

# Review Essay:

## *Crime, Risk and Money*

*The Currency of Justice: Fines and Damages in Consumer Societies*

Pat O'Malley, Routledge-Cavendish, Oxford, 2009, 187 pages (ISBN 978-1-84568-112-8)

*Crime and Risk*

Pat O'Malley, Sage, London, 2010, 120 pages (ISBN 978-1-84787-351-4)

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Sharing some closely related themes and a common theoretical orientation based on the governmentality analytic, these are nevertheless two very different contributions to criminological knowledge and theory. The first, *The Currency of Justice: Fines and Damages in Consumer Societies (COJ)*, is a sustained and highly original analysis of that most pervasive yet overlooked feature of modern legal orders; their reliance on monetary sanctions. *Crime and Risk (CAR)*, on the other hand, is a short synoptic overview of the many dimensions and trajectories of risk in contemporary debate and practice, both the practices of crime and the governance of crime. It is one of the first in a new series by Sage, 'Compact Criminology', in which authors survey in little more than a hundred pages some current field of debate. With this small gem, Pat O'Malley has set the bar very high for those who follow. For all its brevity, *CAR* traverses a massive expanse of research, debates and issues, while also opening up new and challenging questions around the politics of risk and the relationship between criminal risk-taking and the governance of risk and crime. The two books draw together various threads of O'Malley's rich body of work on these issues, and once again demonstrate that he is one of the foremost international scholars of risk inside and outside criminology.

I will focus first on the longer book, for this is ground which might be said to be less familiar to criminologists, or perhaps so apparently familiar that it is lost in plain sight.

The fine was of theoretical interest to classical penal thinkers, notably Cessare Beccaria and Jeremy Bentham, and Rusche and Kirchheimers' Marxist analysis of punishment in the 1930s did not overlook it (1939). However, with few exceptions, one being Tony Bottoms' landmark 1983 essay (Bottoms, 1983), criminologists have since shown almost no theoretical interest in monetary penalties (see Carlen and Cook 1989 and especially the chapter contributed by Peter Young). As O'Malley points out, this is despite both their growing centrality to legal governance in the modern world and the availability of some promising conceptual tools for analysing monetary sanctions in the classical sociology of Georg Simmel and Emile Durkheim.

In *COJ*, O'Malley points out that monetary sanctions are by far the most common penalties imposed by criminal courts in all western countries barring the US. Close to 50 per cent of offenders dealt with by magistrates in NSW each year are given a fine as their principal penalty. Fines are rarely imposed by higher criminal courts, but these courts handle no more than 3 per cent of all cases. In addition, for every fine imposed by a court, perhaps as many as five to ten violations are subject to on-the-spot fines imposed without reference to a court, and monetary damages are the principal remedy imposed by civil courts. One of the great advantages of *COJ* is that his interest in money and justice leads O'Malley to a consideration of civil and criminal sanctions *together*; whereas the preoccupation with disciplinary punishments, and especially prison (a penalty imposed on a tiny minority of all offences), has led most criminologists to emphasize the differences and ignore the connections.

In a market society, the very ubiquity of money, its undifferentiated character and its apparent 'meaninglessness' (or capacity to bear so many different meanings) make it attractive as a means of punishment, if at the same time they impose limits on the capacity to punish through money. Money sanctions are highly flexible, infinitely gradable, reversible in the event of injustice, and can be administered at low cost (or even so as to be revenue generating). They can be penal, compensatory or regulatory in nature and purpose. They are readily understood as imposing a hardship but one which is not excessively disruptive to the lives of wrongdoers. The costs can often be transferred or spread, through liability insurance or by pricing, as can the benefits where revenue from fines supports other government programs and services. This points to the ease with which sanctions using money, unlike those that assault liberty, dovetail with the circuits of economic, political and social life. They appear as ideal penalties for a liberal society because they leave the general liberty of the subject intact, a point that was not lost on classical penal thinkers like Beccaria and Bentham who were strong advocates. Critically it is these qualities that have enabled monetised justice to assume the central role in the regulation of vast swathes of social and economic life in modern societies. Should such regulation be undertaken by almost any other imaginable means, it would carry prohibitive and/or politically unacceptable costs. Court-administered fines allow expensive, time-consuming legal procedures to be curtailed, support the extension of summary proceedings in place of trial on indictment, often dispense with the need for alleged offenders to appear in court and encourage guilty pleas. Regulatory fines, in the form of infringement or penalty notice regimes, go a step further by creating an 'opt in' system which takes a vast range of minor offences out of the courts entirely. These developments allow for the legal processing of mass violations at low economic and political cost.

According to O'Malley, it is the rise of consumer society, particularly since the Second World War, which provides the vital conditions for mass regulation based on monetary sanctions. Where the great majority of people in consumer societies enjoy surplus income and consumer markets reach into just about every pocket of existence, and where personal identity and self worth are increasingly bound up with consumption, people can both afford to pay monetary sanctions and are encouraged to see them in much the same light as other routine costs of modern living (like commodity prices, taxes, licence fees, tolls, etc). They are to be weighed against both competing demands on expenditure and the benefits to be gained from the prohibited activity in question. Stripped of any moral meaning or element of condemnation, the penalty becomes literally just another price.

What this means is that monetised justice does not, for the most part, govern crime and other risks by seeking to eliminate wrongful behaviour altogether or by disciplining and correcting offenders. Rather, by imposing a price on infringements, it aims only to modulate levels of offending behaviour, controlling the flows and distributions of offences rather than punishing, condemning and/or treating individual offenders. This represents a major departure from the normalising mission at the centre of penal modernism. This is manifest in that money sanctions, perhaps uniquely among modern punishments, dispense with the requirement that the offender bear the burden of the penalty. The law does not insist that it is the offender who is punished. The law requires payment, but is indifferent as to who makes it. This is what might be expected in a system reliant on an abstract, universal medium like money, where sourcing payment and tracking monetary movements present almost insurmountable obstacles.

Moreover, in the case of infringement notice systems, liability commonly does not attach to an individual at all, but to a status, capacity or what O'Malley (following Deleuze) refers to as a 'dividual', like that of driver, owner, etc. Penalties are uniform, fixed and graded according to risk category: e.g. x amount for driving 0-15 kph over the speed limit plus a loss of y demerit points. The personal characteristics of the offender play no part. In some circumstances the 'dividual' will in the first instance be liable whether or not the person behind the status is the actual offender (e.g. the registered owner of a vehicle caught on a speed camera who may not necessarily have been the driver at the time). Conduct is regulated through the digital traces left behind as we routinely access the many sites of daily activity. Drivers' licences, car registration numbers, credit cards, swipe cards, and so on are increasingly essential passports to the exercise of our daily freedoms, particularly the freedoms associated with consumption. So:

...governance is increasingly effected through immanent regulation: regulation that is built into the activities and process of everyday life rather than being exercised in the domain of disciplinary institutions...We circulate in this securitized system not as disciplinary individuals, but as 'dividuals' – two-dimensional identities stripped of personality (we might say), of motives and intentions. (Deleuze 1995:25–6)

Again, money's abstract, undifferentiated character is essential to the workings of such regulation, which also conduces to the automation of the entire justice process where regulatory penalties are concerned. An automated process centred on monetary penalties also dovetails neatly with other risk-based measures centred on the 'dividual', which are activated at higher thresholds of risk, for example automatic licence suspension upon the accumulation of demerit points. The emphasis remains on incapacitation in relation to the risk behaviour in question, rather than any sort of correction or discipline aimed at the individual offender, although this may take effect at some later point. If, for example, the offender appears in court for driving without a licence, punishment is more likely to be individualised and perhaps involve elements of moral condemnation, deterrence, deeper incapacitation and perhaps rehabilitation, although the last appears increasingly to involve risk management techniques in place of the old focus on normalisation and correction.

In the middle section of *COJ*, O'Malley traces the rise of this monetised mode of justice, centred on the regulation of risk, through chapters examining the expansion of penal fines in the 20th century at the expense of short prison terms whose correctional efficacy was increasingly doubted; the advent of penalty notice systems and regulatory fines (especially in relation to motoring); and the broad shift, particularly under the influence of liability insurance, from a fault-based, punitive system of civil law in the 19th century to one centred

overwhelmingly on compensatory damages in the 20th. One might also seek to locate imprisonment for debt—commonplace in the 19th century—in this genealogy. It is a reminder of the historical contingency of the prison's association with criminal punishment and of the punitive dimensions of 19th century civil law.

O'Malley depicts the general shift from punishment to regulation across both civil and criminal law in largely positive terms, for, among other considerations, it increasingly avoids a form of justice that involves the pointed setting apart of individuals, status degradation ceremonies and moral stigma. He resists the dystopian totalising image of the 'surveillance society' so often invoked in connection with new information technologies. He argues that monetised justice is more appropriately depicted as a technology of freedom adapted to the very character of consumer societies and the vision of freedom they hold out, in which the depersonalising character of money has served to weaken relations of social dependency, enlarge freedom of choice and increase opportunities for personal expression and fulfilment based on consumption. Regulation through money is fluid and unrestricting; if controls are (as Deleuze argued) immanent to daily life, they nevertheless afford substantial leeways of individual choice; 'to park, pay and display', or simply to park and take the risk of having to pay a bit more later. The punitive controls of the security state that operate to single out and stigmatise individuals only operate on the outer perimeter of this regulatory system.

There are limits of course, which O'Malley also discusses. First, the impersonal character of monetary penalties appears to make fines morally and culturally inappropriate to some crimes—seriously violent or sexual—of a deeply personal nature. Putting a monetary value on such offences appears to be subversive of the integrity of the human body and of personhood (Young 1989). It is not therefore surprising that fines are so little used in the higher criminal courts which process the most serious crimes. Second, while monetised justice works very smoothly for paying customers (so to speak), it has its limits when confronted with those outside or marginal to the circuits of consumption. The unequal burden on the poor and inability to pay have been perhaps the most common concerns in policy debates about the fine, especially when default serves to convert a penalty rather bereft of meaning into another penalty; imprisonment, laden with (punitive) meaning. A variety of measures, including legal requirements to take account of means, provision for time to pay and day fine systems have been adopted to mitigate these effects. Current arrangements in most Australian jurisdictions ensure that imprisonment is now a remote prospect in the event of fine default. Nevertheless, the administrative rationality of 'risk-based recovery' that applies in NSW may raise other significant difficulties for the failed consumers of monetised justice, whose plight is likely to remain a low visibility concern in any system from which incarceration has been substantially removed. These are issues to which I will return after considering some of the arguments in *CAR*.

Criminological oversight in relation to monetary sanctions may be related to the predisposition of criminologists, especially those of critical bent, to assimilate developments in penalty, policing and the governance of crime to what David Garland called 'the culture of control' (Garland 2001). In one of the few major theoretical analyses of the fine since the 1980s, Tony Bottoms (1983) pointed to an earlier version of this tendency which saw concerted critical attention given to developments in community corrections, with this being depicted as an extension of disciplinary power into the interstices of society, yet at the same time there was no acknowledgement, let alone analysis, of the fact that overwhelmingly the most common and fastest growing sanction (the fine) was non-disciplinary in nature. In

*CAR*, O'Malley also spots and regrets this reductionist tendency in contemporary social theories and analyses of risk where the predominant focus is upon some exemplary measures—'three strikes' laws, zero tolerance policing, electronic surveillance, curfews, Megan's Law—which are taken as evidence that the ascendancy of risk is inescapably negative and controlling in its implications.

He does not discount the evidence for the malign role of risk in these developments. Yet, as his entire analysis of monetary sanctions is designed to show, many risk measures hardly fit this dystopian thesis, but if rendered invisible (as the fine has been) they can leave a lop-sided analysis intact. Other developments around risk—like harm-minimisation policies in relation to drugs, developmental crime prevention, risks/needs programs in prisons, restorative justice, etc.—he suggests also carry promise of a more positive deployment of risk in the governance of crime. In *CAR*, he urges the abandonment of theoretically induced pessimism in favour of a more open, more discriminating and more experimental attitude to risk in all its diverse dimensions and manifestations. We are enjoined to embrace risk. Having no pre-determined and singular meaning and belonging (to the culture of control, neo-liberalism, etc.), he argues the trajectory of risk-based measures will be governed in significant part by the *politics* that are brought to bear on risk. It is necessary to be specific, therefore, about the role that risk plays in particular measures and strategies of crime governance and to recognise the various ways in which it might be appropriated, subjugated or resisted in particular political and moral agendas. Sometimes—as with zero tolerance policies—it may reflect little more than a gloss on punitive and populist measures. It might also be added here that some apparently risk-based measures allow for the sending of very different messages to different audiences. Preventive detention of sex offenders and increasingly restrictive, risk-based bail laws may be legitimised within the relevant branches of government (correctional authorities and the judiciary) in the amoral, technical and scientific language of risk while a very different, emotive and moralistic rhetoric is aimed at the public to reassure them that this is about banging up sexual monsters, violent thugs and recidivists.

O'Malley suggests that it is with the development of a democratic politics of risk that much work remains to be done. This should reflect and build on an acceptance of certain other features of risk in the contemporary world, including in relation to new forms of risk-taking behaviour (whether licit, like extreme sports, or illicit, like binge-drinking or street car racing). These, he suggests, should not be seen as symptoms of social pathology, nor as attempts to wrestle back a sense of personal control and mastery in an age of widespread insecurity, alienation and powerlessness. Rather, they may reflect a sort of democratisation of risk-taking that was formerly more reserved to narrow elites. This is also apparent in the decriminalisation of many offences (gambling, public drunkenness, vagrancy, swearing) that were associated historically—at least in their problematic forms and habitats—with the rough working classes and with efforts to discipline and moralise them to the norms of self-restraint, frugality, diligent labour and delayed gratification of an industrial capitalist civilisation. These, O'Malley argues, should be welcomed as freedom-enhancing developments, driven in no small part by the rise of a consumer market society since the Second World War.

There is no more practical symbol or manifestation of these social and economic changes than the democratisation of one specific form of commodified risk-taking in particular. The spread of car ownership to all classes, and especially to the young, delivered a hitherto undreamt of personal mobility to masses of people. More than just a mode of transport, the

car became a cultural artefact that buttressed identities centred on individualism, personal expression and masculine prowess and competitiveness. It was also linked, practically and symbolically, to other freedoms (and risks) like those associated with sex and with the consumption of alcohol. It loosened familial constraints, weakened the ties of neighbourhood and community and helped reconfigure the built environment around the development of 'divergent cities' in which criminal opportunities proliferated. And as O'Malley shows in *COJ*, it re-focussed the preponderance of criminal justice activity away from the street and onto the road. It aided the expansion of the insurance industry and drove the rise of a monetised system of risk management in the second half of the twentieth century. Since the 1970s, neo-liberalism's promotion of the market and a society of active risk-takers has further valorised the shrugging off of constricting moralities, the kicking over the traces, and the pursuit of pleasure, excitement and personal expression through consumption.

O'Malley does not express unqualified approval for all these developments but argues that a risk-taking criminology should embrace the positive potentialities opened up by risk rather than obsessing only about its negative features and manifestations. Risk, he suggests carries considerable possibilities for 'tolerance' (p84). So, what in current circumstances, are these possibilities—or 'lines of flight' to reiterate his invoking of Deleuze—that might point to the potential for developing a democratic politics of risk? In the final chapter of *CAR* he points to two.

One relates to the democratic governance of crime risks through community-based crime prevention and community justice. The essence of any politics is that it provides space for contestation. This carries the potential to democratise risk by challenging the hegemony of technical-managerial expertise in the shaping and deployment of risk technologies, a hegemony that rests in large part on the appearance of objectivity and technical sophistication conferred by statistical and actuarial knowledges. As with all crime data, this cloaks the underlying value assumptions and political processes involved in the production of such knowledges. Amongst others, women, racial minorities, and gays have frequently challenged the definitions of risk embodied in these practices and pointed to the ways in which the meanings and experiences of risk, danger and victimisation in the lives of some are submerged and discounted, how some risks are amplified and others de-amplified by processes that are deeply political.

To demonstrate the prospects for such a democratisation of risk, O'Malley draws on the work, amongst others, of Clifford Shearing and his colleagues on the mobilisation of communities in the South African townships and in other African and third world settings to define and confront the risks facing them. Of course, these are settings in which the governance of crime was inescapably and overtly political. In South Africa, it primarily operated in the service of a system of rule, apartheid, which was itself a crime against international law. In the process of transition, a prisoner was released to become president and police and prison guards were called to account for their crimes, which they frequently had not seen as crimes, but as protecting the state against terrorist threats to its existence. Those who formerly held the reins of state power feared dispossession, violent reprisals and worse. Where there is no shared narrative of risk it is necessary to experiment with something new: to seek to 'create a justice where, no matter how difficult, the future takes precedence over the past' (p96). This could mean, most radically, challenging the very victim/offender binary that lies at the heart of the construction of crime risks, supplanting it

with a 'stakeholder approach' that encourages all the various conflicts of interest and value to be brought into the open to be dealt with.

These experiences are instructive in relation to the potential for peace-making in divided societies, but it is less clear what lessons they carry for 'advanced liberal' states, lacking the sort of communal solidarities and wellsprings of collective action that racial, ethnic and religious polarisations tend to foster. Moreover, the rise of consumer societies (not such a feature of the third world) has, as O'Malley points out elsewhere, dramatically liberated individuals from older collective constraints and solidarities in western societies. As one barometer, membership of political parties and associations like trade unions has declined steeply in recent decades. Perhaps this is one reason why O'Malley commends looking initially for sites of democratic experimentation at the local level rather than the central or national level.

The other 'line of flight' for a democratic politics of risk suggested by O'Malley involves a dramatically different focus. He argues for the further development of the monetary sanctions analysed in *COJ* and briefly rehearses their attractions as a system of risk management; in particular that monetary sanctions regulate levels of risky conduct while avoiding stigmatising, intrusive forms of intervention against individuals and without imposing huge financial costs on the state and taxpayers. They can be used in combination with other measures (like licence suspension or disqualification) which are triggered when thresholds of acceptable risk are reached, but which only in the last resort affect the general liberty of the individual.

There could hardly be a greater contrast than between this highly centralised, substantially automated and impersonal risk regime and crime prevention and justice processes based on local participation. One of the claimed advantages of the former is precisely that they do not necessitate participation of any kind in the justice process beyond paying up. It is therefore difficult to see how a monetised regime of justice that engages 'dividuals' harbours any great potential for a democratic politics of risk. Rather, it reflects the triumph of an administrative logic in which a significant premium is imposed on any discussion or contention whatsoever.

This does not mean that there is nothing going on here that is worthy of contention or a politics of risk. There is the question that is stirred from time to time of how far in such monetised risk measures social risks (like those associated with motoring) are subjugated to fiscal considerations. One dimension of this relates to the extent to which enforcement becomes governed, not by the social risks involved, but by the technical requirements of risk management. In the domain of motoring, offences like speeding and prescribed concentration of alcohol, where risk is amenable to quantification and automation (speed cameras), or mechanisation (breathalysers), appear to take massive precedence over enforcement of older offences like 'furious', 'dangerous' or 'negligent' driving (except, perhaps, where the latter result in accidents). These priorities do not necessarily correlate with the risks involved and they place less emphasis on encouraging individuals to be responsible drivers than to know where speed cameras are located or in what back streets you are most likely to avoid breathalysers. There are also questions of the differential, and for some far-reaching, impact of financial penalties and, even more so, default measures like licence suspension. Under certain conditions (e.g. geographical isolation), and for some groups and individuals, this can entail a major disruption of the taken-for-granted freedoms now associated with car ownership and the personal mobility it provides, threatening employment and other serious consequences. In other words, risk is managed through a

system in which the costs are designed to be fixed and uniform, but they necessarily vary enormously in their impact depending on context.

Under current arrangements in NSW, the collection of fines and infringement notice payments is merged with general state debt recovery processes and is administered by the State Debt Recovery Office, now a branch of the Office of State Revenue in the NSW Treasury. A 'risk-based recovery' system involving graduated administrative sanctions is applied to all debts whether they relate to penal or regulatory fines, payment of court fees or some other civil debt. The hierarchy of sanctions includes reminder notices, enforcement orders (involving imposition of an enforcement fee), Roads & Traffic Authority (RTA) sanctions (suspension of driver's licence or car registration), property seizure orders, impositions of Work and Development Orders, community service orders and the ultimate sanction of imprisonment (*Fines Act 1996* (NSW)). There is provision for hardship appeals and applications for time to pay. The SDRO states that it operates 'a comprehensive compliance system based on risk analysis and data matching' in order 'to ensure the integrity of the fines system' (Office of State Revenue, NSW Treasury 2009:30). RTA sanctions in particular appear to be very effective at increasing the recovery rate early in the chain of enforcement (Audit Office of NSW 2002).

What is clear is that 'risk-based recovery'—managing the risk of non-payment—has subsumed the risks which attract the monetary penalties in the first place. Failure to pay in response to an enforcement order issued by the SDRO will automatically result in suspension of a driver's licence, whether the default relates to a penalty for a driving or parking offence, or for failure to vote in a local election, or failure to pay some other outstanding fee. One debt appears and is treated like any other. The civil/criminal distinction is at this point dissolved and, ironically, the risk (albeit remote) of imprisonment for debt has been restored and will be imposed not by a court but by a revenue agency. No meaningful connection between offence (the risk) and the sanction is required. As against this, a politics of risk would insist that one risk is not necessarily like another, the purpose of such a politics being to reveal and address the different forms, levels and meanings of risk; however, in a monetised and automated regime of risk, all risk is homogenised as debt and a heavy price (relatively speaking) is imposed on contestation. The political deficits may be the cost that has to be paid for the benefits offered by such a risk regime, but there is little point assuming that extended monetisation and extended democratisation are in any ready sense mutually supportive.

So there is a tension here between the urging of a democratic politics of risk and the essentially favourable account of those large-scale social, economic and political changes—the advent of a consumer society and the spread of monetised risk management—that arguably have contributed to eroding the bases for such politics. Without falling back into the disempowering theoretical pessimism O'Malley so effectively criticises in both books, there is nonetheless a need to analyse some of the less palatable features, effects and indeed risks of advanced consumerism (especially in light of the vulnerabilities associated with indebtedness exposed by the sub-prime collapse in the US and the GFC: see Stiglitz 2010).

Consideration might even be given to the contingency that some of the anxieties induced by consumerism (e.g. the pressures and insecurities created for wide sectors of society by large-scale debt) are linked to popular resentments, collective victim mentalities and vindictiveness that narrow and harden collective identities and fuel punitive sentiment. It is possible that exemplary punishment (the spectacle of suffering being inflicted on deserving others) is one other thing that many people want to consume more of. This may be a further



instance of the vicarious satisfaction of the desire for excitement, risk and danger valorised in consumer societies. If such desires in any way focus on the drama of doing justice (and the attention accorded them in entertainment and news media suggest they do), then the rather seamless, sanitised and de-dramatised justice delivered by monetised risk management obviously has a limited capacity to meet them. If this were the case it might explain the simultaneous growth in both incarceration and monetary penalties in contemporary consumer societies.

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