

## THE NEW REGULATORY STATE AND THE TRANSFORMATION OF CRIMINOLOGY

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*The forms of government and social relations that increasingly characterize contemporary society are giving rise to new ways of thinking about crime and crime control. In particular it is argued that although the discipline of criminology is currently well established in institutional terms, the intellectual tools of the discipline are of diminishing relevance to the social world that is now emerging.*

*The article describes the major developmental trends in government policy as involving a shift from a welfare state, governed by Keynesian techniques of demand management to a new form of regulatory state, premised upon a neo-liberal combination of market competition, privatized institutions, and decentred, at-a-distance forms of state regulation. These new styles of governance are premised upon a recognition of new social forces and mentalities, particularly of the globalizing logic of risk management, and they will increasingly reconfigure the social and political fields in ways that have consequences for the policing and control of crime.*

*Criminology's traditional focus upon street crimes and the institutions of police, courts and prisons may be decreasingly relevant to the new harms, risks and mechanisms of control that are emerging today. The innovative work of 'regulatory state scholars' such as Clifford Shearing is identified as pushing criminology in new directions that confound the discipline's traditional boundaries but which give it more leverage in the attempt to understand and respond to the control problems of the end of the century. The possibilities for restorative justice in the new context are also discussed, as are other methods for combating insecurity, and both are linked to the importance of developing forms of local knowledge that are informed by a sense of the global development context.*

*It is argued that the Keynesian state has been replaced by a new regulatory state that is a more Hayekian response to a risk society. Clifford Shearing is identified as a criminological theorist who has come to terms with these developments, especially in his collaborations with Phillip Stenning, David Bayley, Tony Doob and his colleagues at the Community Peace Foundation in Cape Town. Shearing et al. are forging a new paradigm (that incorporates the restorative justice paradigm) which might just transcend criminology and become something of general import to the social sciences.*

### *Carved in Stone*

When I entered the University of Queensland in 1969, there was a large sandstone building with Zoology carved over the entrance. Next to it Botany was carved into the stone. Behind was a newer building called Microbiology. Today, these disciplinary divides don't mean much. The big organizing themes of the biological sciences are molecular biology (transformed by the DNA revolution), evolutionary biology and ecology—all themes that run right across the old biologies based on types of organisms.

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Comparable change is descending upon the social sciences. This essay will attempt to explain why. It will contend that some of the scholars who are currently thought of as criminologists might become central influences in the social sciences, even though criminology itself, according to this analysis, is destined for decline. Most of the contributors to this collection, including this one, come from the discipline of sociology, which is already in decline. The risk is that in 20 years our collection will be read as a dialogue between a dead and a dying discipline.

But for the moment sociology is far from dead and criminology is booming. Criminologists have only recently begun to think of themselves as belonging to a discipline, though most continue to have a healthy scepticism of criminology going the way of disciplines they have escaped. In North America, where criminology is most disciplined, there now may well be more university scholars who identify themselves as criminologists than as philosophers or geographers. There are certainly more of the former in government research posts.

The criminology boom is not fed by the intellectual accomplishments of the field, but by the continuous growth in public sector employment in the criminal justice system combined with new expectations that police should be university graduates, and by even stronger growth in private policing. This criminology expansion is so sustained that the criminal justice building will probably still stand on the university campus a century from now. My prediction is that just as there is exciting biology going on in the zoology and botany buildings today, in future we might see criminology abandoned inside the criminal justice building in favour of studies of regulation, child development, restorative and procedural justice and other yet unforeseeable organizing ideas. Why? Because of a shift from a Keynesian state to a new regulatory state. Perhaps 'new' should be in inverted commas because all its individual elements are old, and similarly with 'state' since the most important feature of the new regulatory state is that most of the regulation is neither undertaken nor controlled by the state.

The nightwatchman state which preceded the Keynesian state will be conceived as one where most of the steering and rowing (Osborne and Gaebler 1992) was done in civil society. The Keynesian state that succeeds it has the state do a lot of rowing, but was weak on steering civil society. The new regulatory state that is most recent in this chronology holds up state steering and civil society rowing as the ideal.

#### *From the Nightwatchman State to the Keynesian State*

The nightwatchman state of classical liberal theory had functions more or less limited to protecting its citizens from violence, theft, fraud and promulgating a law of contract (Nozick 1974). Until the nineteenth century most of the steering and most of the rowing in the regulation of social life was done in civil society rather than by the state. Oliver McDonagh (1977) has documented the pattern of government growth in Victorian England that began the journey from the nightwatchman to the Keynesian state. Part of the same pattern was professionalizing the nightwatchman functions themselves with the Peelian revolution in policing from 1829.

The most decisive shift to the Keynesian state was the New Deal in the United States, when a great variety of national regulatory agencies assumed a degree of expert central

state control of formerly unregulated activity. It took something as terrible as the great crash to end the nightwatchman state, with the libertarians fighting a rearguard action to the very end. When Richard Whitney, President of the New York Stock Exchange, appeared before Senate staff investigators who were setting up the Securities and Exchange Commission in 1933, he said: 'You gentlemen are making a great mistake. The Exchange is a perfect institution.' (McCraw 1984: 194).

Compared with what went before and with the more Hayekian policy that followed it, the Keynesian state justified quite a lot of rowing by the state, without paying much attention to steering regulatory activities in civil society. In practice, of course, it was still a liberal capitalist society where a great deal of steering and rowing continued to be undertaken by institutions of civil society such as the stock exchange. But the mentality of the Keynesian state was general belief that the state could do the job, including the job of policing; the debate was no longer with liberal minimalism (Hayek was a marginalized, 'out-of-touch' intellectual) but with socialism. Under the ideology of the Keynesian state, the response to every outbreak of disorder was to increase central state policing resources. Social workers, probation officers and other welfare workers employed by the state also acquired ever more resources and powers under the same Keynesian disposition.

#### *From the Keynesian State to the New Regulatory State*

Following the lead of the Thatcher government in Britain, during the 1980s and 90s thousands of privatizations of public organizations occurred around the world. Contrary to the Hayekian philosophy of Thatcherism, deregulation did not always go hand in hand with privatization (Ayres and Braithwaite 1992: 7–12). Rather we saw what a number of scholars have discussed as the rise of a new regulatory state (Majone 1994; Loughlin and Scott 1997; Parker 1999a). Hence, 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 for rail in 1993 (Baldwin *et al.* 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 but not to row.

The rise of the new regulatory state was partly European catch-up with the New Deal, partly a fresh phenomenon shaped by European Commission imposition of regulatory standards on states (Majone 1994). IMF and World Bank conditionality requiring former communist and developing economies to implement 'good governance' initiatives have also been important in globalizing the new regulatory state (Braithwaite and Drahos 2000). But the new regulatory state is qualitatively different from the New Deal in its reliance on self-regulatory organizations (Clarke 1986), enforced self-regulation (Braithwaite 1982) and other responsive regulatory techniques that substitute for direct

command and control. Responsive regulation also flows into strategies for regulating already private institutions through compliance systems, codes of practice and other self-regulatory strategies.

The decentring of the state and 'rule at a distance' are evident in other contemporary intellectual currents, including the 'regulated self-regulation' of neo-corporatist theory (Streeck and Schmitter 1985) and the work of Marsh and Rhodes (1992) on 'policy communities' and 'issue networks' as more important in some ways than states as policy makers (see Crawford 1997). The latter echoes Meidinger's (1987) analysis of 'regulatory communities' of state, business and NGO policy networks with a shared epistemic frame.

While the development of the concept of the new regulatory state by regulatory scholars predates the popularity of late-Foucauldian ideas of liberal governmentality, in the 1990s regulatory scholarship began to be influenced by Foucault's (1991) governmentality lectures. There is no doubt that at the end of his life Foucault was grasping at similar phenomena, albeit in a way that lacked the concrete referents of the scholars of the new regulatory state, or of his own earlier work on disciplinary power with its detailed analyses of practices such as imprisonment (Garland 1997).

For the late Foucault, successful government operates through a capacity of both those who govern and those who are governed to regulate their own behaviour. What Foucault meant by a progressive governmentalization of the state was a move away from direct domination or law enforcement toward indirect rule through inventing technologies for the regulation of conduct, technologies which reshape the institutions within which individuals regulate their own conduct (Hindess 1996). Foucault believed that we 'live in an era of "governmentality" first discovered in the eighteenth century' (Foucault 1991: 91). This account is more or less compatible with the new regulatory state chronology of (1) eighteenth century 'police' in the pluralized, privatized regulatory sense that one sees for example in the writings of Adam Smith (1978), followed by (2) the rise of the Peelian project of a unified state monopoly of 'the police', culminating with (3) the ascendancy of Keynesianism that re-pluralizes into (4) the new regulatory state from the 1980s. On both accounts, the Keynesian mentality obscures both the eighteenth and late twentieth century reality of a state that is not a unified set of instrumentalities. What we must study today is strategies of regulation by state and non-state actors, where the state is both a subject and an object of regulation (by the IMF, Moody's, the Security Council, the International Organization for Standardization and the World Trade Organization, among other institutions).

The substantive topics studied by eighteenth century scholars of police were almost identical in range to those researched by contemporary regulatory scholars, so many of whom moved beyond a base in criminology (like Clifford Shearing and his colleagues). In France and Germany in the eighteenth century, included among the topics covered by 'police regulations' were security, customs, trade, highways, foodstuffs, health, labour standards, fire, forests and hunting, streetlife, migration and immigrant communities (Pasquino 1991: 110). Both eighteenth century scholars of police, of which there were thousands (Pasquino 1991: 112), and the equally numerous researchers of the new regulatory state, share an interest in integrating explanatory and normative theories (eg Loader 1998; Crawford 1997). For most of the police scholars, the normative theory tended to utilitarianism: 'The object of police is everything that has to do with maintaining and augmenting the happiness of its citizens' (Von Hohental 1776). For the new

regulatory scholars, the normative frame tends to involve a blend of neo-liberal and Keynesian welfarist objectives, well illustrated by Shearing's attraction to a neo-republican concern with freedom as non-domination (see Brogden and Shearing 1993). More broadly, new regulatory scholars blend police, liberal and Keynesian mentalities of governance. The marriage of police and the market effected in the writing of Adam Smith (1978)<sup>1</sup> is in turn married to a nostalgia for certain Keynesian virtues, as we will see below.

The new regulatory state has touched even the heartland of the Keynesian state in Australia, with job placement services for the unemployed being privatized and subjected to the regulatory standards of what was initially called the Employment Services Regulatory Authority. The criminal justice system has not been immune to the vectors of the new regulatory state. As in so many nations, in Australia we have seen ten private prisons built during the 1990s, though the new institutions for regulating them have been rather limited (Harding 1997; for Britain see Hood *et al.* 1998). Again, Hayekian marketization combined with Keynesian regulation of markets.

Much more dramatic has been the privatization of policing, with most developed economies having today more private than public police (Shearing and Stenning 1981, 1983, 1987). As early as the 1950s in the US private security personnel outnumbered public police. But the huge taxpayer investment in public police during the 1960s restored a roughly equal balance of the private and public by 1970, only to see the 1.1 million private police by 1982 standing at almost double the public police (Johnston 1992), increasing to 2 million in 1994, thrice the public police (Bayley 1994). In South Africa the preponderance of private over public police is much more profound than in the United States or Europe. There, not only have private replaced public police at sporting events, in high-rise buildings and in gated housing communities for the wealthy, but on the streets in the nightlife areas of the cities nightclubs and restaurants employ the armed private security personnel who patrol to help us to feel safe as we park along the street. Increasingly, the governmental role is to regulate the standards of these private security providers. In Papua New Guinea, which may have even a worse crime problem than South Africa, the new regulatory state has on some occasions taken the fascinating form of Justice Ministers and Police Commissioners negotiating gang surrenders whereby Rascol gangs hand over their weapons and give various other self-regulatory undertakings in return, among other things, for help by the government to set them up in employment in the private security industry! (Dinnen 1996).

The biggest difference between the new regulatory state of criminal justice versus telecommunications, for example, is that whereas private sector growth has been coupled with public sector decline in telecommunications, this is far from universally true with criminal justice. Public prison building has been as expansive as private prison construction during the 1990s. Between 1970 and 1990 the number of public police

<sup>1</sup> Adam Smith's agenda of fostering competitive markets by eliminating both public and private monopolies and liberalizing trade is shared by most scholars of the new regulatory state. Where they differ is that new regulatory state researchers are highly attracted to many Keynesian forms of regulation, of banking, stock markets and labour standards, for example, that would not have been in the least congenial to Smith. Moreover, new regulatory state students utterly reject Smith's ironically statist and authoritarian approach to 'security': 'In every civilized nation death has been the punishment of the murder(er), but in barbarous nations a pecuniary compensation was accepted of, because then government was weak and durst not meddle in the quarrels of individuals unless in the way of mediation . . . In the laws of all nations we have the remains of this ancient state of weakness' (Smith 1978: 476). For new regulatory state theorists who find much that is attractive in decentralized restorative justice, this 'weakness' of pre-mercantilist states was an attractive one.

increased from a low of 22 per cent in Japan (which was the lowest per capita to start with) to a high of a 97 per cent increase in Australia (Bayley 1994: 37), with Britain and the United States falling in the middle at 35 per cent and 64 per cent growth respectively. Where we do find some public sector retrenchment with criminal justice is in the employment of social workers and with other types of welfare provision for offenders, ironically at a time when the evidence clearly no longer sustains a 'nothing works' conclusion. While the welfare state is wound back, the punitive state is not. Andrew Scull's (1977) prediction that the fiscal crisis of the Keynesian welfare state would lead to decarceration has happened with mental patients but not with criminals. Indeed, we might say that with recent cuts to the defence establishments in most states, the Keynesian punitive state stands alone as the major exception to 'the hollowing out of the state' (Jessop 1993).

Associated with the neo-liberal economic policies of the 1980s and 90s have been much higher levels of unemployment than the levels possible in the Keynesian world of the 1950s, 60s and early 70s. Part of the ideological strategy of Bush-Reagan and Thatcher-Major, copied by many other states, was to blame the victims for a slothful welfare mentality, but most of all through the war on drugs. In the United States by 1994 there were 678,300 black men behind bars, more than were enrolled in higher education (Mortenson 1996: 4). The impression that the United States has a lower unemployment rate than some European nations today disappears if you correct the unemployment rate by adding those in prison. In 1980, there were 31,000 Americans in prison or jail for selling or using drugs; by 1994, there were 400,000 (mostly unemployed when arrested and black) (Reuter 1997: 264).

But the simultaneous expansion of the new regulatory state to monitor privatized security and the punitive state is beginning to take a financial toll. The state that has gone further than any other in winding back Keynesianism, New Zealand, has been the state that has gone furthest with the new social movement for 'restorative justice' (the most important manifestation of the new regulatory state in criminal justice). Part of the appeal was the fiscal windfall from reducing the number of juvenile justice institutional beds. A close competitor to New Zealand as the most liberal economy in the world is Singapore, the only state that has nominated 'restorative justice' as the officially sanctioned model of its juvenile (but not its adult) justice system (Singapore Subordinate Courts 1997). The Howard conservative government in Australia was elected in 1995 with a justice policy which committed it to expansion of restorative justice initiatives. In the event, while it has cut federal police numbers substantially and while all Australian jurisdictions do have some kind of restorative justice programmes, the expenditure on the latter has been minimal and the cuts to the former are being reversed. The US Attorney General and the British Home Secretary are giving speeches about picking up restorative justice initiatives without really taking any significant policy turns.

#### *Risk Society and the New Regulatory State*

Clifford Shearing (1995), who I will construe as the quintessential scholar of the new regulatory state, believes with Beck (1992), that we have become a risk society in which preventive governance (O'Malley (1992) calls it 'prudentialism', Feeley and Simon (1994) an 'actuarial logic') has become more important. In this, Shearing follows in the

footsteps of a variety of regulatory scholars, including Albert Reiss (1989), Carol Heimer (1985), Nancy Reichman (1986), Peter Manning (1989), Charles Perrow (1984), Ellen Baar (1989), Joseph Sanders (1989), Susan Shapiro (1989), Diane Vaughan (1989) and Keith Hawkins (1989) who made the study of risk a central theme of the sociology of regulation during the 1980s. Shearing sees a difference between feudal governmentality as decentralized rule from the centre (sovereignty devolved) and a marketized mentality that devolves authority itself. Here he picks up on Beck's (1992: 104) idea that the 'universalism of the market' engenders a mentality of loss-reduction, a risk-focused strategy. This combines with the imperative to respond to certain risks that are extreme (and extremely difficult to manage) which have come with the late twentieth century. Let me give two illustrations of what I want to construe as the key connections between risk society and the new regulatory state.

One of the ironies of financial markets is that the engineering of new products to spread risks (derivatives such as futures contracts) has increased systemic risks. The collapse of Barings, England's oldest merchant bank, once referred to as the 'sixth great power in Europe' (Ziegler 1988), by the derivatives trading of a single employee in Singapore, led the development of various risk-reduction strategies coordinated by the International Organization of Securities Commissions and the Basle Commission on Banking Supervision. But the most revealing response to the Barings collapse from the perspective of the new regulatory state was by J.P. Morgan, which had succeeded Barings and the Rothschilds in the late nineteenth century as the most powerful banking house in the world. J.P. Morgan released for general use in October 1994 its own proprietary risk management model, RiskMetrics, accompanied by the data set on the volatilities of different types of financial products used with the model (Dale 1996: 165). As a big player, J.P. Morgan realized that it was in a community of shared fate with smaller players like Barings which used less sophisticated risk management technologies than RiskMetrics. Trading in derivatives actually does not generate new kinds of risks, but risks that can get out of hand with a rapidity obscured by the complexity of secondary markets. The risks of derivatives trading had to be made more transparent to fend off the systemic risk of a major financial collapse.

The second illustration is another of a community of fate (Heimer 1985). Joe Rees (1994) showed how following Three Mile Island, the American nuclear industry shared self-regulatory technologies that they had previously kept secret from one another. They believed another Three Mile Island would see the mentality of the risk society wipe them all out. They set up an industry self-regulatory organization which seems to have been more effective than state regulation alone, though state regulation in the background was an important element of their success. For example, scrams (automatic emergency shutdowns) declined in the US from over seven per unit in 1980 to one in 1993. After the Chernobyl disaster, this self-regulatory programme globalized under the auspices of the World Association of Nuclear Operators (WANO). WANO pairs all nuclear power plants in Russia with sister plants mostly in Germany who help them upgrade to international standards of risk management.

What do these two cases illustrate?

1. The centrality of the mentality of risk management in regulation.
2. The globalizing logic of risk management and how it decentres the regulatory role of the state compared with transnational corporations, and hybrid

private/public international regulators such as WANO, IOSCO and the Basle Commission on Banking Supervision.

3. The possibilities for what Rees (1994) calls 'communitarian regulation' within communities of fate.

Fourthly, these cases illustrate the limited relevance of criminology, with its focus on the old state institutions of police-courts-prisons, to the crimes which pose the greatest risks to all of us. Even at the level of state institutions, one would never grasp from reading criminology journals that 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. 'Future generations will look back on our era as a time when one system of policing ended and another took its place' (Bayley and Shearing 1996: 585). Perhaps the alleged success story of state policing of hot-spots in New York under Mayor Giuliani is a different story of state policing resurgent. Yet the more neglected and more interesting Giuliani story from a new regulatory state perspective is the 1990s liberation of New York from the grip of organized crime told by James Jacobs (1999). This was accomplished by a shift of reliance away from criminal enforcement (usually followed by the replacement of one jailed mafioso with another) and toward a regulatory strategy (e.g. using licensing powers to deny licences to mob-controlled firms).

#### *The Progressive Collapse of the Peelian Vision*

Shearing (1995: 82) interprets Peel's vision of policing as unifying the machinery of policing within the state 'in the form of an expert system staffed by professionals':

Peel hoped that this development would shift the focus of policing from remedying the past to colonizing a future. What actually happened was quite different. The police soon found that they could not watch over directly and that they had to rely on citizens to do their watching for them. Policing was re-privatized rather than de-privatized. The result, with very few exceptions, was not an unremitting watch, but a system for identifying breaches of the peace. This result was the opposite of what Peel envisaged. (Shearing 1995: 82)

This was true of the business regulatory agencies as well. They grew to be more significant law enforcers than the police (who once covered their responsibilities) because the corporatization of the world during the twentieth century changed it to one in which most of the things done for good or ill in the world are now the acts of corporations rather than individuals (Braithwaite and Drahos 2000). This same corporatization also meant that the greatest regulatory capabilities lay with corporations rather than states. By the mid-90s for the first time, a majority of the largest 'economies' in the world were transnational corporations rather than states (Anderson and Cavanagh 1996). So in my time as a Commissioner with the Trade Practices Commission in Australia, the most significant things the Commission did were to set up the Society of Consumer Affairs Professionals in Business and the more general Australian Compliance Professionals

Association (Parker 1999b). A Peelian professional project of surveillance, but privatized surveillance (Halliday and Carruthers 1996).

Criminologists tend to see community policing writ small as something public police do when they realize that the Peelian project has failed. Something to make state police more effective by getting the community to help them. Shearing sees it writ large as primarily private activity articulating the possibility of loosely coupled 'bubbles of governance' by 'private governments'. Actually, the process is not just a possibility; it is underway:

[These bubbles of private governance] include such spaces as communities of library users, the residential communities that North Americans term 'gated communities', communities of shoppers at malls, and so on. Together, these communities, or arenas of governance, form a complex and expanding archipelago of private governments that together establish what we might term an emerging 'neo-feudalism'. One of the features of this new feudalism is that the contracts that establish these arenas of governance are, in part, contracts that set out such things as the proper expectations (rights) and responsibilities (duties) of community members. An ubiquitous example is the contract that persons enter into as library user. Most libraries today require, as part of this contract, that members agree to submit themselves to electronic scanning as they enter and leave the book collection. Similar contracts are required if one wishes to fly . . . In our contemporary world we move around this feudal-like archipelago of governance by moving from one contractual community to another. Each of these bubbles has its own mode of governance and its own rules . . . (Shearing 1997)

Shearing connects the rise of restorative justice in schools, churches, business organizations, ethnic communities and through ad hoc institutions such as the South African Truth and Reconciliation Commission to the evolving practice and imperatives of local risk management more motivated by the Peelian vision of making the future safer than by post-Peelian resort to punishing the past: '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). Moreover, Shearing concludes that unlike the retributive paradigm, the restorative paradigm 'does not call into being consequences that conflict with the aims of an actuarial approach to security' (as practised by business and business regulators) (Shearing 1997: 14). Because a combination of predominantly restorative justice in business regulation with heavy reliance on self-regulation among communities of shared fate seems to be doing better at reducing risks of nuclear scrams than police are doing at reducing the risks of rape, a major reassessment is beginning to occur (Braithwaite 1999). This reassessment will pose a challenge not only to mainstream criminology, but also to feminist criminology, which for its greater part continues to be dominated by the myopia of police-court-corrections.

### *Injustice and the Hayekian Vision*

Friedrich Hayek was Margaret Thatcher's hero and is a sometime hero of Clifford Shearing<sup>2</sup> as well. Thatcher and Shearing converge on the view that something like the

<sup>2</sup> Personal communication with Clifford Shearing. To reinforce the shame Clifford may experience at my letting his Hayekianism out of the closet, I want to say all the ideas in this section are stimulated by conversations with him!

configuration of changes I have called the new regulatory state was inevitable for the reasons Hayek articulated. As economies became larger and more complex, the central state could not acquire the local knowledge to intervene effectively. It tried to pick winners but regularly picked losers in circumstances where knowledgeable locals could see the loss coming: ‘knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess’ (Hayek 1949: 77). Hayek’s (and Thatcher’s) prescription for empowering local knowledge was the market—a price that reflects aggregated local preferences and that delivers profits to those in the best position to know and exploit local knowledge.

Shearing’s prescription is different. While he sees Hayek’s analysis of local knowledge as the key to understanding the direction of change in criminal justice practice,<sup>3</sup> he sees myopic marketization as a path to insecurity.<sup>4</sup> This is because Shearing regards security for the poor as the best hope for security for the rich. Yet a free market in security as we had in the eighteenth and early nineteenth century delivers private policing services only to the rich, leaving the poor unprotected (and let us be frank, unregulated). Policing works best ‘where it is least needed and worst where it is most needed’ (Bayley and Shearing 1996: 595). For Shearing, the market mentality engenders deep inequalities in security, especially in his beloved South Africa. Yet it is a global mentality that has colonized all our sensibilities. This leads him to conclude that there is no alternative but to work with these sensibilities and seek to harness them in a transformative way. Shearing is no utopian dreamer; he is a Foucauldian schemer.

I am fully aware that in an ideal world it might not be appropriate to work within the terms of neo-liberal discourses, and that a more radical critique might be appropriate. Nevertheless, I am persuaded that this is strategically the most useful thing to do at the moment. This does not mean that it may not be possible at some other moment to launch a direct assault on the market mentality as a source of inequality. This is, however, not that moment. (Shearing 1995: 83)

The implication of the analysis in this paper is that he is right in that judgement. So what is to be done? In the South African context, Shearing’s strategy has three related components:

First, engage the state in ways that will provide for a relocation of control over tax revenues in a manner that will provide blacks with purchasing power. Second, establish blacks as powerful customers with the ability to control their security. Third, do this in a manner that will have currency in the present South African political climate. (Shearing 1995: 83)

The idea at the cusp of the market and community empowerment mentalities is that instead of a police budget, there should be a policing budget; instead of a court budget, a disputing budget that leaves space for communitized restorative justice (see also Bayley

<sup>3</sup> Hayek and Shearing even share a similar position on the limits of quantitative data in explanatory theory: ‘the sort of knowledge with which I have been concerned is knowledge of the kind which by its nature cannot enter into statistics and therefore cannot be conveyed to any central authority in statistical form’ (Hayek 1949: 83). ‘Any approach, such as that of much of mathematical economics with its simultaneous equations, which in effect starts from the assumption that people’s *knowledge* corresponds with the objective *facts* of the situation, systematically leaves out what is our main task to explain’ (Hayek 1949: 91).

<sup>4</sup> Put another way, Shearing buys Hayek’s explanatory theory of the limits of knowledge available to central planners, while rejecting the normative theory of the economy that he erects on this foundation.

and Shearing 1996). In South Africa, enabling this meant breaking the legal framework for centralized state control over policing:

We persuaded the multi-party forum that drafted the constitution to accept a legal framework that distinguishes between the provision of security and the provision of police. This has resulted in provisions in the constitution that enable the new legislature to establish laws that will give at least part of the budget for security to local levels of government. (Shearing 1995: 84)

Shearing then used Swedish foreign aid to set up the Community Peace Foundation in South Africa, which employs local people to work with local NGOs and communities to set up safety committees. These committees are developing their own local theories of why certain kinds of crime are prevalent in their communities and designing a responsive prevention plan. Hayekian local knowledge and local ordering. Peacemaking or restorative justice conferences often become occasions that supply the motivation to plan locally to prevent a recurrent threat to citizen safety.

The next step is to lobby for the actual restructuring of security budgets so that these committees can bid for policing and peacemaking funds. The step after that is to 'find a way of bringing these plans together as part of a larger municipal plan' (Shearing 1995: 86). The South African Attorney-General has publicly articulated his support for the programmatic praxis of the Community Peace Foundation in an article he wrote in the *Sunday Times* of 28 July 1996, 'Bringing Justice to All Our People'. The work of the Community Peace Foundation has the backing of the Cape Town Police, the provincial and national governments. An Argentinean version of the Community Peace Foundation strategy is already being put in place.

Philip Stenning has prepared a paper for the Toronto City Council, which has endorsed it, calling for a pluralizing of policing by enabling safety committees of housing estates and other institutions of civil society to compete with the Toronto police for a policing budget allocated by a citizen board answerable to the Council. Mulgan (1993) has also developed a 'democratic version of competitive tendering' which in the British context has been subjected to a thoughtful critique by Crawford (1997: 311). At the time of writing policing as opposed to police budgets are also being discussed in Northern Ireland.

#### *Retrieving Keynesian Virtues*

A paradox of the security budget idea developed by Stenning and Shearing is that it requires central control of a healthy revenue in order for the problems of security to be solved, a Keynesian rather than a Hayekian budget. Ultimately it does require a strong state. Shearing's (1993) work on regulatory space highlights the dangers of a conception of regulation where the state indirectly controls self-regulation delegated to civil society:

The public interest, it is argued, is likely to be better served by dialogue and contest than by a system of coordination and state oversight. A contested view of the public interest rather than one that is authoritatively settled by the state can warrant, for example, Greenpeace-style actions that totally reject and undercut the state's conception of the public interest. (Grabosky *et al.* 1993: 7)

This much is agreed. The richer democracy is one where different elements of the state, international society, business and NGOs are all regulating one another. However, there is no escape from some privileging of an ultimate oversight that has the special legitimation that a decent electoral process can supply. This privileging is especially important in respect of accountability for the allocation of funds raised by taxes and for the deployment of violence. In the worst cases, rare as they are, there is a need to restrain people forcibly, lock them up against their will, even shoot them. These powers are so dangerous that the only place we should locate them is in those places surrounded by the maximum of checks and balances. The republican tradition has to greater or lesser degree erected these around the institutions of state violence and enforced state taxation.

There is also no doubt that there are quite a few policing functions that will simply be more efficiently and decently provided by public police. The strength of the research agenda that animates a widening circle beyond the Toronto-Cape Town core of Shearing, Stenning, Doob, Bayley, Nina and Ndlovu is that it concedes as much and embarks on a programme of empirical discovery of what is better provided publicly, by markets or by communities.

Restorative justice founders when the welfare state is not there to support it. If a restorative justice conference agrees with a young offender that he should commit to a drug rehabilitation programme and funding is not available at that time and place for the programme, then restorative justice is likely to fail. It often does fail in Australia and New Zealand for precisely this reason. Ken Polk's (1994) work is an enduring testimony to the importance of what he calls 'developmental institutions' that pave transition paths from school to work. The US War on Poverty of the 1960s was barely beginning to discover how to build such institutions when it fell victim to the demise of the Keynesian state. In the early 90s, the Keating Labor government was barely beginning to relaunch this programme of R&D through the labour market programmes of its Job Compact when the more Hayekian government of John Howard swept them away.

Criminologists lobbied for the Job Compact on the grounds that it had good prospects of reducing crime (Braithwaite and Chappell 1994). Nothing captures disenchantment with the Keynesian state among criminologists more than the widespread belief that the evidence shows that the level of unemployment and inequality makes no difference to the crime rate. In fact, the evidence is not consistent with this belief as many scholars have contended for a long time (Braithwaite 1979). When the economy improves, there are short-term increases in opportunities and diminutions of guardianship of persons and property that pushes crime up at the same time as substitution of legitimate for illegitimate opportunities for work pushes it down (Cantor and Land 1985; Kapuscinski *et al.* 1998). Those short-term effects are minor compared to the long-term effects of long-term unemployment, whole generations of truly disadvantaged people, year after year, being left without hope, giving up on their own future, but much more importantly (Weatherburn and Lind forthcoming) on the future of their children. The element of the Keynesian state we might retrieve here is a state that can eliminate long-term unemployment. As the Keating government concluded, it makes good economic sense, partly for reasons of combating crime and drug abuse, to fund an offer to every long-term unemployed person of a publicly funded (or subsidized) job or training place. After they finish the programme, if they return to long-term unemployment, they should immediately have publicly funded employment offered to them again. Long-term

unemployment can be abolished in developed economies; criminologists who have been overly seduced by the Hayekian tradition have been ineffective in explaining why.

So a strong state is needed: (1) to provide welfare services to restorative justice programmes in civil society, (2) to eliminate long-term unemployment, (3) to fund contestable safety and disputing budgets, and (4) to fund the continuation of state police and courts where they can operate more efficiently and in a more rights-respecting way than markets or communities. In short, there is no appeal in returning to the mentality of the nightwatchman state of classical liberal theory with its weak rowing and weak steering capabilities. There is little appeal in returning to a fully Keynesian mentality of a state that is strong on rowing itself but weak on steering civil society. There is limited appeal in a new regulatory state which does all the steering and leaves all the rowing to markets and civil society. What we might aspire to is a state which is strong on rowing in the Keynesian ways specified in this section and strong on steering, combined with strong markets and communities in civil society that are also strong on both rowing and steering.

*Sweeping Across the Disciplines to Become an Educated Scholar of the New Regulation*

There is a joke about the economist who has successfully predicted six of the last two recessions. Economics is a discipline with limited predictive power for the reasons articulated by George Soros (1994) in *The Alchemy of Finance*. Whenever a theory successfully formalizes truths about how local markets work, those locals with the most contextually rich and timely local knowledge will act to transform a true theory into a false one. If the theory says the market will go up when certain things happen, those in the know may buy when they can see those things are about to happen and sell after they do, so that the effect of the theory precedes its cause (and a fall in price rather than the predicted rise comes after the cause). According to Soros, economic theory must be reflexive because its objects are not like objects in physics; they are thinking actors capable of asserting themselves as subjects who render the theory the object.

What I want to suggest is that the kind of study of regulatory institutions illustrated in the work of Shearing, applied to phenomena like J.P. Morgan's RiskMetrics and the Basle Committee's regulatory deliberations, may be more useful to understanding how to avert recessions than neo-classical economics. I sat for four years between 1983 and 1987 on the Economic Planning Advisory Council as Prime Minister Hawke and Treasurer Keating explained to us why they had to float the dollar, deregulate the finance sector, privatize Qantas, eventually give us 'a recession we had to have' with the highest unemployment of our lifetime. What raged around that table was a contest between Keynes, who was being pushed aside, and Hayekian deregulation. In retrospect, what we should have been discussing was the nuts and bolts of a regulatory design for a new kind of world where Keynesian pump-priming no longer worked.

In those days, I also used to say that in four years of day-long monthly meetings, no one ever raised the effect on crime of a policy as a reason for changing the policy. This seemed at the time a sensible judgement of the limited significance of my discipline. By the early 1990s, however, I was convinced that we could abolish long-term unemployment and that the long-term effects on crime and drug abuse were important parts of the reason why the considerable economic costs of doing so made the Job Compact sound economic policy.

Economics as a discipline cannot comprehend the latter arguments because its models of unemployment and crime are simply about the costs and benefits of crime measured against the costs and benefits of employment. They miss the main game of how the demoralization of unemployment ruins lives of the children of the unemployed, through the medium of abusive and uncaring parenting by adults who have lost hope (Weatherburn and Lind forthcoming). Economics might be reformable if its micro-foundations were sensitive to empirical evidence from the discipline of psychology as to how economic behaviour is motivated. But not only is that sensitivity largely absent, also largely absent are psychologists interested in confronting it.

To be good scholars of the institutions of the new regulatory state, we need to be able to draw on analytic strengths and empirical revelations from disciplines like economics and psychology, as well as from the disciplines of sociology, criminology and political science upon which we have drawn in the foregoing pages. But we also need to integrate normative theory from the discipline of moral philosophy with our explanatory theory (Braithwaite forthcoming). If we do not, we will continue to live in a world where moral philosophers do work relevant to possible worlds that do not or cannot exist. And explanatory theories such as those of deterrence and incapacitation will continue to generate data that are not useful to any morally acceptable policy project. Social science is likely to be sterile without what Parker (1999: 6) calls 'iterated adjustment' between normative and explanatory theory.

We must also learn from the discipline of international relations, given that the risks the new regulation tackles are so frequently global. In doing so, hopefully we can avert the ingrained assumptions of international relations theorists that states are the actors that matter and can be understood as unitary actors. All these disciplines are afflicted with assumptions of this ilk that discipline young minds into myopic methodological dispositions and channels of thought.

A key to progress is to keep constructing new paradigms that sweep across the disciplines in ways that are responsive to new realities of the world, but that fade, like Keynesism, when those realities change. The disciplinary structure of the social sciences is its biggest problem. Criminology as it rises to the heyday of its popularity has now become part of that problem. The work at the Community Peace Foundation in Cape Town and of the University of Toronto criminologists toward fostering a morally grounded comprehension of the new regulatory state seems part of the solution. Like Foucault in the years before his death, they have discovered that liberal governmentality is a seminal topic. Like Hayek, they have discovered that the key public policy nut to crack is the ordering of local knowledge. Their method has an empirical precision that Foucault's lacks and a praxis grounded in an iterated adjustment of explanatory and normative theory that Hayek lacked. This is why my hope is that the new regulatory state scholars will advance the social sciences in more important ways than the Foucauldians, the Hayekians and the positivist economists.

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