Cracks Where the Light Gets in: Recent Legal Breakthroughs in Detention and Crimmigration in Canada

Petra Molnar and Stephanie J. Silverman

While the criminalization of immigrants has been pervasive—leading many to adopt the word "crimmigration"—that does not mean that the process is inevitable. As Petra Molnar and Stephanie Silverman report, recent court cases have begun to change the dynamic and offer potential glimmers of hope to immigrants and advocates.

Across the world, the borders between migration management and criminal law are being blurred in an ongoing, historical process referred to by migration experts as the criminalization of immigration, or "crimmigration." Crimmigration is insidious because it is simultaneously legal and physical, with deeply disturbing collateral damage and few modes of legal redress. Scholars have noted the many ways that crimmigration infiltrates daily life and jeopardizes human rights, including through racialization, increased grounds for deportation of felons, and other points of overlap between the expanding carceral regime and migration control.

In Canada, the US, and elsewhere, crimmigration is normalizing into everyday politics in cities, in particular. Its problematic normalization is mirrored in the concurrent rise of immigration detention. Like mass incarceration, immigration detention causes harm to migrants and asylum seekers in general, and vulnerable, racialized individuals and communities in particular. Immigration detention reflects back and adds into crimmigration because the imprisonment of migrants is a central feature of both immigration control and the civil-justice system. In their important global study of migrant-repelling techniques, Jennifer Hyndman and Alison Mountz (2008, p. 256) describe "a deeply geopolitical problem that eschews legal approaches to asylum and migration in general, preferring a politicized, comprehensive and transnational approach of invisible policy walls."

Crimmigration is expanding the discretionary powers vested in the administrative tribunals regulating migration governance. Because immigration law is a civil domain, of predominant concern is the importation of criminal sanctions without the concurrent rights protections afforded to criminal suspects and those convicted: in immigration detention, there are no readings of one's rights, no automatic access to legal counsel or even a telephone, and, usually, no meetings to explain how to apply for release (Silverman and Nethery 2015).

Legally, detention is an administrative step in the immigration and asylum adjudication process, and so the people making discretionary detention decisions are not conventional judges but, rather, civil servants. For example, the highly trafficked New York City Immigration Court overseeing removal and detention hearings is actually an administrative tribunal. As such, immigration detention's "judges" illustrate how crimmigration may be sieving out the punishments from the protections of criminal justice, and redirecting them—with maximum discretion of legal interpretation—to detect, arrest, deport, and deter undesirable migrants and asylum seekers.

The far-reaching injustices of crimmigration are crystallized in individual cases. Take, for example, the case of Alvin Brown, a Jamaican-born father of six who came to Canada as a child,

was convicted of drugs and weapons offences, and then languished for five years in a maximum-security prison until his deportation (Perkel 2016), or Michael Mvogo, whose minor drugs conviction and disputed identity resulted in his incarceration in a maximum-security prison for almost a decade (Logan 2015). Ultimately, crimmigration is unfair because it reduces and flattens the core rights to be free from arbitrary detention and deportation to collateral civil penalties for immigration infractions.

Nevertheless, for all of its important insights into how and why immigration is criminalized, the totalizing narrative of crimmigration risks becoming an orthodoxy of hopelessness. Not all is lost, and we can turn to Canada for some optimistic examples of strengthening legal principles to safeguard the rights of immigration detainees, since Canada has recently seen some encouraging developments (see also Silverman and Molnar 2016). In *BB and JFCY v. Minister of Citizenship and Immigration* (2016), the Federal Court found that detrimental effects of detention on children are a relevant factor in detention reviews, including in cases where the child is being held as a "guest" of her parents, a legal loophole created to allow for incarcerating Canadian children in immigration detention facilities. *BB* confirms that, in line with international human-rights law, Canada must consider the best interests of the child when deciding whether to detain. *BB* also resulted in an instruction sent to Canadian Border Services Agency officials[1], reiterating that the administrative Immigration Division must consider the best interests of children in rendering decisions to detain individuals.

Canada also welcomed a long-awaited judicial clarification of the modern place of the ancient writ of *habeas corpus*, a foundational right for *all* people to seek review and relief from their incarcerations by a state. Twenty years ago, lawyers arguing in the 1995 case of Wahid Khalil Baroud were unsuccessful in efforts to secure detainees' access to *habeas corpus*. Now, in *Chaudhary v. Canada* (2015), the Ontario Superior Court of Appeals has affirmed that detainees' constitutional rights under the Canadian Charter of Rights and Freedoms translate into a right to apply for direct *habeas corpus* relief at court. *Chaudhary* provides an alternative to Canada's provisions for parole or bail for detainees: while previously heralded for its mandatory bail hearings —unfortunately, a rarity in global comparisons of detention systems—the Court now makes it clear that the realities of how these administrative proceedings operate effectively distance immigration detainees from accessing their rights of release. The decision provides important theoretical and practical steps towards justice: the ancient criminal-justice protection of *habeas corpus* is being wedged into modern legal thinking, and, pragmatically, Legal Aid Ontario now funds applications[2] by immigration detainees wishing to exercise their rights for release at the Superior Court.

Collectively, these changes are inching towards a repositioning of the Immigration Division from a discretionary administrative tribunal outside the basic principles of fairness and justice into a sphere where human rights can be asserted and exercised. It bears emphasis that we cannot say that either *BB* or *Chaudhary* will strike a fatal blow to crimmigration. Indeed, *Chaudhary*'s Ontario provincial court status means that the right to *habeas corpus* continues to be legally denied to detainees lacking Canadian citizenship status in the rest of Canada, and *BB* will only curtail the Immigration Division's powers of children's liberties, not other vulnerable people. Nevertheless, the denial of *habeas corpus* will likely be legally contested in other provinces, and the *BB* decision may open up avenues to challenge other factors relevant to detention reviews, such as the mental health of detainees and access to justice concerns.

The perceived problems imbued into society by crimmigration—and how society should think and act in response—confront not only Canada but also the US. Last week, on 30 November 2016, the US Supreme Court heard arguments about reforming the American detention system. In the context of indefinite detention of migrants, the central issue posed in *Jennings v. Rodriguez* (2016) concerns which detainees have the right to an automatic bail hearing. To be clear, this population of

[1] See: http://jfcy.org/wp-content/uploads/2016/11/Instructions-to-CBSA-Officers.pdf.

[2] See: www.legalaid.on.ca/en/info/refugee_habeascorpus.asp.

immigration detainees have not been convicted of any crimes. They are being incarcerated without time limits for immigration infractions. The Court is being asked whether immigration detainees have a constitutional right to a mandatory bond hearing after every six months of imprisonment. *Jennings v. Rodriguez* also addresses the onus on the federal government to disprove that the detainee should not be entitled to a release on the grounds that they pose a threat to public safety or present a flight risk.

In a milieu of crimmigration, these court cases provide means and precedent to increase the ability of immigration detainees to frame and claim their human rights. The cases set important precedents not only for Canadian and US jurisprudence but also for legal cultures in countries traditionally sympathetic to liberal, democratic values. It is unpredictable whether the reforms catalyzed by *BB* and *Chaudhary*—and hopefully *Jennings v. Rodriguez*—lead to wider social and cultural change. Nevertheless, it is indisputable that although states continue to construct Hyndman and Mountz's invisible policy walls of xenophobia and incarceration, there are some cracks where the light can get in.

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