). It is problematic, considering the potential for a ROMI order to result in a prison sentence, that special conditions are attached to only a civil standard of proof and neither a civil nor criminal standard is attached to the determination that a person is a returning prisoner (and automatically subject to standard conditions).[*] Given that the consequence of the determination is the person being made subject to a regime equivalent to a released prisoner who was convicted in a criminal context in New Zealand, Gledhill (2016) maintains that the criminal standard of proof would be appropriate.

In the UK, Ashworth and Zedner (2014: 88) object to the 'two-step structure' of civil preventive orders which, they argue, creates 'unfair procedural consequences' by attaching criminal sanctions to decisions made in civil proceedings, where less demanding civil rules of evidence apply. Should an individual be charged with breaching an order, 'the criminal rules of procedure apply but there is little to decide: the offence is one of strict liability … and so in most cases the main question is one of sentence' (2014: 88). Criminal consequences can follow from ROMI orders, so we should be wary of efforts to insist they are not punitive measures. Indeed, evidence suggests that the New Zealand authorities tasked with administering the regime view it as punitive. A documentary following the lives of returnees as they (re)integrate into New Zealand society records one probation officer telling a ROMI subject that 'your *sentence* has just begun. You've still got until November, so you've still got a lot to prove' (Māori Television 2018 at 24:04, emphasis added). This is a revealing insight into the institutional culture surrounding this "nonpunitive" regime.

[*] The police make the determination when satisfied that the individual fits the criteria for a returning prisoner, as set out in the Act, such as length of sentence or amount of time spent outside of custody since release.

Implementation of the Act

The second problem with the Attorney-General's determination of no double jeopardy relates to the way the Act is operating in practice. It is fairly clear that when the Bill was drafted, legislators conceived of special conditions as tools for targeting only the most high-risk individuals; the Minister of Corrections, Sam Lotu-Iiga, described special conditions as necessary 'to meet the need for those *particularly high-risk* individuals who do require extra supervision' (NZHR 2015c, emphasis added). The Ministry of Justice's (2015a: 13) regulatory impact statement, which informed the policy decisions that led to the ROMI Bill, estimated that an application for a discretionary order like a special condition would be made for around half of all returning prisoners, with the courts accepting 90 percent of applications. This reflected the belief that discretionary powers should be 'targeted toward those who pose a *clear risk* to public safety' (2015a: 13, emphasis added).

The Attorney-General's determination was conditional upon 'the increased risk threshold contemplated by the legislation' (NZLS 2018: 4). But in the first 18 months of the regime, Corrections applied for interim and final special conditions in almost all cases (Ministry of Justice 2017: 11). Contrary to the expectation that the court would curb the immoderate use of ROMI powers, on only four occasions did the court decline to impose an interim condition as a final condition (Ministry of Justice 2017: 11). As a result, the Law Society (NZLS 2018: 5) submit that the implementation of the ROMI regime 'is far more restrictive than was intended and outside the Attorney-General's assessment of what would be a justified limitation on fundamental rights and freedoms.'

It is striking, given the assurances that the use of special conditions would be tempered by a high threshold of risk, that the stated rationale for Corrections routinely applying for special conditions was 'the unknown risk profile of these offenders' (Ministry of

Justice 2017: 11). This makes plain that the use of special conditions is not contingent on individualised assessments of risk, as was purportedly intended. Rather, the *absence* of a risk profile suffices in demonstrating the need for greater restrictions. In official statistics produced by the Department of Corrections (2017: 120), there is no record of a risk classification for the vast majority of returning offenders (93% in 2016/17). This might, of course, reflect poor recording practices, but the Ministry of Justice (2017: 10) hints at a different explanation in a reference to the challenges of making 'a thorough determination of a returning offender's needs or risk before they arrive in New Zealand.'

Information obtained through an OIA request confirms that interim special conditions are sought for all returning prisoners and are not triggered by an assessment of risk (Department of Corrections 2020a). The standard actuarial calculation of RoC*RoI (risk of reconviction/risk of imprisonment) would be too time-consuming to calculate given the volume of returning prisoners.[*] Even if the Department had the capacity to complete a risk assessment for each individual, it lacks the necessary data because the information received from Australia is often incomplete. This finding is contrary to the Minister of Justice's guarantee to Parliament that 'anything we need to make a proper risk assessment' would be at the New Zealand authorities' disposal through a recently formalised information-sharing agreement with Australia (NZHR 2015c).

In lieu of actuarial risk assessment, the New Zealand authorities appear to be embracing a precautionary approach to managing the uncertain risks of returning offenders. Presented with 'unknown, unruly and risky bodies' (Hall 2010: 890), the Department of Corrections makes a presumption of dangerousness across the entire population. As a

[*] Actuarial risk assessment is problematic in itself. Despite trends towards 'actuarial justice' (Feeley and Simon 1992), it is impossible to predict risk of reoffending with any certainty (i.e. Ginneken 2019).

consequence, returning offenders are subject to a more restrictive supervision regime than offenders released from New Zealand prisons. As it is inherently unlikely that every returning offender is 'particularly high-risk', some people's liberty will inevitably be unjustly infringed upon as a consequence of the default application of special conditions.

By relocating 'the burden of the *risk of error* away from potential future victims and onto offenders' (Ramsay 2013: 204), the regime is remaining faithful to the imperative of public protection. It might not be entirely accurate, then, to characterise the blanket application of special conditions as a misuse of ROMI powers. In political discourse surrounding the legislation, it was anticipated that protecting the public would involve some curtailment of offenders' liberties. As the Minister of Justice explained: '[w]e have needed to strike the difficult balance between offenders' rights and public safety' (NZHR 2015c). In light of this oppositional understanding of security and rights, it is not entirely surprising that the New Zealand authorities elected for public safety at the cost of criminal justice principles and offenders' rights. I develop this argument further in the next section, where I examine the political rationales underpinning the ROMI regime.

The Justice Committee's 2019 review lends weight to the claim that the current use of special conditions is aligned with the aims and principles of the ROMI Act. Because the Act was passed under urgency, and the standard select committee examination did not take place, the Justice Committee was charged with evaluating the first 18 months of the regime and offering recommendations for improving its operation. For Denis O'Rourke MP, the Bill was 'saved' by this provision because it demonstrated 'that the Government will be willing to make changes' (NZHR 2015d). Having acknowledged that Corrections applies for special conditions 'in nearly all cases' (Justice Committee 2019: 5), the Committee nonetheless concluded 'that the operation of special conditions is satisfactory' and the Act 'is generally

working as intended' (2019: 6, 7). Only one minor recommendation was made, which was to amend the Act to allow for the revocation of determinations where a returning offender's underlying conviction is quashed or pardoned.

The Law Society submitted a number of reforms for the Justice Committee's consideration, including the proposal that special conditions be based on individual circumstances rather than being issued by default. The Justice Committee rejected the idea, stating that 'over time, Corrections will reassess whether the practice of applying for special conditions in almost all cases is necessary'—a process that will occur naturally as 'Corrections develops its understandings of the risks posed by returning offenders' (2019: 6). This is an implicit endorsement of the precautionary approach taken by Corrections: in the absence of complete knowledge of risk, the prudent course of action is the one which prioritises public safety, even at the cost of offenders' liberties.

Other procedural violations

By relabelling measures as nonpunitive, states circumvent the criminal process and its human rights protections (Zedner 2016). We see this in the denial of double jeopardy by reference to the nonpunitive intent of ROMI orders, but there are some additional examples of the regime subverting principles of procedural justice which are worth highlighting. The legislation does not provide any framework through which the validity of a conviction may be challenged. Instead, all overseas convictions are presumed to be properly obtained. As Gledhill (2016) points out, this creates the potential for miscarriages of justice. For example, an individual could be made subject to supervision orders on the basis of a conviction obtained 'in a country that is notorious for the corruption of its police officers or the inadequacy of its court system' (2016: 24). The Law Society (NZLS 2018) raise a similar point;

they note that compelling New Zealand authorities to accept the fact of an overseas conviction is at odds with the country's approach to extradition, which requires New Zealand courts to investigate the adequacy of the evidence from overseas. A more consistent policy, the Law Society submit, would be one which allows returning offenders to challenge their overseas conviction.

The response from the Justice Committee (2019: 7) held that the Law Society's reform was 'not necessary' because the vast majority of offenders are convicted in Australia, where the criminal law 'is similar to New Zealand's in terms of evidential requirements and criminal procedure.' Indeed, between January 2015 and May 2017, only 27 individuals were returned from countries other than Australia (Ministry of Justice 2017). But this included people deported from the USA, Thailand, Cambodia and Indonesia—countries whose criminal justice systems may differ from New Zealand's in respect to substantive law, evidence or procedure. Although these represent only a small number of cases, it is potentially hazardous to overlook them, and the willingness to do so illuminates the propensity for the ROMI regime to elect expediency over adherence to criminal justice principles and safeguards.

While the Ministry of Justice (2017) reports just one erroneous determination in the first 18 months of the regime, it is quite possible that a number of false positives have escaped the attention of the New Zealand authorities. As noted, the determination that someone is a returning offender/prisoner is not attached to any standard of evidence. Moreover, the regime is hamstrung by inadequate legal representation: while returning offenders are eligible for legal aid, they often do not take it up (Ministry of Justice 2017). As the Justice Committee (2019: 6) explains, some offenders may be 'unaware of their eligibility'. Lack of legal representation reflects the inherent vulnerability of individuals compelled to navigate

an unfamiliar criminal justice system, and it also exacerbates the legal vulnerabilities already present in the regime.

Access to legal aid is critical, should a person wish to challenge the determination that they are a returning offender, or when there are court hearings about standard or special conditions. Whereas domestic offenders may apply to vary their release conditions through the Parole Board, there are no such provisions under the ROMI Act. Instead, the returning offender is required to make a review through the courts—and their ability to do so is dependent on their access to legal aid. If they wish to challenge a determination that they are a returning offender/prisoner, they must do so within just 15 days of being served their determination notice. Given the lack of legal representation, and the reality that these women and men will have only just arrived in New Zealand and may have more urgent concerns, like finding a place to sleep, this time frame creates a significant practical barrier to justice.

The Law Society (NZLS 2018) suggest that lack of legal representation is a possible explanation for why there are so few cases in which the courts have declined to impose special conditions. Another explanation offered by the Law Society (NZLS 2018: 5) relates to 'the lack of clarity over the court's role, the appropriate standard of proof and the type of evidence Corrections is required to produce'. These points are also raised by the Ministry of Justice (2017: 11) in its statutory review of the implementation of the ROMI Act. They refer to an 'uncertainty amongst the judiciary about procedure and the categorisation of these applications, which are similar to aspects of the parole regime but fall within the civil jurisdiction.' Despite this uncertainty, the court is clearly reluctant to decline applications for special conditions. Perhaps the precautionary approach favoured by the Department of Corrections is shaping the decision-making of the court, as well.

That the court is seemingly declining to exercise its discretionary authority is problematic by the government's own logic. Prior to the Bill becoming law, the Ministry of Justice (2015a: 13) proposed that embedding judicial discretion within the creation of a special condition would make it 'easier to justify limitations on human rights'. Meanwhile, in the Parliamentary debate, the Minister of Justice suggested that the risk of special conditions being applied unjustly would be mitigated by giving the courts 'whole new powers … to make the case by case assessment as to when those additional, more restrictive conditions are required' (NZHR 2015c). Judicial discretion was expected to perform a core legitimising function for the regime by acting as a counterweight to the wide discretion enjoyed by the Department of Corrections in setting the terms of special conditions. In practice, however, this legitimising function is largely absent.

It is debatable whether the regime would be legitimate even if the courts were acting as an effective check and balance. Ashworth and Zedner (2014), writing on civil preventive orders in the UK, problematise the delegation to courts of the power to design tailored prohibitions for individuals. Such power, they argue, elides legislative, adjudicative and executive functions in a subversion of the separation of powers. Moreover, as previously discussed, ROMI orders are attached to less demanding civil rules of evidence, despite criminal sanctions for breach. Some fundamental due process tenets do not apply to the ROMI determination process. Those whose liberty is at stake are afforded no prior notice of the decision to classify them as a returning offender/prisoner, and no opportunity to be heard before the imposition of special or standard conditions. These due process vulnerabilities are compounded by lack of legal representation.

In sum, ROMI orders impose punitive measures, backed up by criminal sanctions, in the absence of adequate procedural protections. Weakened criminal justice safeguards give

carte blanche to a political culture preoccupied with the production of public safety. The outcome is a curtailment of individual liberties beyond what was originally deemed acceptable by the Attorney-General, and beyond what is standard for domestic offenders released on parole. Irrespective of whether they are being used as intended, ROMI orders can be made in respect of a person whose sentence has expired, so any curtailment of liberty under these powers should raise concerns to do with double jeopardy and retroactive penalties. While policymakers hoped to establish the legitimacy of ROMI orders by marketing them as equal to parole conditions in terms of the infringement on individual liberty, overseas offenders experience a greater loss of liberty and access fewer criminal justice protections.

Normative Concerns

In the previous section I offered a critique of the design and implementation of the ROMI regime which focused on procedural concerns. I now turn to the normative concerns raised by this legal regime. The following discussion addresses the question of why the government would choose to pursue a policy which amounts to a further penalty, rather than one focused on providing support mechanisms for returning New Zealanders. This question is significant: the punitive character of the ROMI regime makes it incompatible with the principles of Te Tiriti o Waitangi ("the Treaty") and the Act may be vulnerable to legal challenge as a consequence. More specifically, because a disproportionate number of Māori people are subject to these punitive measures, the Crown is failing its duty to actively protect the interests of Māori. This is also a violation of New Zealand's international obligations: under Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDP"), 'Indigenous peoples have the right to the recognition, observance and enforcement of treaties … and to have States honour and respect such treaties'.[*]

The Waitangi Tribunal, established under the Treaty of Waitangi Act 1975, is tasked with making recommendations on 'the application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty' (Waitangi Tribunal 2017: 25). In a 2017 report on disproportionate reoffending rates among Māori, the Tribunal made a number of recommendations which are pertinent to the ROMI Act. The Tribunal determined that where Māori are significantly overrepresented in the corrections system, a generalised approach to managing risk of reoffending would be incompatible with the principle of active protection (2017: 57). Under these circumstances, Treaty obligations require government to

[*] The Waitangi Tribunal (2014) has noted that the rights affirmed in the UNDP are coterminous with the Treaty. A breach of the UNDP is therefore tantamount to a breach of the Treaty principles. This opens up potential avenues for legal challenge in the domestic courts and the Waitangi Tribunal (Charters 2017).

instead adopt a supportive approach which pursues 'the successful rehabilitation and reintegration of offenders' (2017: 30).

The ROMI regime's punitive character and its policy of assuming risk across the returnee population, coupled with a lack of investment in the rehabilitation or (re)integration of returnees, underpins a strong case for the Act's violation of the principle of active protection. Moreover, the Act appears also to flout the principle of partnership,[*] which is intertwined with the principle of active protection. As the Tribunal explains:

> for the Crown to protect actively the interests of Māori, it must adequately inform itself of the nature and extent of Māori rights and interests at issue. It must do this through meaningful consultation with Māori (2017: 82).

As the ROMI Bill passed through parliament under urgency, no meaningful consultation with Māori people and communities took place, even though the government almost certainly was aware that Māori would be disproportionately impacted by the legislation, which only a cursory glance at Australian deportation statistics demonstrates.

Consistent with the pattern of Australian deportations to New Zealand, the ROMI regime exhibits a stark racial disparity: 37 percent of returning offenders are Māori, 26 percent are Pasifika, and 20 percent are European (Department of Corrections 2017: 58). These figures mirror the racial composition of the New Zealand carceral state: more than half of the prison population are Māori, 30 percent are European, and 12 percent are Pasifika (Department of Corrections 2020b). These are staggering disparities given that Europeans comprise 70 percent of New Zealand's general population, while Māori are 16 percent and Pasifika peoples are 8 percent (Statistics New Zealand 2018). The persistent overrepresentation of Māori and Pasifika peoples in New Zealand's criminal justice statistics

[*] The principle of partnership has been recognised as a legal obligation in certain circumstances. See *New Zealand Maori Council v Attorney-General* [1993] 3 NZLR 140 (CA) at p.169 and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at p.683

(Webb 2009; Tunufa'i 2017) has been attributed to a history of racialised policing and imprisonment practices rooted in Aotearoa's experience of colonialization (Cunneen and Tauri 2019; Pratt 1995; Webb 2017).

The ROMI regime is another manifestation of the structural interdependencies between race, criminal justice and colonial power which have existed at the heart of this nation since its conception. Naturally, the counterargument would be that the ROMI regime's racial disparity is a product of Australian policy—not the bias of the New Zealand state. While this may be true, New Zealand *chooses* to make a presumption of dangerousness across the returnee population and, as I will now demonstrate, it *chooses* to respond to returning New Zealanders as risks to be contained and controlled. It would be disingenuous to deny the significance of these choices in light of the fact that the majority of returnees are non-white.

Choosing punishment

The Parliamentary debates on the ROMI Bill were marked by the fatalistic surrender of the House to its inevitability. While there was disagreement over the Bill's content, there was consensus on its purpose and framing: returning New Zealanders were a problem about which something had to be done. Denis O'Rourke MP proclaimed that 'we have to deal with the situation as it actually is, not as we wish it should be. So we do need legislation of this kind' (NZHR 2015c). It is not immediately obvious, however, that there really was a need for this legislation—or at least, legislation *of this kind*.

In establishing the rationale for New Zealand's approach, the Ministry of Justice (2015a: 3) explained that 'lack of release conditions … creates unnecessary inconsistency and risk, and may contribute to reoffending.' The assumption here is that supervision would lead to a reduction in offending. This is contradicted by a footnote in the Ministry of Justice's

(2015a: 3) statement accompanying the ROMI Bill. Recidivism rates between 2000 and 2002 were lower for overseas offenders than those convicted in New Zealand and released under the supervision conditions applicable for domestic offenders (48% and 55.4%, respectively). While the Minister of Justice, Amy Adams, insisted that 'this legislation is an important part of reducing the risk for law-abiding New Zealanders' (NZHR 2015c), according to the Ministry's own figures, "law-abiding New Zealanders" might have been no worse off had the government elected to do nothing.

Nevertheless, the ROMI Bill was a top priority for the government—as is attested to by it being introduced and, without the benefit of select committee consideration, passed under urgency. The Minister of Justice suggested that the 'quick turn-round' of the Bill, which 'was drafted, consulted on, and approved by Cabinet in just 12 working days', demonstrated the government's 'commitment to protecting New Zealanders' (NZHR 2015c). Although not unprecedented, the House's resignation to the logic of urgency is somewhat surprising. A year prior to the introduction of the ROMI Bill, the scope of the ESO had been extended to include people who had committed their offences overseas.[*] By the time the House was considering the ROMI Bill, these ESO powers had, as noted by Labour MP Jacinda Ardern, never been used against any overseas offender (NZHR 2015c).

That New Zealand's authorities were restrained in putting the ESO to use, when ROMI powers have been exercised so liberally, is due to the ESO's higher threshold for intervention. As the Minister of Justice explained, in the absence of an information-sharing agreement with Australia, it was not possible to impose ESOs on overseas offenders for lack of substantiating evidence (NZHR 2015c). This is because, before an ESO order is made, a court must be

[*] Parole (Extended Supervision Orders) Amendment Act 2014 (s 8).

satisfied that there is a 'pervasive pattern' of serious offending, and that the risk of reoffending is 'high' for sexual and 'very high' for violent offending (s 15 at para 2b). While uncertainty constrains the use of the ESO, the ROMI order encounters no such impediment. The Bill's introduction was doubtless motivated by the government's desire to widen its net of control through the creation of a supervision regime less inhibited by traditional procedural safeguards than the established regime for domestic offenders.

If we were to accept any genuine need for a new regime, there remains, as Gledhill (2016: 29) suggests, a question 'as to whether the blanket imposition of a retrospective penalty on anyone within the definition of a returning prisoner is a justified approach'. Ashworth and Zedner (2014: 74) maintain that civil preventive orders 'should only be used to the extent that measures less intrusive on individual liberties have proved, or are likely to prove, ineffective'. The coercive quality of the ROMI Act appears especially egregious when we consider the policy option the government forwent in its favour. Cabinet was presented with four possible approaches for responding to the "problem" of returning offenders (Ministry of Justice 2015a). One option was a register, similar to those in place for child sex offenders. There were two options for supervision regimes, one mandatory and the other discretionary—the ROMI Act is a combination of these. And finally, an 'enhanced support service' dedicated to providing returnees 'support for reintegration, as opposed to the arguably more punitive options which balance supervision and support' (Ministry of Justice 2015a: 7).

The enhanced support service was to be modelled on an existing refugee resettlement programme which equips recently arrived refugees with the 'information needed to … live in New Zealand, including law and customs', as well as administering 'physical and mental health checks to assess their settlement needs' (Ministry of Justice 2015a: 6). Returning offenders,

the Ministry of Justice (2015a: 6) noted, may 'face similar challenges to those of refugees … namely lack of support structure and access to state services.' Accordingly, returnees would be offered help with 'accommodation, employment and general living skills' (2015a: 7). The emphasis on (re)integration was an acknowledgement of the 'additional challenges' these women and men face 'in returning to a country where they have citizenship, but few personal connections' (2015a: 7).

The current regime bears little semblance to the enhanced support service model. Deportees are met at the airport by two police officers and a parole officer. After being fingerprinted, they are given AU$250 and motel accommodation for five nights (funded by the Australian government). Generally speaking, that is the extent of practical support offered: there are no formal provisions in place for managing a returnees' access to housing, social services or community support. Unable to rely on the government for support, many also lack friends or family in New Zealand. One returnee described feeling like 'I had nothing and I knew no one. Where should I go? How should I get there?' (PARS 2018). In government's absence, frontline support services have been left with the burden of facilitating returnees' (re)integration into New Zealand society. As the number of deportees rises, these services 'are increasingly stretched' (Roy 2019).

Support service providers are faced with a formidable task: due to their lack of local referees or credit history, returnees encounter considerable obstacles to securing permanent accommodation or finding work. Many suffer from serious mental health issues, doubtless exacerbated by their experiences of detention-deportation: 'men and women have walked off the plane … in the midst of mental health episodes and actively self-harming and suicidal' (Roy 2019). In June 2017, a year and a half after being deported from Australia, Matthew Taylor committed suicide in New Zealand. He had moved to Australia with his family as a

toddler—until his deportation, Matthew had never left Sydney. Matthew's situation in New Zealand was made 'desperate' because of his 'limited support and ties to the country' (Border Crossing Observatory 2019).

Rather than compensate for the unique vulnerabilities experienced by returnees, the government has chosen to exacerbate them. Returning offenders are subject to a supervision regime which is more restrictive than the regime for domestic offenders. I have shown that this occurs in a substantive sense—because the widespread use of special conditions increases the level of restriction beyond what is imposed on domestic offenders via standard parole conditions—but it also has a subjective dimension. Zedner (2010: 403) suggests that coercive measures imposed on non- and irregular citizens 'are likely to be especially burdensome' because these groups are often 'already marginalized, disadvantaged, and vulnerable'. Such measures, she argues, 'may simply be setting individuals up to fail' (2010: 403). Indeed, the judge in *Kenneth Morley v New Zealand Police* (2018 at para 23) quashed a man's conviction for breach of ROMI condition on the ground that the underlying non-association condition, by removing his one point of support in New Zealand, was 'setting him up to fail'.

The demands imposed on returnees are made all the more onerous because of what the regime fails to deliver in terms of support mechanisms. Requiring an offender to attend a rehabilitation programme or report regularly to probation assumes that they are already embedded within a community. This may be true of people released from prisons in New Zealand, but the returning offender who has just arrived in New Zealand may find they need to relocate for work, housing, or to join a family member in a different part of the country. One returning offender, Josh, reflected that his life could 'so quickly … turn into a nightmare again. I'm only really two steps away from being locked up: one, I miss an appointment with

a probation officer; two, I get locked up' (Māori Television 2018 at 24:32). In the absence of support for (re)integration, people may experience ROMI measures as punishingly restrictive and impossible to comply with. As a result, the regime is potentially criminogenic.

It is conceivable that the goal of protecting the public would have been promoted by supporting effective (re)integration. As Labour MP Kelvin Davis argued:

> if we do not have the support networks in place for these people when they arrive here, they are going to be set up to fail … they may have to resort to crime to get by, which is going to create new victims right here in New Zealand (NZHR 2015c).

With this in mind, the government might have elected for enhanced support services to run alongside the more punitive controls. The Ministry of Justice (2015a: 16) had suggested that support services 'be paired with whichever option is ultimately preferred' as 'the additional support for reintegration will support the objectives of the policy.' This would have been a relatively cost-effective option[*] which would not have required any legislative changes to effect. Importantly, it would also have been more consistent with the principle of active protection under the Treaty.

Constructing the "risky" outsider

Why would the government violate Treaty principles to pursue a more openly punitive and exclusionary policy when a less coercive, and potentially more effective option was available? The answer to this, I suggest, lies in the construction of returning New Zealanders as "risky" outsiders. Australia not only relocates people across borders—it also exports the risk rationalities those people are seen to embody. The punitive and exclusionary quality of Australian migration policy sustains, and is sustained by, 'exceptional categories of risk'

[*] Enhanced support services were estimated at NZ$2,000 per offender. Compare this to the $12,160 per offender per year price tag of supervision conditions—which does not include additional costs like legal aid or imprisonment for breach of conditions (Ministry of Justice 2015a: 19).

(Grewcock 2014: 133). In normal justice, an offender's risk of reoffending is a source of anxiety for the state, but it is something to be managed through strategies of rehabilitation and reintegration into the community (Aas 2014). This norm is radically overturned by the bordered form of penality directed against non-citizens by the Australian state: the riskiness of the non-citizen offender is magnified so that it becomes 'an irremediable and illegitimate character flaw justifying permanent expulsion from the community' (Grewcock 2014: 133). Having established this particular group of offenders to be exceptional risks, Australia proceeds to absolve itself of responsibility for them by 'exporting' the risk beyond its jurisdiction (Grewcock 2014; Weber and Pickering 2013).

By treating returnees as risks to be contained, and not vulnerable people to be supported and (re)integrated, the New Zealand state gives credence to the risk logics animating the Australian border regime. Australian risk logics are built in to the ROMI legislation: the Act's definition of a returning offender captures anyone deported from Australia with a criminal conviction, so it is premised on the criteria that Australia sets for deportation—the New Zealand authorities make no independent assessment of what constitutes a genuine risk. But New Zealand is by no means a passive recipient of risk from Australia because risk is not a tangible good, it can only be 'exported' if the receiving state imagines it to be real. That is to say, while New Zealand cannot stop the deportation of its citizens, it *chooses* to assume their risk from Australia. This choice informs the precautionary approach taken by the Department of Corrections when determining the use of special conditions, and it shapes the representation of returning New Zealanders within political discourse.

A week before the vote on the Bill, the then Prime Minister John Key declared in Parliament that returning New Zealanders were 'rapists … child molesters … murderers'

(NZHR 2015a). He identified those held on Christmas Island as being particularly dangerous: '[t]he vast majority within the Christmas Island Detention Centre are serious criminals' (NZHR 2015a). In fact, nearly all detainees on Christmas Island at that time had been convicted of shoplifting or low-level drug offences—none had convictions for rape or murder (Stanley 2018). Key's histrionics drew on the wider culture of suspicion which surrounds the "criminal alien"—a figure deemed risky by virtue of their alien status and 'the illegitimacy of their presence' within the community (Grewcock 2014: 134). While formally citizens, returnees are constructed as de facto foreigners through political discourse; the Minister of Justice commented that Australia is 'deporting people back to New Zealand who, other than their DNA, are really not New Zealanders' (NZHR 2015d).

Hudson (2006: 232) identifies two figures on the borders 'of our geographical, political, moral or cognitive communities'—the "alien" and the "monster". The monster is dangerous because he transgresses our moral standards; he may be a terrorist, a 'super-predator', or an 'anti-social' youth. The alien, meanwhile, is dangerous because she is unclassified: '[u]nlike monsters, the alien is a figure we have not yet judged' (2006: 239). The returning offender embodies simultaneously the threat of the monster and of the alien. The New Zealand authorities know enough to classify him as a risk—as a monster—but they know too little about that risk to treat him as anything but alien. Such uncertainty is intolerable to a risk-averse penal culture intent on identifying and classifying offenders through actuarial knowledge of risk. Hence, the 'unknown risk profile of these offenders' serves to reaffirm their presumed dangerousness, and this creates the rationale for their more punitive and illiberal treatment.

As well as embracing Australia's 'exceptional categories of risk' (Grewcock 2014: 133), the New Zealand state appears to have adopted its neighbour's reluctance to accept

responsibility for that risk. According to Labour MP Phil Goff, Australia is 'dumping' its offenders in New Zealand (NZHR 2015d). He protested that if deportees 'are shaped by Australia, why is it our problem?' Similarly, Denis O'Rourke MP described it as 'an unreasonable imposition on New Zealand that our so-called Aussie mates are fobbing off some of their convicted crims on us' (NZHR 2015c). More recently, Prime Minister Jacinda Ardern has implored Australia to stop the deportation of its long-term residents, noting that some deportees '[w]ere too young to become criminals on our watch … We will own our people. We ask that Australia stop exporting theirs' (Moir 2020). The government's failure to invest in the rehabilitation or (re)integration of returnees might reflect a belief that New Zealand owes little to offenders whose criminality it does not consider itself responsible for. I propose, however, that we are witnessing more than a passive neglect on behalf of the New Zealand state; the exclusionary treatment of these "risky" outsiders performs the symbolic function of reinforcing the boundaries of membership within the community.

As an individual is shuffled between the Australian and New Zealand regimes, we witness her transformation from "foreign offender" to "overseas offender". Her citizenship status changes, but her criminality and the risk she is deemed to pose continue to be qualified by reference to her alien status. In Australia, she was alien by virtue of her lack of citizenship; in New Zealand, she is alien because she falls outside the social and moral boundaries of membership. Bosworth and Guild (2008) propose that deportation has a constitutive role in helping define an ideal of citizenship. Likewise, the construction of the deported New Zealander as a "criminal alien" confirms his social and moral alienage—and this, in turn, reaffirms the boundaries of belonging within the New Zealand polity. Investing in returnee's (re)integration would undermine the symbolic gains of punitiveness by communicating the message that these dangerous outsiders *really are* New Zealanders.

On account of their de facto alienage, and the particular threat they are presumed to pose, returning New Zealanders are being made subject to an 'abnormal justice'—a more exclusionary regime, with a different standard of rights and procedural norms (Aas 2014). The abnormal justice of the ROMI regime has an antecedent in Australian border policy. Zedner (2010: 381) demonstrates that '[t]he logic and language of immigration policy as applied to "noncitizens" is mirrored in the policing and criminalization of "irregular citizens" within the body politic.' This dynamic is playing out across borders: the governing of non-citizens' conduct through Australia's 'character test' is mirrored in the rendering of returnees' access to full citizenship in New Zealand conditional upon their compliance with the state-determined norms of good behaviour set out in ROMI orders. As citizenship has been steadily redefined as a privilege to be earned, people's membership within the polity has grown more precarious, conditional and exclusionary (Zedner 2010). The deported New Zealander experiences this first-hand, and on both sides of the Tasman.

An awareness of precisely *who* is being excluded as a consequence of these governance strategies unmasks the racialised constructions of citizenship which animate and structure cross-border securitisation. Like colonial power, bordered forms of penality reproduce ideologies of exclusion across borders. In the white settler colonies of Australia and New Zealand, migration policy and criminal justice have always been tools for enforcing racialised constructions of citizenship (Cunneen and Tauri 2019; Blagg 2019). It is against the historical backdrop of the infamous White Australia migration policy[*], which ended only in 1973, that visa cancellation powers have been used disproportionally against Māori and Pasifika peoples (Grewcock 2014). Australia's detention-deportation regime articulates a

[*] The White Australia policy refers to a set of polices which aimed to exclude people of non-European ethnic origin from immigrating to Australia, starting in 1901.

politics of citizenship intertwined with, as well as disguising, anti-Polynesian racism rooted in colonial ideology.

Australian border policy has been shaped by a long-standing tension over the "back door" immigration of Pasifika and Māori populations from New Zealand (Hamer 2014; Nolan 2015; Stanley 2018). Where once an 'open-door policy' facilitated free movement across the Tasman sea, it has become increasingly difficult for New Zealanders to live in Australia (Nolan 2015: 259). Fewer than 10 percent of New Zealanders who arrived in Australia between 2006 and 2012 have acquired permanent status (Stanley 2018). As a consequence, they are barred from political rights like voting and have limited access to social security or welfare support; they are, as Stanley (2018: 524) suggests, 'in a state of limbo'. This is particularly true of Māori and Pasifika peoples, for whom achieving permanent status is especially unlikely (Hamer 2012, 2014). The position of non-white New Zealanders in Australia is made all the more precarious by their construction as inherently deportable, in keeping with the myth of a "white Australia" (Grewcock 2014; Hamer 2014).

As well as determining who is targeted by the Australian border regime, issues of race and racialisation structure how the receiving state responds to deportees. New Zealand's application of Australian risk logics within its own securitisation campaign owes to the striking resemblance they bear to patterns of criminalisation and exclusion already embedded within New Zealand society (Brittain and Tuffin 2017; Cunneen and Tauri 2019). Racial bias exists at all levels of the New Zealand criminal justice system, including the courts and policing (Latu and Lucas 2008; Webb 2009). We can hypothesise that the ROMI regime has racially discriminatory outcomes beyond the initial disparity of who is being deported from Australia. It is a real possibility that racialised women and men are being made subject to tighter controls on their behaviour due to the discriminatory application and enforcement of ROMI

conditions.[*] Given the entrenched racisms of New Zealand's criminal justice system, it is reasonable to speculate as to whether the government's response would have been less punitive, were the returning offender population not majority Māori and Pasifika peoples.

We can also expect race to have an influence on how an individual subjectively experiences the ROMI regime. As a consequence of their marginalisation, Māori and Pasifika New Zealanders enjoy, at best, only a 'stunted' citizenship (Gibney 2008). They will confront forms of political, social and economic exclusion in New Zealand that are additional to those created by the ROMI regime. Permanently excluded from Australian society, deportees racialised as non-white will also encounter a lasting barrier to inclusion within the New Zealand polity. For Māori—the tangata whenua ("people of the land")—this exclusion has a unique dimension. Many Māori relocated to Australia because their communities have been economically crippled by successive New Zealand governments (Hamer 2012). Not only are they shunted out of Aotearoa—when they return to their indigenous land, they are disowned, criminalised and disciplined.

Crimmigration contagion

The three forms of exclusion I have discussed here—stunted citizenship, irregular citizenship and criminalisation—are reproduced and hardened through bordered penality. In striving to contain the risk non-citizen offenders purportedly pose, the Australian authorities utilise a 'prison-to-plane' policy which separates them from the community following release from custody and prior to removal (Billings 2019). The ROMI regime extends this crimmigration infrastructure across borders, effecting a sort of "prison-to-plane-to-supervision" process.

[*] No research has looked at how the ROMI regime intersects with race (nor, indeed, any other marker of difference, such as gender). This is an area for future study.

This is characteristic of what Stanley (2018) describes as the 'contagion of crimmigration'. Unlike ordinary crimmigration, which is directed against non-citizens,[*] ROMI powers target those who hold formal citizenship. As has already been suggested, however, the citizenship of the returning offender is in doubt; as Denis O'Rourke MP observed, 'we have to accept back here in New Zealand what are, essentially, in many cases, not really Kiwis' (NZHR 2015c).

Although preoccupied by "risky" outsiders, the ROMI regime cannot be understood as merely a risk management strategy—it is also a compensatory show of sovereign strength when New Zealand's sovereignty is most compromised. Through the act of deportation, Australia exercises its sovereign right to exclude non-citizens from its territory, thereby reaffirming the territorial ideal of who belongs within the Australian polity. The consequence of Australia's performance of territoriality is the subversion of New Zealand's own territorial ideal. New Zealand's inability to prevent de facto aliens from entering its territory betrays the 'limits of the sovereign state' in a similar fashion as the bona fide non-citizen who crosses the border without permission (Bosworth 2008). Much like how deportation has the trappings of 'hyper-sovereignty' but is really 'compensating for its loss' (Bosworth et al. 2018: 45), New Zealand's punitive regime for managing returnees betrays a loss of sovereign authority over the border.

Powerless to stop the deportation of its citizens, and anxious to reclaim its authority, New Zealand is pursuing a sovereign state strategy of its own, giving rise to a 'contagion of crimmigration' (Stanley 2018). As National Party MP Chris Bishop argued:

> Australia is a sovereign country that makes its own laws and makes its own rules … there is little that New Zealand can do about that. But what we can do is manage our own affairs and put in place a regime, which this legislation does, to make sure that we manage those who are returning to New Zealand (NZHR 2015d).

[*] While there are numerous examples of crimmigration powers being used against legal citizens (i.e. Chacón and Coutin 2018; Romero 2008), rarely is this their explicit purpose.

That the consequent regime has a distinctly punitive and exclusionary quality is testament to the particular appeal of the appearance of control for policymakers operating at the intersection between borders and crime. As previously noted, the failure to address returnees' lack of accommodation, employment or support networks is likely to undermine the goal of public safety. Bosworth (2008: 211, 210) reminds us, however, that measures taken to control crime or defend the border 'are dominated by their symbolic effect' and not their 'actual utility and success'.

If punitiveness against ordinary offenders is a symbol of sovereign power (Garland 2001), then punitiveness against the returning offender—the "criminal alien" in all but legal status—is even more so. When applied against this particular category of offender, penality's expressive function gains twice the potency: the state positions itself as protector against domestic crime threats *and* dangerous foreign elements. Former Prime Minister John Key spoke forcefully of the need to defend 'New Zealanders, who deserve protecting' (NZHR 2015a). The Minister of Corrections, meanwhile, spoke of weighing up 'offenders' rights versus public safety' before announcing that he 'will always come down in support of public security and public safety' (NZHR 2015c). Security is articulated as a question of the risk posed by returning offenders to New Zealand. The risks these women and men face during the detention-deportation process, and the ongoing risks they experience once they have arrived in New Zealand, are rarely addressed.

It is conspicuous that the promise of public protection is seldom extended to those New Zealanders subject to human rights abuses by the Australian state. Australia's 'unprecedented regime' of detaining and deporting non-citizens convicted of criminal offending is a wildly disproportionate punishment which inflicts acute harms on the individual, their family and community (Billings 2019: 1; Weber and Pickering 2011). As

Gledhill (2016: 29) notes, the deportation of long-term residents 'clearly results in disproportionate breaches of the right to family life of those deported and, more importantly, of their family members who remain in Australia.' Unsurprisingly, people experience deportation as a punitive measure (Billings 2019).

Australia's deportee population is close to a cross-section of the country's general prison population. Their backgrounds of addiction, poor mental health and social marginality mean they are people with pronounced vulnerabilities (Grewcock 2011). These vulnerabilities are aggravated by the enforcement process surrounding deportation (Stanley 2018). Immigration detention is associated with 'a host of mental health problems for detainees including depression, self-harm and suicide attempts' (Stanley 2018: 522). A number of reports have emerged detailing abuse and inhumane treatment inside Australian detention centres (Stanley 2018). Compounding the pains of detention-deportation is the powerlessness of being subject to a process into which the deportee can interject little as these non-citizens have only limited access to the usual avenues for legally challenging decisions (Billings 2019; Stanley 2018). In this way, the process of mandatory visa cancellation deviates from norms of procedural justice and, in doing so, 'invites unjust and arbitrary outcomes for non-citizens' (Billings 2019: 3).

As Gledhill (2016: 29) suggests, there is a normative question as to 'whether it is appropriate for New Zealand legislation to give support to problematic Australian policy.' The existence of a statute for managing returnees has the effect of naturalising Australian deportations so that they appear to be an inevitable, albeit undesirable, reality. The New Zealand government might have directed its energies toward protesting the infringement on its citizens' rights by the Australian state. Instead, the New Zealand response is closer to a ratification of Australian policy. I have shown this to occur normatively, through the

endorsement of Australian risk logics, but there is also a more practical consideration. Gledhill (2016) points out that one reason for why Australian deportations are problematic is because people are left with no post-custodial support. New Zealand effectively solves that problem by creating a supervision regime (however misguided this "solution" might be), and in doing so it disables a meaningful objection to the deportation policy. The process of deporting New Zealanders from Australia is already facilitated by the '[p]roximity and close political ties' between the two nations (Grewcock 2014: 129). By removing a political barrier to deportation, the ROMI Act simplifies the process even further. The contagion of crimmigration might therefore be understood as a mutually reinforcing phenomenon.

Conclusion

New Zealand not only endorses Australian penal logics; it also extends them, both geographically and temporally, so that the sentence does not end at deportation. Rather, to return to our parole officer's words, a new sentence *'has just begun*' (Māori Television 2018 at 24:04, emphasis added). The ROMI Act is yet another example of 'the flexibility of punishment and how easily it is unhinged from the state and its territory' (Bosworth et al., 2018: 40). But we are witnessing more than simply one penal state's expansion across borders; New Zealand has contrived its own forms of criminality and modes of criminalisation. The Act reveals a novel dimension for our understandings of bordered penality, as the 'intricate connections between citizenship, penal power and social exclusion' (Bosworth et al., 2018: 46) which structure the Australian deportation regime are setting the agenda for New Zealand's domestic criminal justice system, with implications for New Zealand citizens that are not only discursive, but legal.

Prime Minister Ardern exhorted Australia to '[s]end back Kiwis, genuine Kiwis—do not deport your people, and your problems' (Moir 2020). This leaves unanswered the question of who is a "genuine Kiwi" and what the state owes to those who fall outside the definition. I have suggested that the ROMI Act imposes a penalty for nonbelonging and that this amounts to a kind of abnormal justice, deployed against people who are formal citizens but, by virtue of their de facto alienage, made subject to a 'more exclusionary penal culture' and access only the shadow of usual legal protections (Aas 2014: 520). Not only is the "criminal alien" cast as an exceptional risk on both sides of the Tasman; she is also excluded from the full rights and protections of citizenship in both Australia and New Zealand. As the New Zealand state endeavours to control these "risky" outsiders by rendering their citizenship conditional upon

adherence to norms of good behaviour, we witness the extension of Australian governance logics and the further marginalisation of an already vulnerable population.

The ROMI regime's illiberal quality flows directly from the political preoccupation with securing public safety. Protecting offenders' criminal justice rights is subordinated to the loftier goal of protecting *genuine* New Zealanders from threatening outsiders who would do them harm. As 'unknown, unruly and risky bodies' (Hall 2010: 889), returning offenders are dangerous not only because of what they have done, but because of who they are—or rather, who they *might* be. Their precautionary construction as threats legitimates the use of more punitive measures against them, and their differential treatment is naturalised through discourse which casts doubt on their citizenship. These "criminal aliens" threaten not only the security of "law-abiding New Zealanders", but also New Zealand's territorial sovereignty and the social and moral boundaries of membership within the polity. Their harsh treatment performs the symbolic function of reasserting sovereign authority and rearticulating the division between "us" and "them". This division is composed of the colonial complexes of race, mobility and citizenship which reverberate through the histories of Australia and Aotearoa New Zealand and into the present. While the technologies of exclusion and criminalisation evolve, the targets remain as predictable as ever.

This essay has been only a preliminary examination of the ROMI legislation and there remains significant ground for future research to traverse. The interaction between the regime and issues of race and racialisation demands further attention. I did not have the space to reflect on the regime's striking gender disparity, but the fact that 95 percent of ROMI subjects are identified as men raises numerous questions. Has male predominance in the deportee population influenced the design and implementation of the Act? What does it mean to be one of the few women entangled in the regime? Another line for further inquiry

is the subjective experiences of Māori, many of whom are returning to an indigenous land which is foreign to them. To better grasp the logic, substance and consequences of New Zealand's policy, future research might look to those directly involved: policymakers, government officials and, most importantly, returning New Zealanders. Occupying the liminal spaces between citizen and non-citizen, the foreign and the domestic, the returning New Zealander gains a unique insight into the meaning of membership and belonging in a bordered world.

Bibliography

Aas, K.F., 2007. Analysing a world in motion: Global flows meet 'criminology of the other'. *Theoretical Criminology* 11, 283-303.

Aas, K.F., 2014. Bordered penality: Precarious membership and abnormal justice. *Punishment & Society* 16, 520-541.

Aas, K.F., 2013. *Globalization and Crime*, 2nd ed., SAGE Publications, London.

Aliverti, A.J., 2013. *Crimes of Mobility: criminal law and the regulation of immigration*. Routledge, London.

Anderson, B., Gibney, M., Paoletti, E., 2011. Citizenship, deportation and the boundaries of belonging. *Citizenship Studies* 15, 547-563.

Ashworth, A., Zedner, L., 2014. *Preventive Justice*. Oxford University Press, Oxford.

Attorney-General, 2015. *Report of the Attorney-General under the New Zealand Bills of Rights Act 1990 on the Returning Offenders (Management and Information) Bill.*

Attorney-General, 2014. *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Order) Amendment Bill.*

Australian Border Force, 2017. *Immigration detention and community statistics summary.* Department of Immigration and Border Protection.

Australian Bureau of Statistics, 2013. *2011 Census QuickStats.* Retrieved from: https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0

Australian Department of Home Affairs, 2020. *Freedom of Information Act correspondence May 2020.*

Barker, V., 2013. Democracy and deportation: Why membership matters most, in: Aas, K.F., Bosworth, M. (Eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*. Oxford University Press, Oxford.

Bhui, H.S., 2018. Understanding Muslim prisoners through a global lens, in: Bosworth, M., Parmar, A., Vázquez, Y. (Eds.), *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging*. Oxford University Press, Oxford.

Bhui, H.S., 2016. The place of 'race' in understanding immigration control and the detention of foreign nationals. *Criminology & Criminal Justice* 16, 267-285.

Bigo, D., 2008. Globalized (in)security: the field and the ban-opticon, in: Bigo, D., Tsoukala, A. (Eds.), *Terror, Insecurity and Liberty: Illiberal practices of liberal regimes after 9/11*. Routledge, Abingdon; New York.

Billings, P., 2019. Regulating crimmigrants through the 'character test': exploring the consequences of mandatory visa cancellation for the fundamental rights of non-citizens in Australia. *Crime, Law and Social Change* 71, 1-23.

Blagg, H., 2019. Postcolonial criminology: the past isn't over, in: Blagg, H., Anthony, T. (Eds.), *Decolonising Criminology: Imagining Justice in a Postcolonial World.* Palgrave Macmillan, Basingstoke.

Border Crossing Observatory, 2019. *Australian Border Deaths Database*. MonashUniversity. Retrieved from: https://www.monash.edu/arts/border-crossing-observatory/research-agenda/australian-border-deaths-database

Bosworth, M., 2011. Deportation, detention and foreign-national prisoners in England and Wales. *Citizenship Studies* 15, 583-595.

Bosworth, M., 2008. Border control and the limits of the sovereign state. *Social Legal Studies* 17, 199-215.

Bosworth, M., Franko, K., Pickering, S., 2018. Punishment, globalization and migration control: 'Get them the hell out of here'. *Punishment & Society* 20, 34-53.

Bosworth, M., Guild, M., 2008. Governing Through Migration Control: Security and Citizenship in Britain. *The British Journal of Criminology* 48, 703-719.

Brittain, E., Tuffin, K., 2017. Ko tēhea te ara tika? A discourse analysis of Māori experience in the criminal justice system. *New Zealand Journal of Psychology* 46, 99-107.

Charters, C., 2017. Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims, in: Erueti, A. (Ed.), *International Rights in Aotearoa New Zealand.* Victoria University Press, Wellington.

Chacón, J.M., Coutin, S.B., 2018. Racialization through Enforcement, in: Bosworth, M., Parmar, A., Vázquez, Y. (Eds.), *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging.* Oxford University Press, Oxford.

Cornelisse, G., 2010. Immigration Detention and the Territoriality of Human Rights, in: De Genova, N., Peutz, N. (Eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement.* Duke University Press, Durham.

Cunneen, C., Tauri, J.M., 2019. Indigenous Peoples, Criminology, and Criminal Justice. *Annual Review of Criminology* 2, 359-381.

Dauvergne, C., 2008. *Making People Illegal: What Globalization Means for Migration and Law.* Cambridge University Press, New York.

De Genova, N., 2018. The "migrant crisis" as racial crisis: do Black Lives Matter in Europe? *Ethnic and Racial Studies* 41, 1765-1782.

Department of Corrections, 2020a. *Official Information Act correspondence April – May 2020.*

Department of Corrections, 2020b. *Prison facts and statistics — March 2020*. Retrieved from: https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2020

Department of Corrections, 2017. *Corrections Volumes Reports 2016/17*. Retrieved from: https://www.corrections.govt.nz/resources/research_and_statistics/corrections-volumes-reports/corrections_volumes_report_201617

Department of Home Affairs, 2019. *Visa statistics*. Australian Government. Retrieved from: https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation

Feeley, M., Simon, J., 1992. The new penology: notes on the emerging strategy of corrections and its implications. *Criminology* 30, 449-474.

Fekete, L., Webber, F. 2010. Foreign nationals, enemy penology and the criminal justice system. *Race & Class* 51, 1-25

Foucault, M., 1977. *Discipline and Punish: The Birth of the Prison*. Penguin, London.

Garland, D., 2001. *The Culture of Control: Crime and Social Order in Contemporary Society.* University of Chicago Press, Chicago.

Garland, D., 1996. The limits of the sovereign state: strategies of crime control in contemporary society. *British Journal of Criminology* 36, 445-471.

Gibney, M., 2008. Asylum and the expansion of deportation in the United Kingdom. *Government and Opposition* 43, 613-626.

Ginneken, E., 2019. The use of risk assessment in sentencing, in: Keijser, J. W. (Ed.), *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, Oxford.

Gledhill, K., 2016. *Legislation Note: The Returning Offenders (Management and Information) Act 2015*. Te Wharenga — The New Zealand Criminal Law Review.

Grewcock, M., 2014. Reinventing 'the stain,' in: Pickering, S., Ham, J. (Eds.), *The Routledge Handbook on Crime and International Migration.* Routledge, London.

Grewcock, M., 2011. Punishment, deportation and parole: The detention and removal of former prisoners under section 501 Migration Act 1958. *Australian & New Zealand Journal of Criminology* 44, 56-73.

Hall, A., 2010. 'These People Could Be Anyone': Fear, Contempt (and Empathy) in a British Immigration Removal Centre. *Journal of Ethnic and Migration Studies* 36, 881-898.

Hamer, P., 2014. 'Unsophisticated and unsuited': Australian barriers to Pacific Islander immigration from New Zealand. *Political Science* 66, 93-118.

Hamer, P., 2012. *Māori in Australia: An Update from the 2011 Australian Census and the 2011 New Zealand General Election*. Retrieved from: https://ssrn.com/abstract=2167613

Hernández, C., 2016. What is Crimmigration Law? *Insights on Law and Society* 17, 22-25.

Hudson, B., 2006. Punishment Monsters, Judging Aliens: Justice at the Borders of Community. *Australian & New Zealand Journal of Criminology* 39, 232-247.

Justice Committee, 2019. *Review of the Operation of the Returning Offenders (Management and Information) Act 2015*. New Zealand House of Representatives. Retrieved from: https://www.parliament.nz/en/pb/sc/reports/document/SCR_91348/review-of-the-operation-of-the-returning-offenders-management

Kanstroom, D., 2007. *Deportation Nation: Outsiders in American History*. Harvard University Press, Cambridge; London.

Khosravi, S., 2009. Sweden: Detention and deportation of asylum seekers. *Race and Class* 50, 38-56.

Latu, A., Lucas, A., 2008. Discretion in the New Zealand criminal justice system: The position of Maori and Pacific Islanders. *Journal of South Pacific Law* 12, 84-93.

Law and Order Committee, 2014. Parole (Extended Supervision Orders) Amendment Bill. House of Representatives. Retrieved from: www.parliament.nz/resource/en-nz/51DBSCH_SCR59562_1/eb0230b88f63b57a8f1caa0bf3e61d3e239ac6e2

Lazarus, L., 2007. Mapping the Right to Security, in: Goold, B., Lazarus, L. (Eds.), *Security and Human Rights.* Hart Publishing, Oxford.

Macklin, A., 2001. Borderline Security, in: Daniels, R.J., Macklem, P., Roach, K. (Eds.), *The Security of Freedom*. The University of Toronto Press, Toronto.

Māori Television, 2018. *Section 501*. Bouchet, P., Mayow, N. (Drs.). Retrieved from: https://www.maoritelevision.com/shows/documentary-aotearoa/S01E001/section-501

McCulloch, J., Wilson, D., 2017. *Pre-crime: Pre-emption, Precaution and the Future.* Routledge, London.

Mehta, R., 2016. Borders: A view from 'nowhere.' *Criminology & Criminal Justice* 16, 286-300.

Ministry of Justice, 2017. *Ministry of Justice submission to the Statutory Review of the Returning Offenders (Management and Information) Act 2015.* Retrieved from: https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCJU_EVI_74558_JU595/ministry-of-justice-2017-submission

Ministry of Justice, 2015a. *Regulatory Impact Statement: Management of offenders returning to New Zealand.* Retrieved from: https://www.justice.govt.nz/assets/Documents/Publications/RIS-Management-of-returning-offenders-to-New-Zealand.pdf

Ministry of Justice, 2015b. *Departmental Disclosure Statement: Returning Offenders (Management and Information) Bill.* Retrieved from: http://disclosure.legislation.govt.nz/bill/government/2015/98/

Moir, J., 2020. "Do not deport your people and your problems" - PM Jacinda Ardern on trans-Tasman relations. *RNZ*. Retrieved from: https://www.rnz.co.nz/news/political/410607/do-not-deport-your-people-and-your-problems-pm-jacinda-ardern-on-trans-tasman-relations

New Zealand House of Representatives (NZHR), 2015a. *Oral questions 10 November 2015*. Hansard, p.7787.

New Zealand House of Representatives (NZHR), 2015b. *Oral questions 11 November 2015*. Hansard, p.7878.

New Zealand House of Representatives (NZHR), 2015c. *Returning Offenders (Management and Information) Bill — First Reading, Second Reading, In Committee.* Hansard.

New Zealand House of Representatives (NZHR), 2015d. *Returning Offenders (Management and Information) Bill — In Committee, Third Reading.* Hansard.

New Zealand Law Society (NZLS), 2018. *Statutory review of the Returning Offenders (Management and Information) Act 2015*. Retrieved from: https://www.lawsociety.org.nz/ data/assets/pdf file/0020/118451/l-SC-Returning-Offenders-Act-review-30-1-18.pdf

New Zealand Police, 2020. *Official Information Act correspondence May 2020.*

Nicholls, G., 2007. *Deported: A History of Forced Departures from Australia*. UNSW Press, Sydney.

Nolan, M., 2015. Welfare limbo? Social welfare and citizenship debates about New Zealanders living in Australia. *Commonwealth & Comparative Politics* 53, 253-273.

O'Regan, S.V., 2018. Why New Zealand is furious about Australia's deportation policy. *The New York Times*. Retrieved from: https://www.nytimes.com/2018/07/03/world/asia/new-zealand-australia-deportations.html

Parmar, A., 2018. Policing belonging, in: Bosworth, M., Parmar, A., Vázquez, Y. (Eds.), *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging*. Oxford University Press, Oxford.

PARS, 2018. Stories about people affected by deportation. Retrieved from: https://www.pars.co.nz/stories/stories-about-people-affected-by-deportation

Plumb, S., 2015. Anger after tetraplegic "dumped" in NZ. *NZ Herald*. Retrieved from: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11530899

Pratt, A., 2005. *Securing Borders: Detention and Deportation in Canada*. UBC Press, Vancouver.

Pratt, J., 1995: Penal history in colonial society: new issues in the sociology of punishment. (New Zealand). *Australian Journal of Law and Society* 11, 3-31.

Ramsay, P., 2013. Imprisonment under the Precautionary Principle, in: Sullivan, G.R., Dennis, I. (Eds.), *Seeking Security: Pre-Empting the Commission of Criminal Harms*. Bloomsbury, London.

Romero, M., 2008. Crossing the immigration and race border: A critical race theory approach to immigration studies. *Contemporary Justice Review* 11, 23-37.

Roy, E.A., 2019. "I was petrified": The New Zealanders deported from Australia despite decades working there. *The Guardian*. Retrieved from: https://www.theguardian.com/australia-news/2019/sep/08/i-was-petrified-the-new-zealanders-deported-from-australia-despite-decades-working-there

Stanley, E., 2018. Expanding crimmigration: The detention and deportation of New Zealanders from Australia. *The Australian & New Zealand Journal of Criminology* 51, 519-536.

Statistics New Zealand, 2018. *Ethnicity, culture, and identity*. Retrieved from: https://www.stats.govt.nz/tools/2018-census-place-summaries/new-zealand#ethnicity-culture-and-identity

Stumpf, J., 2006. The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power. *American University Law Review* 56.

Tunufa'i, L., 2017. Samoan Youth Crime, in: Deckert, A., Sarre, R. (Eds.), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*. Palgrave Macmillan, Cham.

Turnbull, S., 2017. Immigration Detention and the Racialized Governance of Illegality in the United Kingdom. *Social Justice* 44, 142-164.

Wacquant, L., 2009. *Punishing the poor: the neoliberal government of social insecurity*. Duke University Press, Durham.

Waitangi Tribunal, 2017. *Tū mai te rangi! Report on the Crown and Disproportionate Reoffending Rates* (No. WAI-2540).

Waitangi Tribunal, 2014. *Whaia Te Mana Motuhake: Report on the Māori Community Development Act Claim* (No. WAI-2417).

Waldron, J., 2003., Security and Liberty: The Image of Balance. *Journal of Political Philosophy* 11, 191-210.

Walters, W., 2002., Deportation, expulsion and the international policing of aliens. *Citizenship Studies* 6, 265-292.

Webb, R., 2017., Maori Experiences of Colonisation and Maori Criminology, in: Deckert, A., Sarre, R. (Eds.), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*. Palgrave Macmillan, Cham.

Webb, R., 2009., Maori, Pacific Peoples and the Social Construction of Crime Statistics. *MAI Review* 3, 1-4.

Weber, L., Bowling, B., 2008. Valiant beggars and global vagabonds: Select, eject, immobilise. *Theoretical Criminology* 122, 355-375.

Weber, L., Bowling, B., 2004. Policing Migration: A Framework for Investigating the Regulation of Global Mobility. *Policing and Society* 14, 195-212.

Weber, L., Gelsthorpe, L., 2000. *Deciding to detain: How decisions to detain asylum seekers are made at ports of entry.* University of Cambridge, Cambridge.

Weber, L., McCulloch, J., 2019. Penal power and border control: Which thesis? Sovereignty, governmentality, or the pre-emptive state? *Punishment & Society* 21, 496-514.

Weber, L., Pickering, S., 2013. Exporting risk, deporting non-citizens, in: Pakes, F. (Ed.),. Routledge, Abingdon.

Weber, L., Pickering, S., 2011. *Globalization and Borders: Death at the Global Frontier*. Palgrave Macmillan, Hampshire.

Weber, L., Powell, R., 2020. Crime, pre-crime and sub-crime: Deportation of "risky non-citizens" as "enemy crimmigration," in: Pratt, J., Anderson, J. (Eds.), *Criminal Justice, Risk and the Revolt against Uncertainty*. Palgrave Macmillan, Cham.

Zedner, L., 2016. Citizenship Deprivation, Security and Human Rights. *European Journal of Migration and Law* 18, 222-242.

Zedner, L., 2013. Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment, in: Aas, K.F., Bosworth, M. (Eds.), *The Borders of Punishment: Criminal Justice, Citizenship and Social Exclusion*. Oxford University Press, Oxford.

Zedner, L., 2010. Security, the state, and the citizen, The changing architecture of crime control. *New Criminal Law Review* 13, 379-403.

Zedner, L., 2009. *Security*. Routledge, London.

Zedner, L., 2007. Pre-crime and post-criminology? *Theoretical Criminology* 11, 261-281.