

## What's Wrong with the Sociology of Punishment?<sup>1</sup>

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### *Abstract*

*The sociology of punishment is seen through the work of David Garland, as contributing useful insights, but less than it might because of its focus on societal choices of whether and how to punish instead of on choices of whether to regulate by punishment or by a range of other important strategies. A problem in Garland's genealogical method is that branches of the genealogy are sawn off – the branches where the chosen instruments of regulation decentre punishment. This blinds us to the hybridity of predominantly punitive regulation of crime in the streets that is reshaped by more risk-preventive and restorative technologies of regulation for crime in the suites, and vice versa. Such hybridity is illustrated by contrasting the regulation of pharmaceuticals with that of “narcotics” and by juxtaposing the approaches to a variety of business regulatory challenges. A four-act drama of Rudolph Giuliani's career as a law enforcer - Wall Street prosecutor (I), “zero-tolerance” mayor (II), Mafia enforcement in New York (III), and Rudi the Rock of America's stand against terrorism (IV) - is used to illustrate the significance of the hybridity we could be more open to seeing. Giuliani takes criminal enforcement models into business regulation and business regulatory models to street crime. The weakness of a genealogical approach to punishment can be covered by the strengths of a history of regulation that is methodologically committed to synoptically surveying all the important techniques of regulation deployed to control a specific problem (like drug abuse).*

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*David Garland's Culture of Control*

*The Culture of Control* (2001) is the third in a trilogy of books on the sociology of punishment that begins with *Punishment and Welfare* (1985) and *Punishment and Modern Society: A Study in Social Theory* (1990). *The Culture of Control* is a comparison of the US and UK that analyses the enormous expansion of crime control in both societies and its influence on governance more generally. The sweep of the analysis ranges from the growth of mass imprisonment to zero tolerance, video surveillance and paedophile registers, among other dynamics. The reason for picking on this author is that in my view Garland's work is the best case of the sociology of punishment. It is work of supreme erudition, balance, perceptiveness and breadth of historical vision that rewards the reader at every turn. Moreover, the judgment that Garland is the leading contemporary thinker of the sociology of punishment tradition seems widely shared. So in selecting Garland I follow the methodological prescription of not attacking a "straw man", but rather of selecting as the target the "least likely case" (Eckman, 1975) – the target where the critique is least likely to hold. The conclusion will be that while Garland's scholarship is replete with insight, those insights might have been enriched by broadening the scope of the enquiry from punishment to regulation. And indeed that Garland's conclusions are sometimes wrong in a way that becomes obvious once this broadening move is made. So I will find Garland at the same time magisterial and myopic. The idea of this methodological prescription is that if the critique has some value with the least likely case, it may have even greater force with less outstanding contributions to the tradition. That said, any least likely case is bound to have some features that are more likely to be vulnerable to particular lines of attack than other cases. While the critique I will launch of the history of the penal present (as an inferior method to the history of the past) applies to others among the most influential scholars of the field, from Foucault to Feeley and Simon's (1992) "New Penology," which also involves "writing a history of the present" (Simon

and Feeley, 1995:149), there is in the tradition much great writing of histories of the past, from Rusche and Kirchheimer (1939) to O'Malley (1983). There are others who have written histories of the past punishment of business crime (e.g. Carson, 1979).

### *Garland's Genealogical and Sociological Method*

Garland's work is in the Foucaultian (1977: 31) tradition of a "history of the present": "the point is not to think historically about the past but rather to use that history to rethink the present" (Garland, 2001: 2). His methods are "analytical rather than archival" (Garland, 2001: 2). Garland is a much better read historian of punishment than Foucault. He does not make the factual errors Foucault does, indeed an important part of his project in *Punishment and Welfare* was to correct some major historical errors of Foucault. Yet not being obsessed about which archives are relevant to the enquiry, not having a method for doing one's best at scanning them systematically – even if only by reading what we claim to be the secondary sources that most authoritatively summarize the archival work – seems a methodological error of non-historians who tackle historical questions. I am a scholarly repeat offender here myself because I believe regulatory scholarship is better when the present is understood by thinking in time. Yet it seems a mistake to make a virtue of our being unsystematic about the primary sources by dressing this up as doing the history of the present. Better simply to say that we wish we could do everything rigorously, but we settle for only doing certain things well. We do better when we make our archival selectivity transparent rather than write it off as methodologically irrelevant to our kind of project. Garland does not document his method of archival selectivity. This is important because my critique of Garland is bound up with the kind of selectivity he deploys. In my conversations with him about the above, David Garland said that what he means by wanting to "distance myself from the conventions of narrative history" (Garland, 2001: 2) is simply that he did not seek to add to the archival material. It is fine to be ultimately concerned to understand the present. It is legitimate not to seek to add to archival material about the past. But we cannot trace explanatory

genealogies from the past to the present without a method to choose “which kinds of archives about what subjects” are relevant to our project. My critique is that the choices David Garland makes lack methodological explicitness and the implicit choices are bad ones in some important respects.

Even as well read an historian of the punitive present as Garland ends up relying overwhelmingly on two sources of data – first that delivered up by criminology, particularly historical criminology, and the sociology of punishment itself; second, what we read in the newspapers and other mass media about contemporary developments – crime news<sup>2</sup>. All of these are sources distorted in different ways by their capture by a crime control industry interested in managing the impression that punishment is the central topic of regulation (Christie, 1993). These are myopic sources to hold sway over the archival inputs. One myopia I will find important is the neglect of business law-breaking. Punishment of commonplace weights and measures breaches by business does not make it into the newspapers or the criminology journals. Sutherland (1983) drew this problem to our attention long ago. Yet the sociology of punishment proceeds as if Sutherland never gave his 1939 Presidential address to the American Sociological Society that brought “white collar crime” into the English language and many other languages.

What I will attempt to show is that the *Punishment and Welfare* project is really a punishment of the poor project<sup>3</sup>. That’s fine. So long as sociologists of punishment are clear that this is how the limits of their project are set. But this is not so. What we are presented with is a genealogy of punishment, or a genealogy of crime control, not a genealogy of the punishment of the poor that self-consciously and transparently opts for the methodological prescription of selecting only archival inputs about the poor.

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<sup>2</sup> Garland certainly relies on other non-historical sources as well in explaining the present, particularly contemporary sociologies.

<sup>3</sup> Garland’s (1985) book *Punishment and Welfare* is explicitly a punishment of the poor project. This is less true of *Punishment and Modern Society* (1990). *The Culture of Control* (2001) appears to be about something broader – crime

The methodological error is not merely one of failing to specify the limits of the project; it is a self-defeating error in the project's own terms. What we get is a genealogy of punishment where one whole branch of the family tree that nourishes the practices of the present has been sawn off. I want to argue that this is so in Garland even though Garland (2001: 6) is more sensitive than many writers of the sociology of punishment to inquire into how "the transformation of one institutional field inexorably leads to questions about contiguous fields". Garland's aspiration of a history of the present, a genealogical method to trace structures of the past through to the things that are most structurally significant about the present, seems unexceptionable. What I challenge is two methodological choices in the execution: first, the narrowing of the focus to punishment; second, the effective narrowing of the archives scanned mostly though not exclusively to gleaning from historical criminology and contemporary mass media reports on crime.

#### *What's Wrong with the History of the Present*

While we learn much from histories of the present like Garland's or Simon and Feeley's (1995), it has some vices that the good old fashioned history of the past does not. By the history of the past I mean history that treats the present as just one point in a continuum of time, history that studies the past for its own sake. One reason Foucault is sloppy about the past is because his history of the present is not interested in the past for its own sake. Foucault is not interested in those branches of his genealogy that die out before the present. An example in his penal history is transportation of convicts. Foucault did not take transportation seriously, which is odd because he takes Bentham seriously and Bentham took transportation so seriously that he devoted more energy fighting it to defend his alternative of the panopticon than to any policy idea. In 1802 he published *Panopticon Versus New South Wales*. Foucault (1977) actually says that England abandoned transportation "at the beginning of the nineteenth

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control policy - yet, like mainstream criminologists, Garland devotes most of his attention to punishment, albeit in a critical way, and utterly neglects punishment of the rich.

century". Transportation to Australia was not abandoned until 1868 and continued to Gibraltar (where 9000 were shipped) until 1875. There was more transportation to Australia in the second third of the nineteenth century than in the first. Worse, Foucault was an appalling historian of the past of his own country in this regard. Tocqueville after returning from America failed to persuade his countrymen of the virtues of American penitentiaries and French transportation continued to 1938, albeit at lower volume and with less colonial success than English transportation<sup>4</sup>. Foucault gets the history of the past so badly wrong because he wants to write it to lead to his big fact about the history of the present – the ascendancy of the prison. So my first problem with the history of the present is that myopic interest in the present induces the error of getting the past wrong. This matters because criminologists actually go to the Michel Foucaults and David Garlands in search of an understanding of the past.

A second problem is that the history of the present conduces to getting the present wrong. We don't understand the present as well when we saw off those parts of the genealogy that in the past branched off from the phenomenon we study in the present. The rest of this essay is an extended treatment of this kind of error, using the example of sawing off the business regulatory branches from the study of

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<sup>4</sup> As late as 1911 transported convicts represented 13 per cent of the population of Guiana (Nicholas and Shergold, 1988b: 35), though this was a much smaller destination than New Caledonia. Nicholas and Shergold (1988b) point out that after 1820 two and a quarter million convicts were transported to destinations that included Australia, Siberia, Singapore, New Caledonia, French Guiana, Gibraltar, the Nicobar Islands, Brazil, Sumatra, the Andaman Islands, Bermuda, Penang, Malacca and Mauritius. Transportation of convicts were central policies of the three major powers of the eighteenth and nineteenth centuries – Britain, France and Russia. Transportation was of a piece with the slave trade and the trade in indentured labour (e.g. Chinese coolies) in transcontinental emigration from regions of labour surplus to colonies with labour shortages. Throughout the century, Britain threw its weight around to prevent other states following the path to colonial development it had pursued. For example, it resisted attempts by Austria, Italy and Germany to establish penal colonies in the Pacific.

the contemporary *Culture of Control*. But we could equally persist with the example of the huge eighteenth and nineteenth century population movements effected by transportation and slavery: how America's love affair with the penitentiary was connected to its rejection of being a dumping ground for England's outcasts (Rothman, 1995), how understanding slavery is fundamental to grasping why American criminal justice is so exceptional in comparison with all other Western criminal justice systems.

This sets up a third problem with the history of the present: it cuts an understanding of the imperial present off from the influence of colonial pasts. The genealogies that work through the periphery of the world system get sawn off from the history of the present. So Jonathan Simon (1993) can write an engaging history of American parole with an interesting pre-history back to the Frankpledge in medieval England, but without mentioning that the quintessentially 19<sup>th</sup> century institution of parole was invented in the Australian penal colony. The method of taking first world institutions in the present as the objects privileged in the analysis does not rule out genealogies that work from the periphery to the center, but in practice the method tends to work from the penal in earlier American or British or French history to the penal in their presents. In this respect, David Garland is fairly typical of North Atlantic genealogists of the present. While it is to be expected that most branches of a genealogy that shapes the North American present will be from the American past, it is not necessarily desirable for all of them to be so planted. We can learn a lot from a history of jazz that does not mention Africa; we can learn more from one that does.

### *Making a Good Start*

At the beginning of his story in *The Culture of Control*, Garland actually avoids the errors that are my concern. He discusses the early modern idea of "police" and how it differs from the contemporary notion of police as an organization devoted to fighting crime. Police until the 18<sup>th</sup> and early 19<sup>th</sup>

century in Europe continued to mean institutions for the creation of an orderly environment, especially for trade and commerce. Police certainly included the regulation of theft and violence, but also of weights and measures and other forms of consumer protection, liquor licencing, health and safety, building, road and traffic regulation and early forms of environmental regulation. The institution was rather privatized, subject to considerable local control, heavily oriented to self-regulation and infrequent (even if sometimes draconian) in its recourse to punishment. Peel's creation of the Metropolitan Police in London in 1829 and the subsequent creation of an even more internationally influential colonial model in Dublin were watersheds, though the spread of the French model of a para-military Gendarmerie by Napoleon's conquering armies three decades earlier was also important. While the initial 19<sup>th</sup> century model of a central police organization was, as Garland (2001: 31) points out, preventive, over time it became not only increasingly focused on crime but also increasingly on detection with a view to punishment after the event, as opposed to prevention before the event. This was partly a Benthamite project of utilitarian rationalization and partly a political project of asserting central control over the disorderly populations of the industrializing metropolis where revolution was most feared.

Such steps toward centralized punitive regulation of the poor through para-military police organizations were eventually taken almost everywhere, though often much later.

Uniformed paramilitary police, preoccupied with the punitive regulation of the poor to the almost total exclusion of any interest in the regulation of commerce, became one of the most universal of globalized regulatory models. So what happened to the business regulation? This is the genealogy David Garland did not pursue. It grew and grew and continues to grow in important ways post-Enron even under George W. Bush. In this regard Garland is empirically mistaken to see the US and UK under Reagan and Thatcher as an era of deregulation. He is right that there is a change in the discourse: "If the watchwords of post-war social democracy had *been economic control and social liberation*, the

new politics of the 1980s put in place a quite different framework of *economic freedom and social control*.” (p. 100). While it was true that the poor were increasingly disciplined in the name of traditional morality, what happened on the business side is that both markets and the regulation of markets were strengthened. It was privatization combined with regulatory growth rather than the illusion of privatization and deregulation (see Ayres and Braithwaite, 1992: 7-12). Even at the level of state institutions, as opposed to the stronger currents toward regulated self-regulation, the combined numerical strength of public police had not only fallen behind that of private police, but by 1984 in Australia the combined strength of the 100 largest governmental business regulatory agencies had risen to approximately equal the number of public police (Grabosky and Braithwaite, 1986). As in Adam Smith’s (1978) account, the most consequential domain of “police” is not the regulation of safety on the streets, but business regulation and self-regulation.

From the mid-nineteenth century, factories inspectorates, mines inspectorates, liquor licencing boards, weights and measures inspectorates, health and sanitation, food inspectorates and countless others were created. While the police force model of creating a more specialized agency was followed, this other trunk of the genealogy of regulation is much more variegated into many different specialist regulatory branches. The regulatory growth here is more in the number of branches than in their size and power. This makes it harder to get to grips with. Unlike police forces, they mostly started out rather punitive, making heavy use of criminal punishment as a regulatory tool, but mostly became much less punitive over the next 150 years (e.g. see Carson, 1979; Braithwaite, 1985). The business regulatory agencies grew to be more significant law enforcers than the police because the corporatization of the world in the twentieth century changed the world to a place where most of the most important things done for good or ill in the world were done by corporate rather than individual actors (Braithwaite and Drahos, 2000). Even in New York, where this trajectory was most advanced, it was not until decades into the twentieth century that the majority of litigants in appellate courts were corporations rather than individual persons

and the majority of actors described on the front page of the New York Times were corporate rather than individual actors (Coleman, 1982: 11).

Being more specialized than police forces, the business regulatory agencies were generally much smaller. But the largest of them were usually larger than the largest of police forces. For example, the tax authority in most nations, including the US and UK, is much larger than the largest of police forces. While police forces and criminal justice system employment has been among the fastest growing areas of public employment since Peel, the growth of business regulatory agencies has been no less impressive. As mentioned earlier, it is an empirical error to associate the arrival of Thatcher and Reagan with the arrival of an era of deregulation and privatization where business regulatory agencies declined. Real regulatory spending increased 10 per cent during the Reagan years (Tramontozzi and Chilton, 1988). Privatization actually created a need for new regulatory agencies. So we saw what a number of scholars have discussed as the rise of a new regulatory state (Majone, 1994; Loughlin and Scott, 1997 ; Parker, 1999). When British telecommunications was deregulated in 1984, Oftel was created to regulate it; Ofgas with the regulation of a privatized gas industry in 1986, OFFER with electricity in 1989, OfWat with water in 1990, and the Office of the Rail Regulator (mercifully not Ofraills!) in 1993 (Baldwin, Hood and Scott, 1998). When the Thatcher government radically shifted the provision of nursing home beds from the public to the private sector (Day and Klein, 1987), 200 little nursing home inspectorates were set up in district health authorities to upgrade the previously cursory regulatory oversight of the industry. This led Patricia Day and Rudolf Klein as early as the mid-80s to be speaking of the rise of a new regulatory state in the health and welfare sector, replacing the Keynesian welfare state. Privatization combined with new regulatory institutions is the classic instantiation of Osborne and Gaebler's (1992) prescription for governments to steer rather than row.

A paradoxical feature of the new regulatory state is that the state itself, including its criminal justice system, becomes an object as well as a subject of regulation. One consequence of increasing the inspection of private nursing homes is an insistence from the private sector that public sector providers be put on a level playing field and subjected to equally rigorous inspection. So in many countries we have seen the privatization of prisons associated with new regulation of the old public prisons as well, though neither the UK (which always had a degree of public prison inspection) and the US (which relied on direct supervision of prisons by courts!) are good examples of this. Increasingly, prisons have also been subject to inspection by official international human rights agencies and international human rights NGOs as well. Accreditation, a self-regulatory strategy developed in the health care sector, is now widely influential, with US police departments promoting that Law Enforcement Accreditation has pronounced them an “internationally accredited law enforcement agency”.

Why does it matter that Garland has a genealogy that saws off most of the branches of the police genealogy – those sprouting from the business regulatory trunk as opposed to the police-prisons trunk? First, Garland’s story of the demise in recent decades of the penal welfare model that emerged around the turn of the last century is seen as occurring at the hands of neo-liberal models that come from the private sector. In fact many of them come from the organizations that regulate the private sector, from that other trunk in the genealogy of the regulatory state. The audit society (Power, 1996), actuarialism (Feeley and Simon, 1992), situational prevention, risk analysis, empowering victims, partnership, public/private alliance, co-production of security and various other neo-liberal governmentalities that Garland sees reconfiguring the old penal welfare are actually best understood as products of the interplay between markets and the institutions created from the mid-nineteenth century (and earlier) to regulate them. Admittedly, many of these are or initially were private institutions like Lloyds of London, the Bank of England, the London Stock Exchange. But even as such they are most productively viewed, at least in part, as old liberal forms of regulation at a distance by the state – forms

of regulatory co-production that pre-dated not only neoliberalism but the Keynesian welfare state as well. Jonathan Simon (1988) recognizes this in his treatment of the role of insurance and insurance regulation in the rise of actuarialism. One place where David Garland does see an explicit influence from business regulatory institutions is where he discusses the idea of a “polluter pays” principle to penalize the suppliers of crime opportunities, though this has not been an effective rational choice strategy in either arena (Garland, 2001: 127). A more indirect reference is where Garland refers to “the new criminologies of everyday life” as “supply side criminology” picking up this central distinction in macroeconomic regulation between the supply and demand side that has always been central in regulation of the macroeconomy by central banks, in tax compliance,<sup>5</sup> indeed central in all forms of economic regulation.

Second, the truncation gives a false impression of the growth of a third “governmental” sector which is a “new apparatus of prevention and security” (Garland, 2001: 170): “The development of this new sector has begun to alter the overall balance of the field. Its very existence exerts a small but insistent pressure that tends to push policy away from retribution, deterrence and reform and towards a concern with prevention, harm-reduction and risk management” (p. 171). This spurious newness also sets up the impression that there is some theoretical originality in Foucault’s discovery of neo-liberal governmentality when regulatory scholars were writing of such governmentalities for most of the century, at least from the time of 1930s SEC chief and Harvard Law School Dean James Landis (McCraw, 1984: 153-209). Governmentality is “neo” neither in regulatory practice nor in scholarly theory.

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<sup>5</sup> For example, with tax shelters which threaten the revenue do you direct regulatory energies at taxpayers who demand entry into tax shelters or designers and promoters who create and distribute them? See also the discussion of withholding tax below.

Third, we will discern important influences of punitive policing of the poor on business regulation as well as the reverse. Neglect of this in truncated analyses of the sociology of punishment also impoverishes our understanding of the bigger question of how regulation works and the smaller one of the part state punishment plays in this.

Fourth, Garland makes a number of statements that are wrong at worst, misleading at best, as a result of his lack of interest in working through the business regulatory trunk of the genealogy of punishment. For example, we are told in several places that restorative justice is of marginal importance – only nibbling away at the edges of the punitive state. A reason sociologists of punishment commonly attribute for this failure is its pre-modern grounding in Indigenous disputing that is out of tune with neoliberal mentalities. While restorative justice thinkers make a special point of acknowledging the Indigenous practices that have shaped their Research and Development of restorative justice, these are easily overstated and usually are. Speaking for myself only, business regulatory practices oriented to restitution, victim empowerment (tripartism), community policing, co-production of security, and restoration of trust and relationships have had much greater practical influences than Indigenous ones on my restorative justice R and D. The takeoff of mediation and other forms of Alternative Dispute Resolution occurred decades earlier than the emergence of victim-offender mediation and restorative justice conferences in criminal justice. Clifford Shearing is one writer in the governmentality tradition who has made something of this connection: “Restorative justice seeks to extend the logic that has informed mediation beyond the settlement of business disputes to the resolution of individual conflicts that have traditionally been addressed within a retributive paradigm” (Shearing, 1997: 12).

An example of a statement that could be in error, viewed from this wider frame, is that the rise of “the responsabilization strategy” in recent decades involves a “new kind of indirect action” (Garland, 2001: 124): “For the first time since the formation of the modern criminal justice state, governments have

begun to acknowledge a basic sociological truth: that the most important processes producing order and conformity are mainstream social processes located within the institutions of civil society, not the uncertain threat of legal sanctions.” (Garland, 2001: 126). Clearly factories and mines inspectorates, among others, had acknowledged this sociological truth for more than a century. That is why their regulatory strategy has long privileged persuasion over punishment, why governments first recognised help with self-help more than a century ago by paying union-elected inspectors to check the safety of mines independently of government inspectors (Braithwaite, 1985) and similar partnership strategies. The more interesting structural question than why responsabilization arises in one area of regulation at a particular time is likely to be why it persists across time more in the regulation of mine safety than in the regulation of juvenile delinquency.

The contest between “defining deviance down” from the 1960s and “zero tolerance” from the 1990s that Garland so eloquently describes does not have so much resonance with business regulation. Sutherland showed that in the first half of the twentieth century business crime was systematically defined down. Not even the Sheriff of Nottingham had tried to enforce zero tolerance with tax fraud. There was no “nothing works” revolution in thinking about environmental regulation; there were always good reasons for believing that regulatory scholars were making credible progress toward developing strategies that would reduce pollution per quantum of production, that could succeed in making the rivers and air cleaner if only the numbers of people and the amount they consumed did not keep expanding (Gunningham and Grabosky, 1998). Just deserts thinking that Garland analyses as emerging in the 1970s had almost no impact on business regulation. Just deserts theorists worked hard at refusing to confront the implications of applying a just deserts philosophy to tax and consumer fraud where tens of millions of offences are detected each year of frauds involving much greater amounts of money than the average blue collar theft. The sociology of punishment was just another part of the academic mainstream that let desert theorists off the hook by willfully forgetting that

Sutherland had ever written. Common ground between the retributivists and the sociologists of punishment was that they were only really interested in the punishment of the poor, so both failed to play any critical role in exposing hypocrisy with respect to the crimes of the powerful.

It would be a big book to work through the genealogy from 19<sup>th</sup> century business regulation to punishment in the present. I am not competent to undertake the task. Yet I feel an obligation to give some content at least to the form such a genealogy might take. I will illustrate with some remarks about the history of tax enforcement, intellectual property regulation, regulation of drug markets, companies and securities and health services regulation in the next three sections of the essay.

### *Tax*

Tax is a very special case and an important one in many ways. Tax was never fully incorporated into localized forms of early modern police. Tax was the one form of regulation the dominant central military power always wanted to control as much as it was able. While weights and measures could be left to municipalities, kings often wanted their armies to collect taxes or to get the armed men of local lords to collect it for them. In the twentieth century, with the creation of specialist tax bureaucracies, governments became enormously effective at collecting tax without ever having to brandish a sword. This was accomplished non-punitively with regulatory methods that in criminology-speak we would call situational crime prevention. PAYE (Pay As You Earn) means most of us have no opportunity to cheat with respect to our biggest tax obligations. In the audit society, our employer has no opportunity or interest in not taking the tax out of our pay before we receive it. We pay customs on something that is imported for us when we pay the price that has the customs duty incorporated into it since the importer had no choice but to pay the duty in order to move goods out of the port. In many countries these days tax liability on our bank interest is paid by the bank before we get it. Again we are

situationally prevented from cheating. VAT was another big step forward in self-enforcing technologies of tax collection. One reason I pay the VAT downstream is that I know I can collect it back upstream. A paper trail of credits and liabilities again leads to a consumer who has no option but to pay. Where tax agencies fail to deliver compliance is where they have to rely on punishment, which is a particularly important issue with taxpayers sophisticated enough to work their way around this situational prevention.

The paradox of punishment here is fascinating to juxtapose with the crime in the streets story of punishment. Early in the twentieth century only the rich paid income tax. Indeed this was the story in most Western democracies until World War II (Smith, 1993). Today the rich pay a tiny portion of income tax collections. Increasingly, rich people can pay nothing at all if they are willing to financially engineer their way around their obligations. Punishment is not needed to secure a satisfactory tax take from most of the population. It is needed to coerce compliance from the rich, but governments are generally politically unwilling to do so. In general, improvements in situational technologies, in risk management and meta risk management (Braithwaite and Williams, 2001), in the negotiation of audit protocols with well healed corporations, deliver better returns.

Foucaultian commentators on audit-based governmentality or scholars of the risk society often fail to make the banal connection that the finance ministry bureaucrats insisting on audits of criminal justice agencies and risk analysis have experience working in or with tax bureaucracies that have been developing such governmentalities since the 19th century. They are not so “neo” in their liberalism in this respect. Flowing the other way, I assume that the references I hear in tax agencies to computerised data analysis across space, industry and time to identify “hot-spots” and “red flags” of fraud come from criminologists.

The Australian Taxation Office, with whom I collaborate through the Australian National University's Centre for Tax System Integrity, only uses criminal prosecution as a compliance tool on about a thousand offenders a year. The trajectory of punitiveness does not fit the story in David Garland's book for any tax authority I know. While states can collect the revenue they need these days without putting evaders to the sword, the size of the underground economy – ranging from a low of about 10 per cent of the real economy in nations like the US and UK to over 70 per cent in cases like Thailand (Schenider and Enste, 1999) - suggests that tax cheating could easily be the most common crime there is with the most dollars at risk, even in the US and UK. It is not an unimportant case of failing to fit any sociology of punishment paradigm. Indeed it is a uniquely universal one in the way it brings all individuals in the society who ever buy or earn anything under a regulatory mentality of a decidedly business regulatory sort.

### *Intellectual Property*

One of the ways the US benefited from the American Revolution was in being able to resist British intellectual property laws. Throughout the next century of its industrial development and beyond, the US was a pirate state on patents and copyright (Drahos with Braithwaite, 2002). When states like the US acquired intellectual property laws for the first time, they were generally introduced into civil law. So intellectual property and the patent offices and other agencies that enforce it does not seem an important branch of a genealogy of punishment. But in the 1980s and 1990s the US decided to use the World Trade Organization to criminalize intellectual property infringements globally. This was a remarkable feat of hegemonic politics as there were only half a dozen countries in the world (the UK was another) which were net exporters of intellectual property rights. In contrast, we in Australia had no interest in undermining the integrity of our criminal law by criminalizing such a private law matter, in making patented drugs from the Northern hemisphere more unaffordable to our people, in making Bill Gates richer and in selling out the free exchange of ideas in our universities to foreign business

interests who hired students in our classes to report us to the police for breaching these US laws. The shift of Australian Federal Police resources away from traditional enforcement to intellectual property enforcement was considerable, something I presume occurred in most other nations as well. Where nations have not succumbed to threats of “Watchlisting” under US trade law for failing to shift resources into enforcement of the criminalization of intellectual property, other more innovative punitive methods have been used, such as hiring organized crime groups to make pirate manufacturers offers they cannot refuse.

Here enforcement strategies from the crime control industry have been imported to the business regulatory side with considerable effectiveness. The normal political unwillingness to employ potent criminal sanctions in business regulatory enforcement has been overcome by the political reality that the most powerful interests in the world system wanted it. This sudden rise of the punitive state in a business regulatory branch is of enormous geo-political significance (Drahos with Braithwaite, 2002). As we move into an information society where the control of abstract objects like patents is more important to wealth creation than the control of traditional forms of capital and labour, punishment is important here in bringing about the widening inequalities that so rightly concern David Garland on the criminal justice trunk of the regulatory genealogy. This new world of wealth creation and distribution is one in which to control a patent in a genetically modified cow that produces twice as much milk as existing cows gives one control of an asset worth as much as all the herds of all the world’s dairy farmers.

### *Drugs*

The US has done this once before – globalized the criminalization of something that almost no other country was initially minded to criminalize (Braithwaite and Drahos, 2000: Chapter 15). The US called this the criminalization of “narcotics”, which included marijuana. This War on Drugs narrative

is rightly an important part of the story in *The Culture of Control*. Yet the rather successful non-punitive regulatory controls on pharmaceutical companies and companies like Coca Cola to get cocaine, heroin and other opiates out of their products (Coke did this in 1903) is not part of the story. Nor is the decision not to enforce bans at all against the more dangerous drug of tobacco, with the exception of a few US states during the 19<sup>th</sup> century.

What the criminologist and the sociologist of punishment alike do is take the drugs story out of the daily newspapers. Here, David Garland's book is another example of a criminologist actually making little pretense of writing a history of present drug control. What is written is a present of the war on drugs without any history of the genealogies of corporate and individual regulation that can make any sense of something that seems so enormously expensive and ineffective. How can one understand how cocaine use – that had been so common in the US in the late nineteenth century – was totally absent and certainly never punished in the 1950s, yet was driving the US homicide rate and prison system by the 1980s? As Peter Drahos and I have argued, to understand these things we need an integrated explanation of both illicit and licit drug regulation (Braithwaite and Drahos, 2000; Chapter 15) that incorporates the remarkably successful non-punitive business regulation of cocaine a century ago and the less successful punitive regulation of late twentieth century cocaine abuse.

### *Antitrust*

The analysis of the War on Drugs is one of the places where David Garland has important things to say on the impacts of the nature of capitalism on patterns of punishment, in this case on an inner city black underclass rendered superfluous by the departure of industrial capital. The impact of punishment on the nature of capitalism is the bigger story in terms of the study of regulation making a contribution to a macro sociology of the twentieth century. We saw how punishment (or rather the credible threat of it)

can transform capitalism with the globalization of the US intellectual property regime through the World Trade Organization. Perhaps the most important instance of law enforcement transforming capitalism is antitrust. The most important moment was the enactment of the Sherman Act in the US in 1890. Alfred Chandler Jr. points out that by the end of the 1890s “lawyers were advising their corporate clients to abandon all agreements or alliances carried out through cartels or trade associations and to consolidate into single, legally defined enterprises” (Chandler, 1977: 333-4). US antitrust laws thus actually encouraged mergers instead of inhibiting them because they “tolerated that path to monopoly power while they more effectively outlawed the alternative pathway via cartels and restrictive practices” (Hannah, 1991: 8). The Americans found that there were organizational efficiencies in managerially centralized, big corporations that made what Alfred Chandler called a “three-pronged investment”: (1) “an investment in production facilities large enough to exploit a technology’s potential economies of scale or scope”; (2) “an investment in a national and international marketing and distribution network, so that the volume of sales might keep pace with the new volume of production”; (3) “to benefit fully from these two kinds of investment the entrepreneurs also had to invest in management” (Chandler, 1990: 8).

According to Tony Freyer’s (1992) revealing study in the Chandler tradition, the turn-of-century merger wave fostered by the Sherman Act thrust US long-term organization for economic efficiency ahead of Britain’s for the next half century, until Britain acquired its Monopolies Act 1948 and Restrictive Trade Practices Act 1956. Until the 1960s the British economy continued to be dominated by family companies which did not fully mobilize Chandler’s three-pronged investment. Non-existent antitrust enforcement in Britain for the first half of the twentieth century also left new small business entrepreneurs more at the mercy of the restrictive business practices of old money than in the US. British commitment to freedom of contract was an inferior industrial policy to both the visible hand of American lawmakers’ rule of reason and the administrative guidance of the German Cartel Courts. A

special kind of regulation for deregulation of restrictive business practices was needed which tolerated bigness.

Ultimately, this American model of competitive mega-corporate capitalism globalized under four influences: (1) Extension of the model throughout Europe after World War II under the leadership of the German anti-cartel authority, the Bundeskartellamt, a creation of the American occupation; (2) Cycles of Mergers and Acquisition (M&A) mania catalysed in part by M&A missionaries from American law firms; (3) Extension of the model to the dynamic Asian economies in the 1980s and 90s, partly under pressure from bilateral trade negotiations with the US and Europe (who demanded breaking the restrictive practices of Korean *chaebol*, for example) ; (4) Extension of the model to some developing countries with technical assistance from UNCTAD.

Hence, while the effects of the Sherman Act may not have been quite as the agrarian progressivists who pushed for it intended, it was an example of a criminalizing of business conduct that transformed the world to that more corporate world where most of the litigants in the appellate courts and most of the actors on the front page of the New York Times were no longer individuals. This is what makes a truncated sociology of punishment and a criminology oriented only to the punishment of individuals a relic of the scholarship of another era. A populist form of scholarship perhaps, but not one that comes to grips with the emerging structural conditions that shape lives in the present.

### *Corporations and Securities*

It was of course company law that globalized audit and with it the “audit society” (Power, 1997) that has so reshaped criminal justice in ways vividly portrayed by Garland and others in the sociology of punishment tradition. It also globalized limited liability, which we might conceive as a globalization of corporate rights with only limited corporate responsibilities, a different trajectory from the

responsibilization Garland describes as emergent in the regulation of individuals. Most such transformations in the corporate sector were not accomplished through punitive regulation, however. Again it was situational prevention. The Stock Exchange would not accept a corporation for listing if it did not meet such basic requirements of corporate law as having an external auditor and later having a board audit committee with a majority of outside directors. Both state regulatory and self-regulatory institutions positioned gatekeepers to ensure that if a company wanted to raise equity from shareholders it had to meet certain requirements. The US SEC was a paradigm-setting regulatory institution in the world system; its early leaders like James Landis were indeed “prophets of regulation” (McCraw, 1984). These New Deal influences of the regulatory state were not mediated by punishment. The SEC remained a non-punitive regulatory agency into the 1980s (Shapiro, 1984).

Enter Rudolf Guiliani, Prosecutor for the Southern District of New York. Guiliani was a consummate politician. He could see that America had changed to a shareholding society. Owning a piece of corporate capitalism was no longer a preserve of the rich. Yet the smallholding majority with good reason distrusted the insider minorities who were the super-rich movers and shakers of Wall Street. The high point of this disillusionment was the crash of 1987. Post-Enron we have entered another high point. The emerging distrust of the stockmarket was even more worrying in Hong Kong in 1987, again for good reason (Gunningham, 1990), and Australia where the excesses of the 1980s, in the form of mega corporate criminals like Alan Bond and Christopher Skase, seemed worse than New York. This was the era of Michael Douglas pronouncing “greed is good” in the movie Wall Street. Two things brought the democratization of shareholding back from the brink. Foremost was the post-1987 recovery/boom. In part, however, this recovery was underwritten by the genius of Guiliani’s regulatory intervention. And of course when investor confidence returns in New York, it returns in Hong Kong and Australia.

Guiliani shocked the world by being a Republican who reversed the deregulatory persona of Ronald Reagan. He brought the symbolism of the war on crime to where it was not supposed to be seen. Police officers were filmed marching into Wall Street investment houses and emerging with exquisitely besuited men in handcuffs. A ritual that was repeated for the cameras in 2002. Giuliani's strategy was crude but effective. It was about symbolism rather than equality before the law. He wanted to get the best notches on his gun that he could. When he stumbled upon a small fish engaging in a bit of insider trading, his officers would sit them down and tell them they were going to prison unless they could hand Giuliani a bigger fish. They were often able to do this, given the nature of insider capitalism. So a sequence of minnows of insider traders ultimately coughed up the big fish of Donald Levine and then Michael Milkin, inventor of the junk bond and the greatest genius on Wall Street.

Pre-Guiliani, insider trading was not even a criminal offence in most countries. As with marijuana/heroin/cocaine and intellectual property, the US led a successful campaign to criminalize insider trading globally. Once the US economy recovered from the stagflation of Reaganomics, punishment on Wall Street once more became mostly redundant to confidence-building. The SEC and the New York Stock Exchange returned to the old regulatory order of situational prevention, now aided by computer software that could instantaneously detect patterns of trading suggestive of insider market manipulation.

### *Guiliani - Act II*

Computer mapping of risk patterns (CompStat) was central to a subsequent New York success story for Giuliani. Of course getting the handcuffs out on Wall Street was a collective accomplishment and I personify crudely by suggesting that Giuliani did it. Yet Giuliani was important. As Attorney for the Southern District of New York he showed three gifts of leadership: 1) he tailored his enforcement

priorities to the anxieties of the time in a way that allowed him to make a real difference by mobilizing popular support behind a reform project ; 2) he insisted on a results orientation from his people that sat oddly with hard-bitten criminal justice practitioners accustomed to the cynicism of just going through the motions; 3) he put a media spin on the project as one of dramatic transformation.<sup>6</sup>

“Zero tolerance” was another example of media spin on a results-oriented criminal justice transformation tailored to anxieties of the time. Criminologists generally, David Garland included, are justifiably skeptical about zero tolerance. But zero tolerance was mainly a media spin. Guiliani was too sophisticated a man to believe in an enforcement policy with no tolerance of non-compliance. His whole strategy on Wall Street had been after all to get results by giving immunity to white-collar criminals who were clearly guilty of major crimes.

The evidence is not persuasively in to evaluate to what degree the transformation of policing in New York in the 1990s can explain the particularly sharp decline in crime that undoubtedly occurred there during the 1990s. My own suspicion is that the ultimate criminological verdict will be that the "broken windows" part of the strategy – cracking down on minor incivilities - will not be proven effective (Harcourt, 2001; Karmen, 2000; Eck and Maguire, 2000; but see some highly qualified support in Taylor, 2001). Indeed cracking down on minor incivilities may be proven counterproductive in damaging race relations, police-community respect and perceptions of procedural fairness that are important for securing voluntary compliance with the law (Tyler, 1990; Tyler and Blader, 2000; Sherman, 1993). Equally it is no more than my suspicion at this point in the limited accumulation of evidence that outcome-oriented analysis of crime reduction by police managers who were given greatly increased resources to take responsibility for changing the patterns reported in computer mapping of

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<sup>6</sup> We see even more vividly Guiliani’s political genius in terms of these three gifts of leadership in Act IV of our biographical drama of law enforcement – Rudy the Rock standing for America against terrorism.

crime will prove one effective aspect of the New York reforms. Here was a genuine alternative to the process and output orientation of the old order. In particular, there are good empirical reasons for believing that targeting gun-carrying at mapped hot-spots can reduce homicide dramatically in the context of American cities with a handgun problem (Sherman, 1995; Fagan, Zimring and Kim, 1998; Wintemute, 2000). As with the handcuffs on Wall Street, I am inclined also to believe that Guiliani's political leadership in insisting on a shift from a process and output orientation to an outcome orientation (manifest in CompStat) may have been one factor in the halving of the New York homicide rate. Politically authoritative announcements of targeting – for example, that the kind of crime that had been tolerated in the subway in the past would no longer be tolerated in the future – with enough political strength to pull the police along with it can be rendered self-fulfilling. While seeing some aspects of “zero tolerance” as counterproductive, one can believe that targeting of hot-spots may have contributed to some of the reduction of the crime drop that occurred in New York over the past decade, without believing that it was the main reason and without discounting other explanations like the sustained fall in long-term unemployment in New York in the 1990s.

The point here is that just as Guiliani took a crime control mentality to Wall Street in Act I, in Act II business regulatory mentalities of quantitative risk analysis are taken to crime in the streets. Act III sees the latter move writ larger with organized crime.

### *Guiliani - Act III*

The third story of Rudolf Guiliani insisting on outcomes to change a problem that practitioners had come to believe would never change was with clearing the Mafia out of a variety of markets in New York City. This story is documented in James Jacobs' with Coleen Friel and Robert Radic (1999) *Gotham Unbound: How New York City was Liberated from the Grip of Organized Crime*. After decades of failed punitive law enforcement against members of organized crime groups who could

simply be replaced when arrested, the strategy that Jacobs describes as finally working was in substantial part a business regulatory strategy, particularly one that targeted licences, though still a strategy with an important place for criminal punishment. A way to stop the mob from fixing prices in the New York garbage collection cartel was to withdraw the garbage collection licences of mob associates. In some markets corrupted by the mob, suppliers were required to hire an auditing firm that specialized in certifying that the business was mob-free. Court appointment of trustees to clean up (restore worker democratic control to) mob-controlled unions was another important strategy. The effectiveness of such preventive strategies compared to purely retributive enforcement comes as no surprise to those who work on business regulation. Jacobs' findings reminded me of US coal mine safety enforcement where locating a resident inspector at the least safe mines in the country to reform their management practices was shown to improve safety dramatically (Braithwaite 1985, pp. 82-3). Jacobs' research shows that a responsive regulatory approach with business regulatory licencing, monitoring, auditing and restructuring moving up from the base of an enforcement pyramid that has long terms of imprisonment at its peak can work against the most entrenched, sophisticated and ruthless organized criminal groups in the world.

*Conclusion: Rudy a Rock Fractured with Hybridity*

While the story of getting out the handcuffs on Wall Street is one of taking a crime on the streets control strategy into the arena of business regulation, the Mafia success story is one of complementing criminal enforcement of crime on the streets with strategies imported from business regulation. Equally the zero tolerance story can be read as one of importing accountability for regulatory outcomes based on computer analysis of patterns of risk from the regulatory side to the criminal justice side. The purpose of this three act play on the political genius of Guiliani is to show that the important contemporary regulatory innovations involve hybridity between the business regulatory and criminal justice branches of the genealogy of regulation. The reason for the relevance of business regulatory

paradigms to criminal justice problems is that today we live in a world where criminal action is increasingly embedded in organizational action. This is true of Giuliani's last enforcement challenge of terrorism. There are money trails to follow involving banking regulation, training camps to shut down involving regulation of states through threatening economic sanctions, reforms to air safety regulation, reputable business financiers of terrorism to scare off, biotechnology industry regulation to head off the diffusion of anthrax, and of course warfare as a radical regulatory alternative to criminal punishments. For an organizational society, regulatory models developed on the organizational side of the economy will become increasingly influential. On the other side, business regulation has always been hamstrung by capture and corruption. Business criminals have always used their money and political clout to buy impunity. As a consequence, those rare moments when criminal enforcement is given a credible against business – antitrust in the 1890s, Wall Street in the 1980s, intellectual property in the 1990s, and now perhaps business financing of terrorism<sup>7</sup> – can be moments that transform the structure of modern societies. We have seen that the first of these (first wave antitrust) was responsible for the US succeeding the UK as the hegemon of the world economy, the second (hand-cuffs on Wall St) underwrote the rise of a shareholder society, the third (intellectual property criminalization) prevented the booming Asian economies from challenging the hegemony of a US which was the first-mover into the information economy, the fourth (terrorism) is about a very different kind of challenge from the developing world to the domination of the US.

It follows that a history of the present that traces a genealogy of punishment only through its criminal justice branches might offer inferior insights to a genealogy of regulation that opens our eyes to the ways business regulatory and criminal justice branches of the genealogy intertwine. My mission here

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<sup>7</sup> The special importance of financing arises from a conception of deterrence that prioritizes soft targets when in this case the hard targets are suicide bombers and leaders like Osama bin Laden who are beyond deterrence because they have doubtless long since given up on the aspiration for a long life with an enjoyable retirement. Some shift in plea bargaining priority from getting bigger fish (in the sense of fungible perpetrators) to getting more highly deterrable major funders of terrorism may be justified.

has been only to offer a critique of the truncated genealogy in the sociology of punishment tradition. Through the concrete case studies in the latter part of the paper I have also tried to convey a sense of the possibilities for an integrated genealogy of regulation. I have not risen to the challenge of even beginning to work through the genealogy that I am struggling to help the reader glimpse. It is beyond my capacities to work it through systematically; that would require a genealogist with the skills of a David Garland, a Pat O'Malley or Jonathan Simon. Ultimately, then, my agenda in this essay is not to dismantle genealogical sociologies of punishment, but to expand their scope, building from their strengths by covering their weaknesses with the strengths of another tradition.

In discussions with David Garland about this critique, he concedes there are some things we can better see by following the business regulatory branches that stemmed from 18<sup>th</sup> century police. Following them can open our eyes to how they often branched across to influence later developments in the punitive regulation of the poor (and vice versa). But he sees the alternative history I advance as having its own limits. Following the branches of different forms of regulation to a regulatory present will miss some of the branches seen in Garland's work. The crime control field might be a narrower present to study, but we can trace its history back through many branches that are not predominantly regulatory. Examples are Garland's masterful treatments of the way welfare state institutions (the rise of the profession of social work for example), labour markets and the media shape the punitive present. Just as with archival selectivity, we cannot follow everything. All genealogists choose their branches. Some will do more to illuminate the present than others. In the worst case choice, the branch will die and influence no more. It follows that there is virtue in putting competing visions of historical method in contest; I point out what you have missed as a result of your choice, you point out what I misconstrue with mine. Then we both see a little less myopically.

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