

**SEEKING ALTERNATIVES FOR CRIMINOLOGY:
THE IMMIGRATION AND REFUGEE BOARD PRACTICES
ON THE REGULATION OF IMMIGRATION IN CANADA**

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For my family

For all those subject to borders and boundaries

in academy and especially in real life

ABSTRACT

Administrative justice is traditionally considered as the main alternative to the criminal justice system when a certain illegality is decriminalized or not enforced by criminal justice institutions (e.g. the regulation of elite deviance, urban disorder, mental health, etc.). This doctoral thesis studies how the conflicts related to immigration are being managed in the largest administrative tribunal in Canada: the *Immigration and Refugee Board* (IRB). It asks how exactly does immigration justice, and administrative law more broadly, constitute an alternative to criminal justice in terms of social reaction, and what kinds of challenges does this alternative present for the study of social control. This research takes a qualitative approach based on documentary analysis and long-term ethnographic fieldwork conducted at the IRB between 2007 and 2009. It uses its own theoretical framework building on post-structural perspectives, including Bourdieu's constructivist structuralism, governmentality and nodal governance studies, left realism and political economy of punishment. In the empirical part of the thesis, I present some of the characteristics of the legal translation of conflicts in immigration law, including the forms and logics of punishment involved and how immigration law is practiced at the tribunal. I argue that administrative adjudication and punishment differ substantially from criminal law regimes and I question the idea of criminalization (of immigration) as a category capable of nuancing the complexity of administrative forms of social reaction. Instead, I suggest that we should take these forms of punitive social reaction as they are, and study how they operate along, beyond and in addition to criminal law. I propose an integrated conception of the penal complex which works as a mobile (kinetic sculpture) and includes the criminal law realm, but also other normative systems that configure 'less' prominent locations of punishment playing an increasing role in social reaction. I conclude by proposing a new reading of selectivity of justice and penal policies, and consequently, a new agenda for criminology and criminologists. In this new agenda, the penal complex should be taken as a totality in order to promote broader and combined propositions for law reform and resistance to punitiveness.

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LIST OF ACRONYMS

Canada

ADR – Alternative Dispute Resolution
CBSA – Canada Border Services Agency
CIC – Citizenship and Immigration Canada
CIMM – Standing Committee on Citizenship and Immigration of the House of Commons
CISC – Criminal Intelligence Service Canada
FCA – Federal Court of Appeal
FCC – Federal Court of Canada
H & C – Humanitarian and Compassionate Grounds of Appeal
IAD – Immigration Appeal Division
ID – Immigration Division
IRB – Immigration and Refugee Board of Canada
IRPA – Immigration and Refugee Protection Act
IRPR – Immigration and Refugee Protection *Regulations*
JD – Judicial review
NDP – National Documentation Packages
PIF – Personal Information Form
PSC – Public Safety Canada
RAD – Refugee Appeal Division
RCMP – Royal Canadian Mounted Police
REB – Research and Ethics Board of the University of Ottawa
RPD – Refugee Protection Division
RPO – Refugee Protection Officer
SCC – Supreme Court of Canada
SPVM – Service de police de la Ville de Montréal (Montreal police)

United States

CIA – Central Intelligence Agency (U.S.A.)
DHS – Department of Homeland Security (U.S.A.)
FBI – Federal Bureau of Investigation (U.S.A.)
ICE – Immigration and Customs Enforcement (U.S.A.)

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INTRODUCTION:

BEYOND BORDERS AND BOUNDARIES

[En définitive], les frontières ne sont que des coups de crayons sur des cartes. Elles tranchent des mondes mais ne les séparent pas. On peut parfois les oublier aussi vite qu'elles furent tracées.

- Philippe Claudel: *Le rapport de Brodeck* (2007: 262).

The 1960s were an epoch of multiple and intensive changes throughout the globe, from East to West, and even above, up to the moon. In the criminological field, the 1960s marked the emergence of a new way of approaching the object of criminology. From the eighteenth century to the 1950s, criminologists were primarily interested in explaining the causes of crime and/or criminal behaviour (etiological model), regardless of whether the causes were biological, sociological, moral, psychological, ecological, economical or more elaborately: multifactorial (i.e. Sutherland's differential association theory; 1992)¹. In the 1960s and 1970s, the focus of criminological inquiry changed substantially from the aetiology of crime to the construction of the criminal phenomenon and how society reacted to it institutionally. Sociological and legal studies, from symbolic interactionism, ethnomethodology, constructivist and Marxist perspectives, restructured in significant ways the field of studies of crime and social control and criminology as a discipline, imposing a divide between traditional criminology (i.e. etiological paradigm) and new criminology or critical perspectives in criminology (i.e. the study of social reaction and/or social control) (Taylor et al., 1974; Young, 1988; Landreville, 1986; Pires, 1993; Pfohl, 1994).

The rise of a new criminology did not mean the disappearance of traditional criminology, but the creation of a schism in the discipline with these two models developing in parallel. While certain scholars claimed that there was an opposition and/or dichotomy between these two approaches, it is perhaps more accurate to acknowledge that the coexistence of paradigms is

¹ Despite the relative avant-gardism of early twentieth century scholars such as Edwin Sutherland and Georg Rusche, whose work would become very important to the emerging new criminology, these scholars were still much more interested in studying the causes of crime rather than how crime was constructed and/or what and how was the social reaction to deviance structured.

² I use the term "immigration justice" as a contraction of immigration justice system. This term is rarely used at the IRB and in immigration law scholarship; the broader term "immigration system" is used more often in the immigration field. However, "immigration justice" is very useful when comparing with criminal justice²

something perfectly normal in the social sciences. The aetiological model (*la criminologie du passage à l'acte*) and the social reaction approach are not necessarily mutually exclusive: crime prevention and victimology for instance, very often mix the study of causes with the study of social reaction. Their opposition is perhaps more political than intrinsically epistemological: it is a question of identity in the academic field (Bourdieu, 1967, 1969, 1984b). Criminologists working within a critical perspective (and anyone working on social control is usually considered as being critical) can hardly affiliate with traditional criminologists and vice-versa.

Both models are nevertheless criminocentric, that is, centered on the categories of crime, criminal justice and penalties (*peine / poena*). However, the social reaction approach is more open to the study of non-criminal forms of judicialization and legal punishment. This has precisely been my main research interest since my Master studies and has culminated in the reflection presented in this Ph.D. dissertation. The category of crime, as the object of criminological inquiry, became highly disputable after the rise of constructivism and conflict theories, at least within the social reaction model. This opening is all I needed to justify academically the study of the immigration justice system in Canada within criminology, to be read by my peers and to question and to nuance the boundaries of criminology internally. Immigration justice² is an ideal topic to explore how punitive social reaction occurs at the administrative law level. The Canadian immigration regime is independent and distinct from criminal justice and may react to a deviant behaviour without accessing any criminal justice

² I use the term “immigration justice” as a contraction of immigration justice system. This term is rarely used at the IRB and in immigration law scholarship; the broader term “immigration system” is used more often in the immigration field. However, “immigration justice” is very useful when comparing with criminal justice because it allows more nuances than the term “immigration system”.

institution – and this is true even in the case of criminalizable behaviours. The immigration justice system is not regulated by crime-related normativity, such as that which occurs in the regulatory regimes that are used along with criminal justice to control legally polysemic criminality³ (e.g. white-collar and/or corporate crimes). Consequently, the study of immigration justice and its practices on the regulation of immigration in Canada moves a step further in the social reaction scholarship by nuancing administrative law styles of legal translation/ judicialization and of punishment in their own specificities⁴.

Thus, this dissertation is situated within the social reaction paradigm, trying to push this paradigm to its limits by studying social reaction beyond the boundaries of criminal justice as well as the punitiveness involved in such processes. More precisely, my doctoral thesis addresses the following question: how exactly does immigration justice (and administrative law more broadly) constitute an alternative path to criminal justice in terms of social reaction and what challenges does this alternative present for the study of social control and critical criminology? In order to pursue this research agenda, I decided to focus on the Immigration and Refugee Board of Canada (IRB), which is the “largest independent administrative

³ Certain problematic situations are legally polysemic, being regulated by different normative systems at the same time and not only by the usual formal sources of criminal law (i.e. Criminal Code, Regulations and other complementary statutes). The classic example of such privileged illegalities (Acosta, 1988) in the criminological field are white-collar and corporate crimes, but technically any criminalizable behaviour may be legally polysemic, being covered by more than one normative regime.

⁴ As a rule, criminological elite deviance studies are still too anchored in crime-related categories and do not focus in-depth on the actual judicialization of such illegalities in administrative and regulatory regimes. In this sense, their contributions are sometimes biased and limited by approaching the phenomena in function of crime (both from the etiological and social reaction perspectives).

tribunal”⁵ in the country as well as the entry level tribunal in the immigration justice system. The IRB deals with all kinds of immigration cases: refugee determination, admissibility (removal orders), detention reviews, sponsorships (family reunification), appeals, etc. The heterogeneous character of the tribunal and the fact that it is completely different from criminal justice made the IRB an ideal laboratory to think social reaction through administrative law.

The administration of conflicts through administrative law follows different processes and complex logics. On the one hand, administrative law can be considered as an institutional alternative for conflict resolution, but on the other hand, it does not mean that this alternative is not penal. This is the tricky (and most important) finding of my research: alternatives to the criminal justice system are part of a broader, pluralistic and integrated conception of the penal field. Non-criminalization or even decriminalization may be (and usually is for almost any kind of offence) a form of penalization through other judicial or legal means. Therefore, administrative law should be understood as only one of the various paths of institutional conflict resolution that can be possibly accessed by the Crown or by an equivalent state prosecution agency aiming at the infliction of legal punishment. It is one of many possible outcomes of the legal translation of an event (Acosta, 1987, 1988; Shapiro, 1984, 1985; Delmas-Marty & Teitgen-Colly, 1992). Therefore, the question is not whether or not or even how these other normative systems constitute an alternative to criminal justice, but rather how their practices constitute different ways of inflicting legal punishment through non criminal law forms of legal translation. As a result, the empirical part of this dissertation is about how an administrative style of punishment works in immigration and refugee law,

⁵ <http://www.irb-cisr.gc.ca/Eng/BoaCom/Pages/index.aspx>, last accessed 2013-12-12.

acting as a complement, supplement and in addition to criminal law.

On a theoretical level, my thesis aims to show how these other forms of legal punishment can contribute to revising the central role of criminal law within the social reaction paradigm in criminology and penology. I am not trying here to reconcile the two models of criminological inquiry (etiology and social reaction), quite on the contrary. In the early 1990s, Alvaro Pires and Françoise Digneffe (Pires & Digneffe, 1992; Pires, 1993) proposed a new paradigm that tried to integrate both models (i.e. *inter-relations sociales*). This paradigm was however challenged by some continental scholars because, in its effort to unify the object of criminology, it ended up centralizing criminological inquiry too much around the idea of crime (Robert, 1995; Van Oustrive, 1995; Mucchielli, 1999). It is no coincidence that such challenges came from continental scholars because of the lack of institutionalization of criminology as a discipline in their respective countries, an academic context where there is no need to delimitate and justify the existence of criminology (Mucchielli, 2010a, 2010b). Clifford Shearing raised similar objections a few years earlier at the Department of Criminology of the University of Ottawa in a different academic context (i.e. criminology existed institutionally and this was not in question) and about a different topic or approach (policing studies). Interestingly, Shearing suggested at the time that whatever unified the topic of criminology, “it was not crime” (Shearing, 1989: 171). My proposal here is more in line with Shearing’s suggestion to decriminalize criminology, but approaching it from social reaction in justice institutions (and not in policing or governance). Therefore, by nuancing the penalization processes in the immigration regime, I propose a new or complementary way of doing criminology within the social reaction paradigm: a criminology that also contains administrative law-based *dispositifs* (Foucault, 1995) on their

own terms, logics and legal sensibilities⁶.

While I had initially planned to study the uses of administrative law by focusing on white-collar criminality and on related forms of elite deviance, I ended up focusing on immigration and refugee law mostly because of data accessibility. At the beginning, this choice was essentially a matter of scale and frequency of cases as the IRB is a sizeable tribunal and it functions on a regular basis. The administration of immigration and refugee conflicts was simply much more observable than any kind of elite deviance case that only very sporadically reached criminal courts. It offered a better sample of the uses of administrative law as an “alternative” or at least as a non-criminal institutional path of conflict resolution or social reaction. Later, while I was in the field, I realized that the heterogeneity of cases and procedures also helped me grasp the nuances of administrative social reaction.

My research was developed following three steps with the use of complementary qualitative methods. First, I gathered documents (e.g. legislation, reports, decisions, IRB guidelines) and engaged in documentary analysis. Secondly, I gained some legal training in immigration and refugee law and conducted informal fieldwork in its justice institutions. Thirdly, I conducted a long-term ethnographic fieldwork at the IRB. The use of these combined approaches enriched substantially my experience during the fieldwork at the IRB as I reached saturation points more easily than someone without specific legal training and

⁶ Clifford Geertz takes law as a form of local knowledge (1983), that is, a form of knowledge enacted by the continuous reinterpretation and reinvention in a particular cultural or symbolic context. In this sense, law is an ongoing constructivist process, in interpretative and constitutive terms. Geertz calls “legal sensibilities” the different senses that law takes in a given context. In other words, we can take this idea as the form, the common sense that law takes in action (Ewick & Silbey, 1998), an interactive process mediated by different forms of symbolic capital and practices that create and recreate law locally.

documentary knowledge. This allowed me to spend more time observing data that appeared “not new” (saturated data) and the continuous observation of such saturated data helped me perceive better the nuances of social reaction in the immigration justice system.

In order to do this research, I took a post-structuralist approach, borrowing elements from different social theories, such as Pierre Bourdieu’s structural constructivism, Clifford Geertz’s interpretative anthropology, critical criminology (Stanley Cohen, Nils Christie, Clifford Shearing, Louk Hulsman, David Garland, among others), Norbert Elias, Michel Foucault, elite deviance studies (Susan P. Shapiro, Vincenzo Ruggiero, Pierre Lascoumes and Lauren Snider) and socio-legal studies – more specifically, critical legal studies (Marc Galanter, Richard Abel, Duncan Kennedy and Roberto Unger) and legal anthropology (Paul Bohannan, Sally Falk-Moore, Laura Nader, Sally E. Merry, Susan S. Silbey, John M. Conley and William M. O’Barr). It is important to make explicit these theoretical influences at the outset because most of them are somehow exoteric to the criminological imaginary. The way I perceive law, power and conflict is not necessarily equivalent to the perception conveyed by mainstream criminological categories, even if my use of Bourdieu, Elias, legal anthropology and critical legal studies may look very similar to what became fairly hegemonic in critical criminology after Foucault’s writings. For instance, power for me is constitutive power in Elias (1982) terms (rather than in Foucauldian terms) with all of the implications for *habitus* and symbolic power – to use categories borrowed and developed by Bourdieu (1977, 1984a, 1990). The same thing can be said about law, as I essentially take legal anthropology and legal pluralistic perspectives, considering law as a symbolic system (culture) and as a semi-autonomous field. However, I do not take law and social reaction as something restricted to criminal law, as most criminologists tend to take for granted, or even

to State law, which is perhaps an even more unanimous posture in the criminological field⁷. Although the focus of my Ph.D. research is conflict resolution in the State law arena, I do operate beyond legal formalistic approaches. Finally, conflicts are not only desirable and pedagogical as Nils Christie (1977), Paulo Freire (1972, 1973) and many political and legal anthropologists have already suggested (Bohannan, 1967; Comaroff & Roberts, 1981; Falk-Moore, 1978; Gluckman, 1955, 1965; Gulliver, 1963; Leach, 1954; Nader, 1965, 1997), but they are also administered in every society by legal institutions (Bohannan, 1965) that are not necessarily mirrored by State-based institutions such as government, tribunals or the police⁸.

My objectives in this dissertation reflect the dualism present in my research question. On the one hand, I aim to contribute to the description of social reaction in the immigration justice system, a process of penalization that is distinct from criminalization, following different rules, practices and logics of punishment. My main empirical contribution is to approach and describe this form of legal translation internally, from an administrative law point of view and without trying to impose crime-related categories (e.g. criminalization of immigration) as it is usually done in the criminological field. On the other hand however, my findings – including the fact that criminalizable acts or criminalization are not necessary to trigger formal social reaction and penalization processes – appeared so problematic to fit within the existing criminological paradigms that I had to move a step further theoretically and epistemologically. Therefore, building on the contributions of elite deviance studies, nodal governance and political economy of punishment, I also aim to question the limits of the

⁷ The obvious exception to this is Nils Christie's "Conflict as Property" (1977), which is probably his most anthropological piece and which is also a classic reference in legal anthropology and conflict studies.

⁸ This was suggested by Shearing (1989) and many others since the late 70s and 80s within criminology.

social reaction paradigm and the boundaries of criminological inquiry and to contribute to the nuance and development of “a criminology of the non-criminal realm”. In order to do so, I ended up developing my own theoretical framework as well as a dynamic model of the Penal Complex (i.e. sites of punitive social reaction), which includes criminal justice and other normative systems that can be understood, to use Mark Galanter’s words, as “less prominent locations of punishment” (Galanter, 1991). This model, which is the result of my fieldwork at the IRB, offers new analytical lenses that may help criminologists to fully understand the implications of my description of the Canadian immigration justice system. In that sense, the IRB practices should not be read *per se*, but as part of a broader punitive and social reaction apparatus. The “penal as a mobile” (kinetic sculpture) model is possibly the most important conclusion and contribution of this dissertation, but I chose to present it before my field description and findings to give theoretical tools to the reader to go through the empirical part.

This dissertation is organized in four main dramatic units: (1) *Overture: Methodological and Theoretical Remarks*; (2) *Act I: The Immigration and Refugee Board of Canada*; (3) *Act II: Heterogeneities*; and (4) *Act III: Seeing the Real you at Last*. My intention is to emulate an opera, by which I mean a drama, a genre or a method designed to represent action that is highly charged with conflicts and emotions, about borders and boundaries and that is essentially performed by multiple voices (i.e. points of view). In short, it is a narrative about two main characters (immigration justice and criminal justice/ criminology) in action with an expected possibility of closure and/or reconciliation at the end of the text. I should mention here that I am (hopefully) more competent as an academic than as a dramaturge or a playwright, and that consequently this proposed structure is only an attempt to draw

attention and to provoke at some given moments of my description and analysis by the use of plots, subplots, a midpoint and a climax. The thesis narrative is dramatically structured around an introduction pointing to the main background elements (theory and methodology) and tensions of the play (the *Overture*), followed by a classic three-act structure. In *Act I* (the *setup*), I expose the main empirical topic (i.e. the IRB), culminating with a plot transitioning to the next act. *Act II* (the *confrontation*) is where I start to blur the boundaries of immigration and criminal justice/ criminology, developing the intrigue introduced at the end of the first act. A dramatic midpoint is present at the second part of *Act II* (i.e. Chapter 6), indicating a substantial shift in how the first plot is being developed and giving rise to a new plot. Finally, this dramatic saga reaches a climax (or anti-climax?) in *Act III* (the *resolution*), where I reaffirm the main tensions presented during the *Overture* in light of the empirical data from the first and second acts, giving a new sense of who the protagonists really are.

These four dramatic units (parts) contain seven chapters as follows: Chapters 1 and 2 (*Overture*), Chapters 3 and 4 (*Act I*), Chapters 5 and 6 (*Act II*), and Chapter 7 which is the conclusion and the sole chapter in *Act III*. Substantively speaking, each part has a theme and a prologue in its opening page like in this introduction. The *Overture* is the methodological and theoretical opening of this dissertation. It is an opening in both senses of the word: a beginning and an act of becoming (theoretically and methodologically) open to empirical data that is neither about crime nor about criminal justice. Chapter 1 (“Learning and Unlearning Criminology”) is my methodological chapter where I present the construction of my object and research question, how I approached them, the ethical issues that arose out of my fieldwork, how I entered in the field and how I dealt with interlocutors at the IRB. Chapter 2 (“Open Justices and Concurrent Systems”) is my theoretical chapter. I present an

epistemological and theoretical discussion about legal punishment and justice studies in Criminology and how they are traditionally and ideologically centered on criminal law despite all the historical and contemporary evidence that point in other directions. Further, I try to map sites of punitive social reaction and propose a broader and non-criminal centered penal complex that should be understood as a mobile-shaped dynamic structure that combines different realms of State law.

Act I: The Immigration and Refugee Board, is a brief ethnographic description of the field on how actors re-interpret and classify social representations in that particular symbolic system. It provides a detailed examination of the IRB organization and practices, its forms of conflict resolution and how they are in part legitimated by upper legal instances. Chapter 3 (“The Immigration and Refugee Board Organization: Norms, Jurisdiction and Enforcement”) focuses on the normative description of the IRB, its organization, what exactly is under its jurisdiction and what cases are managed by the tribunal (e.g. conflicts involving illegal immigrants do not reach the IRB). Chapter 4 (“Standards and Burden of Proof in Immigration Law: Penal Translation in an Administrative Style”) focuses on procedures and on how the events are legally translated by the tribunal (*mise en forme*: Acosta, 1987; Cousineau, 1994). This process of classification differs substantially from criminal adjudication and criminalisation. As a rule, there are less legal guarantees in immigration justice than in criminal trials, even if the punitive outcomes are similar or harsher in the immigration regime.

Act II: Heterogeneities is about how the IRB relates to other normative systems and legal logics, and it is also organized in two chapters. The first one, Chapter 5 (“Punishment: Administrative Style”), focuses on the forms of punishment used in immigration law. I argue that these forms of administrative punishment are part of a broader penal complex and that

they are used as complement, supplement and in addition to⁹ the forms of punishment traditionally used as part of criminal law, but without its legal guarantees. I characterize the IRB as a *legal hole* (Steyn, 2004, Dyzenhaus, 2006; Vermeule, 2009), a very discretionary place with so little constraints to the executive action that its representatives can do virtually whatever they want. In the sixth Chapter (“Back Door for Innovation: Establishing Marital Status in Sponsorship Appeals”), I discuss some examples of legal pluralism that I observed in the field, such as the acceptance of a “*triple Talaq*” as a valid form of divorce and the recognition of a polygamous relationship. This chapter is important to show that the ideas of arbitrariness and discretion also have a positive and creative side: the place where the legal system is the most fragile in terms of rights and liberties may also be a legal space for real pluralistic and innovative solutions. I argue that different normative systems do not automatically constitute legal pluralistic situations within State law as some legal and socio-legal scholars suggest. Quite on the contrary, when dealing with problematic situations, they are actually the manifestation of different components of the same State-based and oriented penal complex. Interestingly, as the dramatic midpoint of the thesis, I conclude that such *legal holes* may also be understood as a form of legal pluralism through deference (Arthurs, 1985). In other words, the normalization of exception is an authorized form of legal pluralism within State law, where the higher courts and doctrine (legal centralism) concede enough discretionary power to local administrative tribunals to (re)do law as they wish – mostly to punish, but also, sometimes, to promote family reunification.

⁹ These three categories may look similar, but it is necessary to make such distinction to better nuance how such punitive practices are used through different normative systems. This will be properly developed and clarified in the respective chapter.

The final part of my dissertation, *Act III: Seeing the real you at last*, contains my conclusion about punitiveness and criminology (Chapter 7: “Bringing politics back into the discussion”). In this chapter, I restate some ideas exposed in my theoretical chapter, proposing a certain reevaluation of prominent social reaction approaches such as new criminology (Taylor et al., 1974), new penology (Feeley & Simon, 1992; 2003), penal welfarism (Garland, 1981; 1985) and governing through crime (Simon, 2007). In short, I bring back politics into the discussion by thinking penal policies at large and social reaction as an interrelated totality; an adaptive penal complex model operating through a multitude of selectivity of justice funnels along, beyond and in addition to criminal law. Finally, as Taylor, Walter and Young foresaw in their classic book *New Criminology*: “This ‘new’ criminology will in fact be an old criminology, in that it will face the same problems that were faced by classical social theorists” (1974: 278). I suggest that this social reaction model based strictly on criminalization processes and a selectivity of justice within the criminal justice has exhausted itself to the point that it occludes various contemporary forms of social reaction and punitiveness. The non-criminal centered penal model (“penal as a mobile”) is represented as a very enriching way to renew the old New Criminology enterprise and to bring (again) politics back into the discussion. This is the best way “to create a society in which the facts of human diversity, whether personal, organic or social, are not subject to the power to [penalize]” (and not “criminalize” as they originally wrote) (Id: 282).

OVERTURE:

METHODOLOGICAL AND THEORETICAL REMARKS

There is an Indian story about an Englishman who, having been told that the world rested on a platform which rested on the back of an elephant which rested in turn on the back of a turtle, asked: What did the turtle rest on? Another turtle. And that turtle?

“Ah, Sahib, after that it is turtles all the way down.”

- Clifford Geertz: *Thick Description*.

CHAPTER I:

LEARNING AND UNLEARNING CRIMINOLOGY

My methodological chapter (chapter 1) is in a way written backwards or, to be more specific, it is the recapitulation of my taking of different positions in the penal and criminological fields. It presents the sixth and final version of the different proposals and perspectives that I have taken about my empirical topic, about criminology itself and of course about myself as a researcher. In fact, I do not know it should be called a methodological chapter or a proposal. On the one hand, it is a chapter about methods, a place where I outline the main questions and theoretical and methodological dilemmas of my Ph.D. research. On the other hand, it is more than that. I am not (yet) stating what I found, where I stand and how and why the data I collected during my fieldwork (and how I framed them) can potentially break down some of the pillars of our discipline, but I explain what I am going to do after this and how I hope to connect the epistemological and methodological questions raised in this chapter and throughout my thesis to a broader research agenda on the penal field, which I will probably pursue for the rest of my career. Thus, more than a methodological chapter, this is a proposal and methodological essay about my limits as a criminologist, the limits of criminology as well as my choice to challenge and push these limits and the potential contributions to the penal field¹⁰.

¹⁰ As I will develop further in chapter 2, my conception of the penal field embraces other normative systems (e.g.: immigration law, military law, etc.), its forms of legal punishment and connected institutions that are responsible for the imposition or administration of legal decisions (sentences). Consequently, my

This is the main reason why I have chosen to entitle this part of my thesis “Overture”: it is both an introduction to my research conducted at the IRB and an opening in all of its different meanings. The idea is to open our perspectives, emancipating them from any disciplinary confining barriers, either methodological or theoretical. It is also an opening in the sense of a beginning, a commencement, and a first step in developing criminological and penological knowledge that is not restricted to crime, criminal law, sentencing and criminal sanctions. Finally, it is a reflection about how I changed as a researcher through my Ph.D. program and fieldwork an emancipation process both in learning, unlearning criminology and reconciling them in a new proposal about the Penal¹¹.

As a researcher, I always had a particular interest in different institutional forms of conflict resolution and in how events were translated by judicial institutions, building legalized truths that have an enormous impact on social relationships and on the social trajectories of people. This is primarily why I chose criminology almost seven years ago and what still drives my scholarship today. It is essential to understand the construction process of a research project that started with questions like: “how does the understanding of how legal institutions deal with white-collar criminality (can) help building alternatives to criminal justice forms of conflict resolution” or “how do the conflict resolution practices present at the IRB (can) contribute to thinking (or even establishing) alternatives to criminalization”; and ended up with a critique of our hegemonic model of the penal field that is centered in

conception of the penal system is also a broader one because it is not only attached to the criminal forms of punishment; the carceral is only part of a larger network of institutions responsible for punitive sequestration (Foucault, 1974; 1995), punitive free-floating control (Deleuze, 1990) and the administration of economic sanctions (fines).

¹¹ See the section “The Penal as a Mobile”, in chapter 2

the criminal justice as the only locus of legal punishment. In other words, I entered the administrative law field (immigration and refugee law) seeking alternatives to criminal justice and I got out of it with alternatives for Criminology, at least to the way mainstream criminology, critical criminology included, frames punitive social reaction.

In the following pages, I will explain better my trajectory over the past seven years, trying to make clear the transformations that occurred in the research and especially in the researcher. The next section “Learning Criminology” focuses on my trajectory in this academic field and I provide a brief retrospective of my first two proposals prior to entering the immigration law field. This section is followed by “Entering the field”, where I describe my first contacts with immigration law, how I learned a specific language and started understanding a particular way of framing conflicts. In that section, I also clarify how and why I drastically changed the previous proposals and briefly point to how I negotiated access in the field and passed through the university research ethics board. In the last section, I address the methodological struggles of my fieldwork and how the practices I observed at the IRB helped me to unlearn and deconstruct criminology and myself as a researcher, building a stronger identity as a criminologist. Finally, I conclude by proposing alternatives to criminology and linking them to my theoretical framework in chapter 2.

I) Learning Criminology

Criminology as a foreign science

Paraphrasing Marx's famous words about the state of political economy in Germany at his time¹², I can argue that "to the present moment, criminology in Brazil is a foreign science". However, it is not a foreign science in the sense contemplated by Marx. The material conditions of its existence were set up in the 19th century as in the rest of the world and the use of criminology as part of a colonial political and bureaucratic package is not exclusive to the Brazilian context or to Latin America. Of course, as post-colonial and counter-colonial scholars have argued (e.g. Agozino, 2003; 2004), the development of criminology as a discipline in such contexts is quite problematic because criminology is perceived as knowledge intrinsically associated to the (colonial) State and even more, to dictatorships, totalitarian regimes and oppression more broadly. In Brazil, for instance, generally those who claim themselves as criminologists are the police, the army or certain jurists who deal with or manage criminal justice institutions and their clientele. This does not mean that no one is developing criminological studies in Brazil. There are Brazilian scholars doing "criminology" in Brazil (Adorno, 1993; Zaluar, 1999; Kant de Lima, Misse & Miranda, 2000; Barreira & Adorno, 2010; Ribeiro & Correa, 2013)¹³, but they will avoid identifying themselves as criminologists. They usually prefer saying that they are doing sociology of

¹² Marx, K. *Capital*, Vol. I, "Afterword to the Second German Edition" (2008 (1873), §5).

¹³ These five references are essentially bibliographical essays and/or reviews on the study of criminological topics in Brazil, covering over 2500 publications in last 40 years (Ribeiro & Correa, 2013, p. 2).

crime, sociology of deviance, sociology or anthropology of law, anthropology of conflict, anti-criminology, critical criminal law, or any analogous sub-areas that will make them less associated to the State or its penal institutions. It is really a schizophrenic situation where the scholars labelled as criminologists are not necessarily doing (new) criminology as we see here in Canada and those who do criminology (even mainstream criminology) simply refuse this label.

This is more or less the academic context where I came from. With respect to my trajectory and academic identity more broadly, I have a multidisciplinary educational background. I completed two BAs simultaneously in Brazil: Social Sciences (a research oriented degree centered primarily on sociology, anthropology and political science, but providing also some background in history, geography, philosophy and political economy) and Communication (with a specialization in editing and publishing). Obviously, both degrees shaped my mind in an irreversible way, determining how I frame reality and recognize myself professionally. Generally speaking however, my main academic identity is that of a “social scientist”¹⁴. During my master’s program, things have become even more complicated. My master’s was an interdisciplinary joint program in Sociology and Law. As a matter of principle, I should have been considered as a sociologist, but my supervisor was from the law school and I also had an external co-supervisor from the Anthropology department. I was in a sort of identity limbo: at the law school, I could not be “from Law” because I was not a lawyer; the sociologists considered me as a sort of “fallen sociologist” doing “anthropology stuff”; and

¹⁴ I know it may sound broad as a professional identity, but I really ended up specializing in all three core disciplines: most of my optional courses were in sociology, my teaching assistantships were in political science and I was a member of a research group composed of anthropologists.

the anthropologists thought that I was not really doing anthropology, but rather sociology, because I was not doing classical ethnographic fieldwork. Later, this unlabeled identity became a hybrid one: “socio-legal”, a more polite and presentable way of saying that I was none of them and all of them at the same time. Thus, coming from such an academic context and being identified as a social scientist and a socio-legal scholar, it would have sounded really bad to present myself to my academic peers as a criminologist. Paradoxically, it was a sort of degenerative identity, a stigma¹⁵, as if the label criminologist contaminated the alleged purity and seriousness of the social sciences’ main disciplines (sociology, anthropology, political science and psychology)¹⁶. Therefore, when I decided to apply to a Ph.D. program in criminology it necessarily implied two things: first, I had to pursue my studies in a foreign university; and secondly, I had to deal with the fact that my Brazilian peers perceived such move as a really bad decision. I still remember vividly a conversation with my one of my professors about this. At the time, he gave me the following advice:

“You know João; you are not going to do a M.A. or a specialization in criminology, but a Ph.D. This is really serious. It will be your identity as a researcher and it will chase you for the rest of your life. People will call you

¹⁵ I have a funny example to illustrate this prejudice. My friend and I presented papers on our respective masters’ research results in an important social sciences’ conference in Brazil and both of our papers were selected for publication. However, the Brazilian Review of Social Sciences, which had previously agreed to publish the selected papers, was only able to publish one of them. The organizers of the panel, who really liked both papers, suggested that we publish one of the papers (“the other one”) at the Brazilian Review of Criminal Sciences, which had a lower symbolic weight in the field of social sciences in Brazil. We openly discussed this situation as a group and, in the end, as my friend was going to apply to a Ph.D. program in anthropology and I was already in the process of moving towards a Ph.D. program in criminology, I accepted the “lowball offer” (as they referred to it at the time).

¹⁶ Disciplines such as economy, social work and law are usually referred to as applied social sciences in Brazil.

criminologist... When you will sign your articles, grant applications, letters of recommendation, etc., it will be written beside your name: ‘Ph.D. in Criminology’. You should think seriously about the consequences that this will have for you and your career.”¹⁷

I should confess that my peers almost convinced (or scared) me. But finally, I decided to pursue my studies in criminology in Canada. This brief narrative of my trajectory prior to my arrival aims at giving you an idea of my background as a researcher migrating to a new country and field of studies and especially to openly state my initial aversion and resistance to the identity of criminologist. Learning English and French criminology at the University of Ottawa at the same time was not an easy process, but learning to think as a criminologist and to accept publicly and intimately this identity without feeling offended was even more difficult and was just achieved after four years of immersion in the Canadian criminological field.

From elite deviance to immigration law:

My first Ph.D. research project was very general and directly linked to what I was doing during my master’s research¹⁸. Basically, the original proposal was to understand how

¹⁷ Free translation; quote from memory.

¹⁸ My masters’ research was about institutional forms of conflict resolution regarding contemporary slavery (debt bondage) in Brazil and the enforcement of anti-slavery laws (Velloso, 2005, 2006). Exploitation of slave labour is a crime in Brazil, but usually these conflicts are not administrated through the criminal justice system; a classical elite deviance situation. Interestingly enough, there was a consensus among State judicial and political actors that slave labour was a crime and therefore, that slave exploiters should be punished by law (it

different legal institutions in Canada administrated elite deviance cases and to compare how such conflicts were dealt with in Brazil. Retrospectively, I think this first proposal reflected more a hurry to apply for scholarships and to a Ph.D. program while finishing my MA than real knowledge about Canadian institutions or what my Ph.D. research would really look like. The proposal was obviously too broad and an expert Canadian reader would probably have thought that I had no idea about elite deviance and its administration in Canada. During my first year in the Ph.D. program in Criminology, I changed this project due to a double immersion: first, I was deeply learning criminology which implied framing empirical problems through its different schools of thought and using its disciplinary validation rules; and second, I was living in Canada and starting to have a better understanding of how its legal institutions worked, being more or less aware of some famous elite deviance cases and especially of what kind of deviance flows to administrative tribunals.

By the end of my first year, I adapted my original proposal to the Canadian context by focusing on “dirty economies” (Ruggiero, 1996, 1997, 2001). In short, the main idea was to examine how legal institutions dealt with conflicts related to the black market and more specifically with the underground economy. I was considering this problematic situation as a

did not matter by which means). There was a clear policy to completely eradicate slavery in Brazil, as if such a thing was ever possible. This was the message, a sort of “war on slavery” policy, and as the criminal justice system was not well equipped to deal with these conflicts, public prosecutors used other normative systems to punish the offenders. It was as simple as that; all available data pointed to this direction and judicial actors were really framing their interventions in non-criminal normative systems as aiming legal punishment. This actually posed an important theoretical problem to solve: on the one hand, conflicts were being clearly decriminalized (either by law reforms or through enforcement), but on the other hand, this was done in a punitive manner. In a way, I never abandoned this dilemma and it is still very present in the latest versions of my proposal and comprehensive papers. In this Ph.D. dissertation, I propose that the penal field is much broader than the hegemonic binary model composed by the criminal justice system and “the carceral”, as Foucault (1995) refers to the penal system (prisons and its surveillance network).

double-faced illegality (*illégalisme à double face*: Pires, 2002) where the employers were prosecuted in one way (e.g.: fraud via criminal or regulatory regimes) and the employees in another way (as they are usually illegal immigrants, they end up facing incarceration and/or even deportation in the immigration regime). I was very excited about this project because I thought it would allow me to observe better heterogeneous forms of conflict resolution outside the criminal justice system and eventually to provide a good picture of the uses of administrative law as an alternative to deal with problematic situations. At the time, when I started gathering documents and reviewing literature, I perceived a relative lack of information about the management of illegal immigrants. It was generally possible to identify the different institutions that managed immigration in Canada and to obtain general statistics about incarceration and deportation, as indicators of “repressive”¹⁹ measures used by the immigration justice system and its respective policing institutions. However, the available data (and literature) usually mixed all kinds of immigration (and refugee) cases as if they had the same status in terms of citizenship, building a sort of common sense that was not very helpful to really perceive the heterogeneities and the richness of the field of

¹⁹ In fact, the most precise term would be “preventive” and not “repressive”, but I prefer keeping the term “repressive” here because it indicates more properly how I perceived legal punishment at the time (a criminocentric conception of punishment), framing the phenomenon through a criminology/criminal law point of view. As I exposed in both of my comprehensive papers and as will be discussed in more details in the chapters 2 and 5, in administrative law there are two forms of legal punishment: administrative sanctions (which are repressive) and police measures (which are preventive). These forms of legal punishment existing in immigration law (detention, removal orders and surveillance) are essentially considered police measures and consequently, to be precise, they are preventive forms of legal punishment. Legal punishment and forms of punishment in administrative law is addressed in a more theoretical and detailed way in the chapter “Open Justices and Concurrent Systems” (an earlier version of this chapter can be found in my comprehensive paper called “Beyond Criminocentric Dogmatism: Mapping institutional forms of punishment in contemporary societies” that was revised and published under this same title in the journal *Punishment & Society*; Velloso, 2013).

immigration and refugee law. Finally, I realized that I had no idea about how these conflicts were administrated by justice institutions. Generally speaking, based on academic and broad common sense, I knew more or less what seemed to be the main outcome of immigration justice institutions (incarceration and deportation), but the process of conflict resolution itself was invisible and largely undocumented. At the time, I felt that the notion of criminalization of immigration was probably not precise enough to describe such processes and that I would probably have to go beyond criminology in order to understand what was happening in this other justice system. Consequently, I decided to take a course in immigration and refugee law as an auditor and to start a more substantial move towards the immigration law field.

II) Entering the field

I still remember my first week of immigration law classes in September 2006. I tried to be as exempt and neutral as possible, but the truth is that I arrived in that classroom at the law school with all the possible preconceptions that an immigrant immersed in criminology could have. I was there to see blood and to claim that the immigration system was “repressive”, unfair and any other atrocious adjectives. After the first hour and a half of class, I was already frustrated and was wondering what I, a Ph.D. student in criminology, was doing here at the law school taking an undergraduate technical and formalistic course. I thought the professors were not critical enough, even if they both advocated for immigrants

and refugee rights, and that the crazy idea of learning immigration law in legal formalistic terms was a total waste of time. During the second part of the class, I realized how stupid and ignorant I had been. After a quick presentation of what was under the jurisdiction of the IRB or, in other words, what kinds of social conflicts were really judicialized, my whole world felt apart. I simply knew nothing about the immigration justice system. In fact, the research I was planning to conduct was an impossible research project because illegal immigrants did not have access to the tribunal and consequently there was no point in trying to observe and theorize something that did not exist at all.

Learning immigration law was a very disturbing process, even more than learning criminology. Everything was new and strange to me. Things did not make sense and legal reasoning was very different from what I was used to, that is, criminal law from a socio-legal and criminological perspective. This course was really important for me and for my research. It was both a moment of pride, when I first realized that I was really thinking like a criminologist, taking criminology and criminal law reasoning as references, and of despair because this way of thinking was actually not very useful to understand what was going on in the immigration field. At the time, I did not know what to do: I was learning concurrent knowledge and it was, almost always, really difficult to reconcile them. It was a breaking point in my Ph.D. My proposal changed drastically, the way I framed conflict resolution in Administrative Law became more sophisticated and I decided to focus my research only on the practices of the Immigration and Refugee Board of Canada.

Everything I needed was potentially there at the IRB. The IRB is the largest independent

administrative tribunal in the country²⁰, dealing with a diversity of conflicts and providing an excellent picture of the different uses of administrative law as an alternative (or not) to criminal prosecution. Its procedures and forms of dispute were fairly heterogeneous among its different sections (adversarial and non-adversarial or inquisitorial), proceeding alternatively with more exclusive techniques such as the use of secret evidence in some refugee cases and in security certificates and also with more inclusive ones such as the possibility of alternative dispute resolution (mediation) in sponsorship appeals. In that sense, I really considered the IRB as an ideal “lab” or empirical situation that highlighted the complexity of administrative justice systems. The IRB was the best context in Canada to seek institutional alternatives to the criminal justice system by observing how a large and heterogeneous administrative tribunal worked. Before my fieldwork I was interested in addressing the following research questions: how are illegalities managed by administrative justice systems? And are these the kind of alternatives to the criminal justice system that we want? They were good questions at the time and like any research questions, they changed a lot, as I changed, during the research process and especially after the fieldwork.

²⁰ This identity as being “largest independent administrative tribunal” in the country should be understood as a native category and not as an analytical one. This statement is omnipresent at the IRB (e.g. posters, folders and decorative plates), on its institutional website (e.g. <http://www.irb-cisr.gc.ca/eng/brdcom/abau/Pages/Index.aspx>) and in its publications (e.g. reports, guides, financial statements). However, until recently the independency of the IRB was fairly questionable, analytically speaking, because members have temporary mandates (usually for 3 years; renewable) and “political motivations” play an important role in appointments and renewals, as revealed by different IRB members and immigration and refugee lawyers during my fieldwork as well as by other scholars (e.g. Crépeau & Nakache, 2008). The combination of these two variables is highly problematic because it places members in a vulnerable position to keep their jobs. As one of my interlocutors said: “if you don’t ‘perform’ (do you know what I mean?), you won’t get a renewal... a friend had a one year [renewal] and she got the message”.

The course was not only helpful for legal training or to learn the language that the natives spoke in the field, but also to start establishing contacts in the field, visiting sites and preparing research strategies to achieve a better comprehension of immigration justice in action. Finally, by the middle of the second year of my Ph.D., I had a better idea of what my doctoral research looked like as well as of my methodology. I decided to follow a qualitative approach, involving different techniques for gathering data, including: documentary analysis and ethnographic observation at the IRB (Eastern Region).

Documentary analysis

Originally, I had planned to contemplate hard law (legislation including statutes and regulations, other legal norms as well as case law), soft law (guidelines and policies) as well as reports or other publicly available documents from immigration institutional actors, including the Immigration and Refugee Board (IRB), the Federal Court of Canada (FCC), the Federal Court of Appeal (FCA), the Supreme Court of Canada (SCC), Citizenship and Immigration Canada (CIC), Public Safety Canada (PSC), Canada Border Services Agency (CBSA), the Royal Canadian Mounted Police (RCMP), Criminal Intelligence Service Canada (CISC), and the Standing Committee on Citizenship and Immigration of the House of Commons (CIMM).

I gathered and consulted the documents from all of the above-mentioned sources in preparation to and during my fieldwork. They were very helpful to provide a broader picture of the field and to clarify specific field data and jargon (e.g. references to legal categories). However, all of these sources were not necessarily and directly taken into account in my

analysis. After conducting my fieldwork, I mostly integrated and referred to the sources that were more frequently used by the IRB actors and my list had to be narrowed down in light of my interpretation of legal actors' practices at the IRB. For instance, I continued using hard law and soft law sources, but I selected them in function of the data gathered in the field and of my focus on the IRB practices. As a result, instead of doing a global legal and normative review, I prioritized how the IRB actors used immigration-related statutes such as the *Immigration and Refugee Protection Act* (IRPA) and its *Regulations* (IRPR), but also the *Canada Border Services Agency Act* and the *Department of Public Safety and Emergency Preparedness Act*. The same reason was applied to case law review by focusing mainly in IRB decisions, especially those that I observed or some of similar content and context to double check legal reasonings and sensibilities, and some very specific decisions of higher courts (FCC, FCA and SCC) to clarify the overall validity and legality of certain procedures and practices. Thus, this dissertation is not a legal dissertation in a classical or doctrinal sense: it is not based on extensive case law analysis (legal doctrine) or on extensive legal analysis (e.g. precedents and so on) in order to extract legal rules although I do refer to many of those legal rules throughout my dissertation. Instead, this dissertation provides a detailed analysis of how IRB actors practice law (in a general and socio-anthropological sense) at a very ground level. As such, statutes and case law were primarily used to support field data, either to clarify the categories used by legal actors or to fill the gaps that direct observation did not always cover (e.g. the reasons for judgment related to a case I observed).

I look at and refer to legal decisions based on my analysis of ethnographic data. Therefore, the most common manner in which I use legal data consists in comparing IRB decisions with my field notes. As a result, case law selection was made following two purposes: first,

case-related decisions, normally decisions made by the IRB; and second, decisions on a particular theme or legal principle, mostly from higher courts. The first was basically a research tool to check and/or complement observation data. This helped me a lot during my fieldwork because I could adapt note-taking strategies in order to focus more on interactions and non-verbal elements as major information about the cases could be captured later from the decision. And consequently, it was necessary to double-check and complement data from the most relevant cases. The second source of legal decisions was more related to my analysis of the field as these kinds of decisions were mainly used to check if an observed IRB practice was backed up by legal doctrine or whether it was something more local. This approach proved to be very interesting to access the level of deference granted to the IRB on certain topics such as the criteria used to establish a gang member and standards of proof used in correlated cases (see chapters 4 and 5). My objective was not to cover all the cases that I had observed, but to check the reasons for judgment in the cases that were interesting and relevant to my analysis of the IRB and that would help me nuancing the debate on social reaction and punitiveness.

Similarly, the same reasoning applies to soft law sources (guidelines, policies, reports etc.). I used these sources more broadly at the beginning of my research and later they were fairly reduced to IRB guidelines, reports and other publicly available documents. From the initial list of ten institutional contexts I ended up having the IRB as the most recurrent institutional reference in the final version of my dissertation, followed distantly by CBSA and some news references. This was not really a surprise as I started moving deeper and deeper into the IRB realm since the beginning of the ethnographic part of my research. This immersion process focused my gaze and over time it also set aside the institutional actors that were not really

present in the everyday life of the IRB.

To sum up, I first got a broad idea of the field through legal training and documentary analysis, then I made a better sense of the tribunal through observation and finally I had to re-use a documentary analysis approach to double-check and complement my ethnographic data. In that sense, I did a kind of dialectic documentary analysis and it permitted me to achieve saturation points about the practices in the tribunal much faster than if I had only used observation as my research technique. Also, this mix-methods approach was really helpful in nuancing observation data and going deeper in the IRB legal sensibilities (both in practical and doctrinal levels).

Ethnographic observation:

The judicial facet of the immigration justice system includes the IRB as well as the review and appellate courts (the FCC, the FCA and eventually, but rarely, the SCC). I first planned to do long-term fieldwork (ethnographic observation, during at least 12 months) at the IRB. Initially, I had also planned to observe some judicial review hearings at the FCC to contrast procedures and to perceive better the interaction of the IRB with superior courts. However, I decided to abandon this aspect of the fieldwork after a couple of judicial review hearings focusing only on the IRB because it would have been an enormous amount of work to map the field in two different institutions with different practices and institutional actors in the scene²¹. It was not useful for the purposes of this research to do observation at the Supreme

²¹ For instance, the professionals disputing in these institutions are institutionally different. At the IRB, the

Court of Canada because what has considerable impact on the immigration justice system is not its procedures, but its decisions (documentary analysis)²². In addition, I did not conduct observation in any political, policing or correctional institutions associated with the immigration justice system because the research focused specifically on “justice systems”. These institutional dimensions (the political field, immigration bureaucracy and correctional institutions) were only considered observable in the context of the IRB, when they were physically or symbolically present at the tribunal. The main research goal at the time was to thickly describe (Geertz, 1973) how the IRB worked in terms of social reaction (procedures, rituals, micro-dynamics of power, etc.) and this goal was achieved, helping me to think beyond the field and to question criminology as a discipline. Further details on my ethnographic approach in a more theoretical sense are presented at the end of this *Overture* (pp. 96 et ss.) when transitioning to the empirical part of this dissertation.

Finally, I spent around 18 months doing observation in the Eastern Region of the IRB (which covers Montréal and Ottawa), attending hearings mostly in the Ottawa regional office. The reason why I decided to extend the total observation period for an additional six months was to cover more hearings and consequently to experience different actors in action. For instance, as a rule there is a rotation of IRB members: they will hear cases mainly in their different regional offices (Montréal and Ottawa), but they will also do some hearings

immigrant or refugee counsel and the CBSA hearing officer (the Minister’s counsel) do not necessarily need to be lawyers. At the Federal Court, the immigrant or refugee’s representative is a lawyer (and sometimes it is not the same person who represented the foreigner at the IRB) and, as a rule, CBSA hearing officers do not do JRs; the government’s representative is usually someone from the Department of Justice.

²² Finally, as I did not conduct ethnographic fieldwork at the Federal Court, I ended up using the same approach for all superior courts.

(usually one week of hearings) in other regions such as Central (Toronto and Niagara Falls) and Western (Vancouver and Calgary, Winnipeg, Edmonton). Thus, the longer one stays in this field, the greater is the possibility to observe an IRB member from other regional offices and regions coming in, thus enriching one's field data. This rule does not necessarily apply to actors representing foreign nationals or the ministry (CBSA hearing officer) because they are mainly locally based. Generally speaking, I observed Ottawa-based counsels in Ottawa and Montréal based counsels in Montréal. Some counsels may also travel and do hearings in different regional offices within the same region, but rarely in different regions. For instance, a counsel based in Ottawa participates in hearings mainly in Ottawa, but he or she may also go to a hearing in Montréal or Toronto in some exceptional circumstances. The bottom line is that staying an additional six months in the field also allowed me to observe more local counsels and, more importantly, this made me realize who were the most recurrent counsels acting at the IRB and having more interlocutions with them.

Why did I choose such a complex method? Why did I do documentary analysis and observation at the same time? It may seem that I gathered the same information twice, but in fact documentary analysis and ethnographic observation deal with different data. This has to do with my conception of law. The sentence "my research focused on how Administrative Law works" can be understood in two distinct ways: first, by considering law as *Loi*; and second, by considering law as *Droit* (Alliot, 2003). In the first case, a library-based research focusing on hard law (statutes and case law) would have been sufficient. Many scholars reproduce this formalist approach, but I was not only interested in that aspect. I preferred to work with the second conception: law as *Droit*. Drawing from legal anthropology and socio-legal studies (Bourdieu, 1987; Ewick & Silbey, 1998; Falk-Moore, 1978; Geertz, 1983;

Gluckman, 1955, 1965; Nader, 1965, 1997), I do not reduce law to *Loi* and it means that I should include not only soft law as part of the law (*Droit*), but also (and principally) the different practices and legal sensibilities (Ewick & Silbey, 1998; Geertz, 1983) that are present in the juridical field (Bourdieu, 1987). As Pierre Bourdieu argued:

“La force spécifique du droit est quelque chose de très paradoxal, de presque impensable. C’est là qu’il faut se tourner vers Marcel Mauss et sa théorie de la magie. La magie n’agit que dans un champ, c’est-à-dire un espace de croyance à l’intérieur duquel il y a les agents socialisés de manière à penser que le jeu auquel ils jouent vaut la peine d’être joué. La fiction juridique n’a rien de fictif; et l’illusion, comme dit Hegel, n’est pas illusoire. Le droit n’est pas ce qu’il dit être, ce qu’il croit être, c’est-à-dire quelque chose de pur, de parfaitement autonome, etc. Mais le fait qu’il se croie tel, et qu’il arrive à le faire croire, contribue à produire des effets sociaux tout à fait réels, et d’abord sur ceux qui exercent le droit.” (Bourdieu, 1991a, pp. 98-99)

In order to do that, to notice the magic, it was really necessary to develop a methodology that incorporates all these aspects of law as *Loi* and as *Droit*. This explains such a complex methodology. I had to include different research techniques to be able to approach law in all of its complexity: first, I had to amplify the documentary analysis by contemplating soft Law documentation (i.e. IRB guidelines, policies, procedures, reports on plan and priorities, performance reports and other analogous documents); and second, I had to conduct long term observation at the IRB to perceive the practices performed by its actors in their institutional contexts, and the legal sensibilities at play. During my fieldwork at the IRB this approach revealed even more appropriate because it helped me reaching saturation points

after six months of fieldwork, allowing me to use the remaining time to observe at a much deeper and reflexive level, nuancing the IRB routines and practices.

Dealing with the Ethics Board

Negotiating access was originally an issue. At the beginning of my research (pre-field) I had planned to focus only on the immigration part of the tribunal, or more specifically, to conduct observation only at the Immigration Division (ID) and Immigration Appeal Division (IAD). I had removed the Refugee Protection Division (RPD) from my ethnographic spectrum first because of accessibility issues. Indeed, I was initially thinking that it would be almost impossible to access confidential hearings (refugee determination). Secondly, I anticipated some “ethics” issues. By “ethics” I do not necessarily mean ethical issues, but rather issues surrounding my dealing with the Research and Ethics Board of the University of Ottawa (REB). Even if my research focused on the tribunal and its practices, the eventual unintended contact with refugees could be potentially problematic to obtain the REB approval because refugees are by definition one of the most vulnerable populations in Canada.

At the time, I suggested to the ethics board personnel that I thought I did not need to apply for ethical approval in order to conduct observations of public hearings in an independent tribunal such as the IRB because my research project could arguably be covered by article 2.3 of the *Tri-Council Policy Statement*²³. My main argument was that I was only observing

²³ At the time, the article 2.3 read: “REB review is normally required for research involving naturalistic observation. However, research involving observation of participants in, for example, political rallies, demonstrations or public meetings, should not require REB review since it can be expected that the participants

the procedures, postures and interactions during those public hearings; i.e., the routines in the IRB hearing rooms as opposed to the people themselves. Technically, my focus was not on human beings, but on actors' practices at the hearings as part of their everyday life in the tribunal. It was a very different situation from that of an interview where you directly approach someone and take him or her out of his or her routines in order to obtain information. Ultimately however, the staff at the REB disagreed and I was nonetheless kindly asked to submit my application. In response, the REB staff raised different kinds of arguments to justify the need of an ethical application. One of my favourite was raised when the REB staff asked me whether I was "only going to observe the tribunal or actually talk to people at the tribunal too?" I tried to (politely) argue that I was not doing bird watching or going to the zoo and that in fact it would be very strange and extremely unethical to spend more than a year in a confined public space just observing people without talking to anyone. Again, the REB staff answer was "sorry, you have to apply for ethical approval". I remember that at the time I really felt that they had no idea of what long term ethnographic observation was about and that their legal and bureaucratic way of framing research was in the end very unethical and potentially dangerous in a long-term fieldwork situation. Finally, the staff discussed with the chair of the REB and they concluded that the research project needed to be reviewed because "there was a possibility that information from individuals could be included" in my research. Ultimately, this was a good thing, as I did not know if anyone in the field was going to ask me for an ethical clearance or have similar concern. However, they "decided to conduct an expedited review (Chair and myself [REB staff] only)" due to the nature of the project (quotes from the e-mail received on Sep. 13, 2007).

are seeking public visibility". This is not the case in the current version of the article 2.3, as it clearly requires REB review when there is "direct interaction with the individuals or groups" (article 2.3 (a)).

In that context, I was really worried about mentioning the word “refugee” in my application. I feared that it could delay my research chronogram and decided to take out this part from the project, focusing only on public hearings. I reasoned that I would not really lose much data because there was already enough information available about the inquisitorial character of their procedures through mediated and/or secondary sources, such as: RPD guidelines and reports, Federal Court decisions (judicial reviews), refugee cases commented by professors and guests speakers during different immigration law courses and principally Peter Showler’s truthful description and theatrical version of refugee claims in Canada (Showler, 2006; 2007)²⁴. Therefore, when applying for REB ethical approval, I simply and cleverly (I think) stated that I would do observation for 12 to 18 months at the IRB, focusing on “their working routines”. I did not expressly mention in my application to the REB that attending refugee hearings could be an ethical issue because these hearings were supposedly not observable, but I clearly stated that if I eventually had access to any confidential data in the field, I would obviously guarantee their confidentiality and anonymity. My application was approved on these terms and the only additional request was to include a short script on how I would present myself if someone interacted with me during the observation period. Thus, I was cleared to observe “their working routines”, which could include observation of confidential data, if I were authorized to do so while at the IRB. Paradoxically, as I will explain in the next section, not observing confidential hearings at the RPD became a serious ethical issue in the field (IRB) and I ended up doing observation there in order to respond to the demands of the IRB personnel.

²⁴ Peter Showler was a former member (1994-1999) and former chairperson of the IRB (1999-2002). He was until July 2013 when he retired and became the director of the Refugee Forum at the Human Rights Research and Education Centre, at the University of Ottawa.

Finally, if there were any potential risks or harms for the participants, I think that it would have been I in the first place that would be in a dangerous position. However, the benefits for me and for them were worth the risks. Obviously the refugee claimants were the most vulnerable population in the field because of their past experiences and undefined status in the country (they were not accepted as refugees yet), but my presence there and my research would not place them in a more harmful or embarrassing situation than the one in which they already were. But I was putting myself at risk as a consequence of this research given that I was an international student with a precarious temporary resident status (student permit), an immigration status that did not give me for instance the right to access the tribunal as a client. I was going to be at the IRB observing institutional actors that had a lot of power over me because of their jurisdiction and of my status. Anyone could easily censor me at any time and, more dangerously, if I walked out of the line I could be arrested, detained or even removed from the country without having access to a due process, actually to any judicial process at all!

On the other hand, studying the Immigration and Refugee Board practices on the regulation of immigration in Canada provided several benefits and not only for me. In a scientific sense and looking retrospectively, there were two main benefits: first, to clarify the dynamics of immigration control and to analyze how administrative tribunals operate as complements or supplements to the criminal justice system, and second, to contribute to a paradigmatic change in our discipline by proposing a criminology of the non-criminal law, mainly administrative law; or in other words, to suggest that other justice systems and forms of governance could and should be understood as relevant objects of study for our discipline. These benefits could eventually be an important source of information for criminal law

reform, immigration law reform and to the review and development of public policies and penal policies more broadly. In turn, my research could provide numerous benefits to the participants' institutions and to society in general. And finally, more than being relevant for social sciences and for the participants, I hoped that this research could have some significance for those who were being managed by the penal field, either through administrative justice systems or the criminal justice system. My objective here is to raise some questions on how social reaction is being structured today through multiple sites of punishment and consequently to have an impact on access to justice as well as further the implementation of more inclusive policies of social control and (new) strategies of resistance. Particularly, and looking backwards, I am proud of this proposal and even more of the experiences I had in the field and how the fieldwork has helped me to move beyond my original worries and theoretical questions.

III) Memories from the Board: ethics, authorship and authority

In September 2007, after getting the REB ethical approval and before formally starting my fieldwork at the IRB, I went to the IRB headquarters to meet high-ranking personnel in order to present myself as a researcher doing a Ph.D. in criminology and to explain my research project. During that meeting, I was immediately and directly questioned about my decision to leave behind the RPD. I argued that it was because refugee hearings were confidential and I raised that there might be ethical issues concerning vulnerable populations, but they replied that "the [ethical] problem would be to do a research about the IRB and not do any

observation at the RPD”. They continued explaining that in fact it was fairly common to have internal and external observers in refugee hearings, but that the IRB controlled who could be an observer, the hearings that could be observed and the number of observers allowed in the hearing room (usually a maximum of two per hearing). As a rule, the IRB Operations Branch contacted refugee counsels on a regular basis asking for their consent to have an observer in the hearing room, creating a sort of “bank” of observable hearings.

At the time I was really amazed by their organization and initiative, but later I realized that this was part of the general management of the tribunal and that in a way, these observations were essential to the institutional reproduction of the RPD itself. The observers were mainly internal observers (IRB personnel who were training to become RPD members, developing policies, or updating National Documentation Packages), but it was not rare to have external observers from the government (e.g. Citizenship and Immigration Canada, Public Safety Canada), Parliament (mainly staff) or other tribunals. Observation of those hearings was a ritual form of socialization and (re)production of practical knowledge in the field that was indispensable to the social reproduction of the RPD, supporting bureaucratic structures and legal sensibilities. My situation, however, was substantially different. I was an atypical external observer, someone who was not a public servant linked to the immigration justice system or to the immigration bureaucracy, but who was doing independent research²⁵,

²⁵ After four months in the field there was an episode that helped me understand the allocation of observers. One day I arrived for a refugee hearing and as I was accustomed to do, I followed the research protocol of identification, asking consent in person to the refugee claimant and his/her counsel (even if I had obtained it already through the tribunal), etc. While I was doing that, three other observers arrived: two internal and one external from the government. I realized that priority of observation was first given to the internal observers, then to the externals from the government and finally to me. The hearing room was full, there were four observers, and it would have been impossible to continue like this. The refugee counsel objected to the

building knowledge for different purposes and without the same political and ethical constraints.

Finally, at the end of the meeting, these high-ranked IRB employees strongly encouraged me to do observation at the RPD, proposing to give me access to some of those previously selected refugee hearings originally destined for their observers (see previous footnote). It was a generous offer that could not be refused. On the one hand, it was a clear demand from the natives I was working with and with whom I was establishing trust relationships; and on the other hand, it was my only means of accessing that data directly. Of course, there were some methodological concerns in having the IRB higher administration intervened and set hearings because technically I could then only observe what they let me observe. I was aware of the possibility of being manipulated by the IRB natives such as happened to Evans-Pritchard among the Nuers²⁶, but retrospectively I have nothing to complain about them or the hearings

presence of too many observers and I was already preparing to pack my things to leave. However, the counsel (which I already knew from other hearings) asked the RPD member to only let one observer in and she argued that I was the only one that she already knew, knowing why I was there for and that I would not disturb her or her client. All the other observers left and I stayed there subverting the hierarchy of observers. Hearing that in such a context was more comforting and rewarding than any ethical approval I have got from the official Boards (REB and IRB together).

²⁶ I should confess that I experienced a sort of *the Nuer* syndrome (“Nuerosis”; Evans-Pritchard, 1940, 12-13) for a while when I entered the field. I thought I was doing fieldwork in adverse conditions, in a situation more or less equivalent to those experienced and described by Evans-Pritchard in his classic ethnography about the Nuer people. When he arrived at Nuerland (Southern Sudan), the Nuers were resisting to British colonization (Anglo-Egyptian Sudan) and “they were unusually hostile, for their recent defeat by Government forces and the measures taken to ensure their final submission had occasioned deep resentment. (...) When I entered a cattle camp it was not only as a stranger but as an enemy, and they seldom tried to conceal their disgust at my presence, refusing to answer my greetings and even turning away when I addressed them.” (p. 11). Being a foreign national under the jurisdiction of the IRB could potentially place me in very a similar position because I was, at least symbolically, not only a stranger (researcher, external observer), but also an enemy (someone sharing the same citizenship status of those being detained

they let me attend. On the contrary, from the beginning of my fieldwork the IRB personnel have been kind and helpful, even if there has always been a certain distance between us, which was part of the game as I was not and could not be one of them. Actually, as discussed in the footnote 26, not being one of them was something good and has allowed me to establish relationships with refugee counsels and to be preferred by them as an observer, despite the IRB structural preference for internal observers. In that sense, there was a dialectical dimension in being manipulated by the IRB, as I could play this game at the actors level and subvert hierarchies by using my credentials as an independent researcher.

This first meeting was also extremely important because the IRB staff gave me some details about the working routines in all IRB divisions in different cities. They explained that their office in Ottawa was small when compared to Montréal or Toronto and, consequently, that not it did not hold every kind of hearings. The office in Ottawa holds refugee hearings on a regular basis, but the immigration division hearings (detention review and admissibility hearings) were very rare and the appeals were usually all concentrated in only one week per month. These data really helped me to plan better my presence in the field, avoiding loss of resources and maximizing the use of my research time.

Originally I had planned to conduct observation in the Eastern Region (Montréal and

and removed from Canada). Consequently, and based on Evans-Pritchard's experience about how his "inquiries were persistently obstructed" and the Nuer were "expert at sabotaging an inquiry and until one has resided with them for some weeks they steadfastly stultify all efforts to elicit the simplest facts and to elucidate the most innocent practices" (p. 12), I was very wary of them and I had to develop defensive strategies to deal with all actors, neutralizing their eventual resistances. Instead of being one of them, I had to be none of them! For instance, hanging around with refugee and immigrant counsels would have made me look too "foreigner" to minister counsels (CBSA) and to IRB members. On the other hand, talking to minister counsels in the corridors or asking them questions about the hearings could easily be identified as if I was from CBSA (hearing officer in training) and it would create some barriers when dealing with foreigners and their counsels.

Ottawa) and in the Central Region (Toronto and Niagara Falls). My idea was to start the observation in Ottawa, where it was more economical and convenient for me to stay, and move to the other offices after having more or less observed a pattern of different forms of conflict resolution in each section. Reconciling the different schedules of hearings in Ottawa ended up being fairly complicated: the Immigration Division (ID) was almost inexistent; the Immigration Appeal Division (IAD) was there one week per month; and the Refugee Protection Division (RPD) worked on a regular basis, but not daily and I could only observe a few pre-selected refugee hearings per month. Thus, I needed to be very well organized and disciplined to stay continuously immersed in the field in order to build relationships and to observe better the interactions in the tribunal. As a result, I stayed full-time in Ottawa during the IAD weeks, being there only part-time to attend specific refugee hearings and sporadic ID hearings. In Montréal this was not an issue and I could attend different kinds of hearing while in the field. Overall the routines were fairly the same in Ottawa and Montréal, providing a good sense of the IRB dynamics in terms of conflict resolution. Finally, I decided to conduct all the fieldwork at the Eastern Region, observing the work of members from other regions when doing rotation of hearings in Ottawa or Montréal.

After two or three months in Ottawa, I was already part of the environment. None of the different actors in the field (immigration counsels, CBSA hearing officers and IRB members and supporting staff) asked questions anymore about my presence and I started to be accepted in the pre-hearing conferences, caucuses as well as in other situations where discussions were going on “off the record”. I was already “part of the furniture”, this was the term used by an IAD member when a “new” appellant counsel asked who I was. Rarely foreign nationals asked who I was or complained about my presence and this can be

explained by different reasons. First, I always presented and identified myself prior to any hearing. Second, most of their counsels already knew me and how I proceed and they would have contacted me if there had been anything more delicate in the case requiring me not to attend or not to take notes. And finally, and possibly more importantly, tribunals are spaces with very hierarchical and precise power relationships (Conley & O’Barr, 1988; 1990; 1998). In particular, legal practitioners have a particular talent to steal conflicts from people (Christie, 1977). Thus, as a rule, clients are encouraged to remain quiet and to voice something only when they are asked. The IRB is a very intimidating legal space, as every tribunal, and even more so as a tribunal that may decide in a punitive manner and that has clients that are not necessarily citizens. I was part of this environment, I was very discreet and I dressed like the “professional thieves” (Christie, 1977); therefore, they might have considered me as unapproachable as everybody else besides their counsels. While I never took advantage of this, it seems clear to me that they were not in the best position to ask me anything and most of the time they were surprised when I approached them to present myself as a researcher.

As I mentioned in the previous subsection, I achieved saturation points in the field much faster than what I had planned due to my methodological approach. At the ID for instance, I started getting a pattern at the end of my first week of admissibility hearings and detention reviews. It was also easy to get a pattern in refugee cases because I had already an idea of what they looked like. However, it took me a bit longer (around four months) to reach this saturation point because I was not able to attend hearings at the RPD as frequently as in the other divisions and the inquiring techniques used during the hearings varied more on a case-by-case basis. Appeals were the most challenging cases because they could be substantially

different in nature (e.g.: sponsorship appeals, appeals from removal orders, etc.) and those were the only hearings at the IRB where something was really in dispute (based on humanitarian and compassionate grounds, see chapter 3). But even in a complex division such as the IAD, a certain pattern was established after three months. By then, I was already able to anticipate questions from both parties, to know what would be their respective submissions, how long the hearing was going to last, and so on.²⁷ Reaching saturation in the early stages of the fieldwork was really helpful to better perceive nuances in the hearings and comprehend the logics present in administrative law that are not evident at all for someone who comes from a criminal law/criminology background. Another advantage of using mix methods (observation plus documentary analysis) was having an overall knowledge about immigration and refugee law and policy and consequently of being well prepared to pass the numerous tests to which I was regularly subject in my interactions with the IRB. At the beginning of my fieldwork, I was tested all the time. Everybody tested me; members, CBSA hearing officers, immigration and/or refugee counsels, even the security guards asked me questions. Usually they asked me technical questions or intentionally overused specialized jargon to check if I was able to follow them. Passing these tests also helped me building trust much faster and consequently accessing earlier a better quality of data. After six months of fieldwork, I was comfortable enough to start analysing the data and engage in a more reflexive dimension of the fieldwork. This was very helpful and a unique opportunity to spend most of my time there thinking and nuancing the IRB and its practices; rather than only being there collecting data to be analysed in a post-field scenario. I had planned to go

²⁷ For a detailed description of conflict resolution in the different IRB divisions, see *Act I: The Immigration and Refugee Board of Canada* (chapters 3 and 4).

back to the field after the 18 months period to double check data or seek clarification, but in the end I did not feel any necessity to do so as most of my doubts were resolved during the fieldwork and through field notes and documents (i.e. IRB guidelines, decisions from the IRB and higher courts).

Generally speaking, the fieldwork was largely uneventful, occurring without major incidents that could have potentially affected the reliability of the data or my position in the field as an ethical researcher. Tribunals are very ritualized spaces and a good researcher can learn really fast how to proceed in such contexts. You know when you should leave or stay. You know when to stand or sit. You know the ethics and etiquette. There was only one moment where actors in the tribunal questioned my presence. It occurred when a refugee counsel questioned me just before the start of the hearing because I was taking notes. I explained that I was respecting the confidentiality of the refugee claimant and that my notes were about the procedures, the way the questions were asked, etc. Besides, I added, it was not essential for me to take notes, and I closed my field journal. While that seemed to resolve the question between the counsel and I, the RPD member insisted and said that he had been wondering about my notes during past hearings, suggesting that maybe I (or him) should destroy them due to ethical issues. I reiterated that I was aware of the confidentiality of what happened in the hearing room and I added that my notes were not about refugee claimants or refugee counsels, but about RPD members and how they inquest the refugee claimants. He remained silent for a while and then he started the hearing and never asked anything about my field notes again after that day. During the break, the refugee claimant approached me saying he thought “I was a spy” [let’s just say that he was a spy himself, he started collaborating with CSIS and ended up in a position in which he could not go back to his country of origin

safely anymore]. He said that I should feel free to use my “notebook” for the rest of the hearing if I wished and, moving on, he asked me where he could eat good Brazilian food and watch soccer games from Brazilian tournaments. Months later, his lawyer brought up this case when we were talking after a hearing and suggested that this client was “quite particular” due to his background. Ultimately, he joked that I should lend him my field notes to help him with refugee hearings and I replied saying that all he needed to know was already written in the National Documentation Packages (NDPs). He laughed, but you will only understand this joke after reading *Act I: The Immigration and Refugee Board* (chapters 3 and 4).

Interestingly however, the only delicate situation that sometimes became an issue was the fact that I was doing a degree in criminology. Every time someone heard the word criminology or criminologist in the field, there was a negative reaction. Sometimes my interlocutors in the field just wondered what a criminologist was doing there in an administrative tribunal instead of observing criminal justice, prisons and so on. At some occasions, it could be really problematic, especially for clients and witnesses who had already gone through criminal justice institutions. Every month, at least one client asked me if I was from the police or corrections and I always had to reassure them. This identity issue was particularly annoying when I was observing sponsorship appeals because people systematically said: “you know this is not a removal order appeal”. Every time I met a new counsel, the whole thing started over again until they realized that I was “not really a criminologist”, as they ended up systematically saying, or whatever they had in mind as the archetype of a criminologist.

These situations bored me not because of identity dilemmas related to the label

“criminologist”, but for the reason that I needed to explain and clarify details of my research over and over again every time someone asked what a criminologist was doing there. One of the things I learned when I studied anthropology a long time ago in a country far, far away is that you have no control over your own identity, especially when you are in a fieldwork situation. This is incredibly true. It does not matter if you follow the ethics protocol and formally identify yourself as a researcher doing a Ph.D. program in criminology because your interlocutors may end up calling you differently. I always presented myself as a Ph.D. candidate in criminology or simply as a criminologist. This label usually shocked them at first, but then I became someone else. Curiously, no one really called me a criminologist in the field. I was the observer, the researcher, the external observer, the law student, the Brazilian, the student, the furniture, the anthropologist, the guy who knew exactly at what time the hearings ended (security guards loved to ask me this), Mr. Velloso, João, Juan, José, the lunch partner, the journalist, the undercover police officer and even the spy.

These different identities are really significant for me and methodologically they are extremely relevant. These identities reflect the perceptions that different actors in the field had about me, indicating acceptance, recognition, proximity and authority (Conley & O’Barr, 1990; 1998; Good, 2007). The first hearings to which I attended were appeals (IAD) and I was an observer like everybody else who went there and left. By the end of the week, my identity had already changed just because I was there continuously observing all the IAD hearings. I was not a mere observer anymore, but someone different: an atypical observer, a student, a researcher etc. My identity was not really clear for them yet, but the actors who spent the week at the tribunal on a more regular basis (IAD members and CBSA hearing officers) knew that I was not like the other observers. Later I started to be identified by the

administrative staff and in the hearing rooms as an external observer. My role was being an observer, but I was not one of their observers; they made that distinction, not me. After the second month in the field, they had already forgotten that I was a criminologist. They referred to me as an observer who was doing a Ph.D. or as a researcher from the University of Ottawa. I was usually identified as “from law”, but sometimes they called me an anthropologist too.

By that time, my presence was already accepted in the field. The administrative personnel who dealt with the public did recognize me from afar and indicated in which room the hearings took place before I even asked for it. Sometimes when the hearing room was closed because it was too early, the security guard still opened it for me. Naturally I started interacting more and more in the field, especially with those who were always there: administrative staff, CBSA hearing officers and two or three immigration/ refugee lawyers that I had already met a couple of times. I knew their names and they knew mine. Sometimes we talked during the breaks or before hearings and I always tried to manage well these situations in order to not be associated with one party or another. At the same time I was recognized as one of them and not one of them. It was as if I were a peer, someone who shared the same language and the general values of the field, but who was not a participant actor in the processes of the field. Yet, I was not one of them and my position there would never let me be one of them. Actually, the way I dealt with such dilemmas during the early stages of the fieldwork was trying to be none of them, which was in part also due to a “Nuerosis” (see footnote 26, pp. 41-42) and the quasi delusional belief that I was collecting data in adverse conditions (Evans-Pritchard, 1940). This initial approach and fairly unplanned methodological move marked somehow my identity in the field in a protective

way. Indeed, I was labelled in different ways, but I was never labelled as one of the parties or actors from the IRB (members and staff) or the government such as external observers from CIC, PSC, and related departments. Retrospectively I can reasonably state that I was always “none of them” and this was a very reassuring position to the actors in the field, myself included.

My relationships with the different actors were fairly different and I think this was more related to the time I spent with them than with their institutional positions, even if their institutional positions also played a role in how they approached me or could approach me. The administrative staff spoke to me as they usually spoke to the other professionals in the field. There was a certain proximity (i.e. I called them by their first name), but there was also a glass wall with a hole between us. They were mainly doing their jobs. The relationships with immigration and refugee lawyers or consultants were quite personal. Some of them were really closed to me and others were fairly distant. Again, I think this varied according to the time spent with them. I was closer to those whom I met more often and with whom I experienced longer hearings, which also meant more breaks and informal interactions, as opposed to those who did fewer hearings or spent less time in the tribunal. This also explains why I ended up becoming closer to CBSA hearing officers than immigration and refugee lawyers, even if I was ideologically, politically and sentimentally predisposed to be more affiliated to the institutional position of the latter group than the former. As a rule, CBSA hearing officers spent the whole day or week in the tribunal when they were doing ID and IAD hearings. They usually arrived early in the morning and had a coffee. They stayed around after morning hearings or during the lunch break because they had other hearings to do during the afternoon. In other words, I spent more time with the Ministers’ Counsels than

with any other institutional actors in the field. They were always there and sometimes they needed to kill time waiting for other hearings exactly like I did. I had more opportunities to build relationships with them than with anyone else. Later, after four or five months in the field, it was not rare that we had lunch together or that I brought them a coffee or vice-versa. I have learned a lot about the IRB in these informal meetings with CBSA hearing officers and immigration and refugee lawyers – especially how they personally cope with their institutional positions and how they respect a lot the work done by their adversaries when they are good professionals.

Obviously, it was much more difficult to become closer to IRB members as their institutional position implied keeping a symbolic distance from all the other actors present in the hearing room and because they had their own distinct physical space in the tribunal. Most of time, I only had quick contacts with them in the hearing room during breaks or after hearings or when I accidentally met a member in external confined spaces such as the elevator. However, there are a couple of situations that occurred in the field, which can speak to the fact that they recognized my work as an independent researcher. The first episode occurred after five months in the field when someone asked who was that observer taking notes all the time during a hearing break. The member intervened before I did saying: “don’t worry, he is a researcher that is around here since last September, he is already part of the furniture”. Later that day, this member asked about my research and said that he would like to read my proposal, and eventually my thesis. I sent him the proposal submitted to the Ethics Committee and he provided some feedback. I have yet to send him my thesis.

The second episode occurred around one month later in a similar situation. The IAD member was introducing the people who were in the hearing room as usual, but he decided to

introduce me as well, which was something very unusual in public hearings, outside refugee hearings. He said “we have a special observer today, he is a researcher from the University of Ottawa and he has been with us since last year, his name is Mr. ... I am sorry, I forgot your family name, but I remember your name is José”. I found that interaction really interesting. Rare were the occasions where members, as members, referred to other professionals using their first names. Their etiquette is to use an honorific name followed by the family name. They usually only use the first name when referring to someone they know for a long time and especially after not seeing them for a while. Of course my name is not José, however the most important thing was not my name itself, but the fact that the member claimed to remember my first name and not my family name. Being José was much better than being “part of the furniture” or “Mr. Everybody” (“*Monsieur Tout-le-monde*”).

The last example is perhaps the most impressive. I had been in the field for about a year and I had a pretty good idea of everything that was happening there, but this was one of my last surprises. I had attended a full day of IAD hearings with a member whom I was meeting for the first time. The first hearing was a sponsorship appeal and the second one was a removal order appeal. It was the first time that I was observing hearings in a format that looked like arbitration. I was impressed for two reasons: first, because arbitration is a very common form of conflict resolution used in administrative tribunals, and initially I had thought that it would have been something recurrent at the IRB; and secondly, because after all that time in the field I was already convinced that in fact there was no form of arbitration in the IRB procedures. At the end of the day after everybody left the hearing room the IAD member asked me what I thought about the hearings I had observed that day. I decided to take a risky position and I answered that after almost one year of observation in all IRB divisions it was

the first time that I had observed hearings that looked like arbitration. He stopped, smiled and said: “It seems that you know very well what we are doing here, but let me tell you a few other things that you might not know”. We must have talked for around two hours that Monday and at least one hour daily during the rest of the week. We talked about a lot of things and he revealed many internal issues about which I had no idea, such as their recruitment and training, their working schedules, their demands to be more productive, the pressures from the IRB, the renewal of their contracts, the decision-making process, as well as controversial and negative impacts of internal policies such as Alternative Dispute Resolution or the streamlining of ID and IAD processes, etc. It was a very rich, critical and open conversation that confirmed several things that I had already observed and it helped me to interpret others in a better and more nuanced way.

IV) Alternatives for Criminology

The fieldwork has completely changed my eyes as a researcher. After learning criminology, I transitioned to another field in studying immigration and refugee law and I was for sure a totally different person after I finished my year and a half of fieldwork at the IRB. Before my fieldwork, I observed administrative law and its connections to the penal system (*the carceral*) from a criminal law-based perspective. In the middle of my fieldwork, I started to observe these connections from an administrative law point of view. At the time, my main dilemma was how to reconcile these different perspectives. Therefore, the period following the fieldwork was really traumatic. I realized that I had a lot of things to say, but at the same

time I thought that these things were not necessarily considered “criminology” and I did not know what to do to get out of that disciplinary limbo.

The easiest solution would have been to simply forget what I had learnt in the field, and follow the criminocentric common sense present in criminology, critical criminology included, in order to write a dissertation that would have been part of that common sense and would not have reflected the complexity of the field. However, as a critical researcher, I felt really uncomfortable about the possibility of changing reality in order to make it fit into these hegemonic theories. So, I follow the teachings of John M. Keynes, who brilliantly replied the following to his critiques after he changed his position on monetary policy: “When the facts change, I change my mind. What do you do, Sir?”²⁸. I simply took the same approach. I did not think that I should have had to change facts, but theories, building new ones if necessary. During six long months I was unable to write anything. I was only able to review field notes and organize more or less what had taken place in the IRB at a very empirical level. I was simply thinking, trying to find a solution to this awkward situation. Later, I realized that this was the most important thing that had happened to me because of the fieldwork. The time I spent at the IRB had not only allowed me to develop a different point of view about the penal legal-bureaucratic complex by looking into it through administrative law lenses, but it also made me think about how justice institutions and justifications of punishment (sentencing) were traditionally studied in criminology. Thereafter, this thesis was

²⁸ This quote is usually attributed to Keynes, even if there is no reference of it in his works, conference or interviews. Paul Samuelson refers similarly to this quote in his article “The Keynes Centenary”, originally published in *The Economist*, 25 June 1983: “When my information changes, I alter my conclusions. What do you do, sir?” (Samuelson, 1986, p. 275) *The Collected Scientific Papers of Paul Samuelson*, Vol. 5 (ed. by Kate Crowley). Cambridge, MA: MIT Press.

not about seeking alternatives to criminal justice anymore, but about seeking alternatives for criminology. At a given point in the field, it became very obvious for me that administrative justice was playing a significant role in the penal complex both in terms of conflict resolution and punitiveness. Moreover, from a historical perspective, there was more than enough evidence that the punitive practices used in immigration regimes were fairly old, especially the idea of banishment or deportation, going back to the rise of *boroughs* in High Middle Ages (i.e. Walters, 2002) or even in Ancient Western History. In other words, not only did administrative law-based punitive regimes already exist, but also they were probably as old as criminal justice or even older. Yet, in the criminological literature, all of these regimes were and still are labelled as if they were crime-related or somehow a criminalization process.

I finally reconciled my field data and myself with criminology by trying to change how criminology and penology dealt with such forms of conflict resolution and punitiveness or at least by contributing to them. After reading, thinking and talking with different scholars and interlocutors in the penal field, I modestly realized that my problem was maybe larger than that faced by Keynes. What was happening in immigration law and in administrative law was not really something new, but it had been put aside or plainly ignored for a long time. What I observed was not a “new wave of criminalization” as Richard Ericson (2007, p. 207) suggested. I was not facing new circumstances that required reviewing old theories. The problem was different. Old and new theories were not able to deal or not willing to deal with old facts. Thus, it was not only a matter of changing my mind (theories) or altering my conclusions, but rather of changing criminology at a theoretical and epistemological level.

Ultimately, this is precisely what this dissertation is about: an effort, a first step within a broader research agenda, aiming at proposing a new paradigm about the penal field and its

institutional forms of conflict resolution and legal punishment; or at least nuancing a fairly established one that is more related to policing and governance (see chapter 2). This is not a dissertation about the Immigration and Refugee Board of Canada or immigration and refugee law, although it does speak quite a bit about it, but about a non-criminal centered Penal Complex model in which the IRB is one of the main legal institutions managing approximately 5% of the Canadian population²⁹.

In the next chapter of this introduction (*Overture*), “Open Justices and Concurrent Systems”, the theoretical chapter, I will complement this methodological opening by providing the

²⁹ Curiously neither *Statistics Canada* nor *Citizenship and Immigration Canada* (CIC) release explicitly how many permanent residents exist in Canada. Actually, their immigration and residency categories are somehow conflicting and fairly deficient for the purposes of establishing the population that is under the jurisdiction of the IRB. *Statistics Canada*, for instance, states in its last census (2006) that there are 31,241,030 residents in Canada: 24,788,725 non-immigrants, 6,186,950 immigrants and 265,355 non-residents. However, by immigrants they mean any person “who are, or have ever been, landed immigrants in Canada”, which means that all permanent residents that obtained citizenship are included in this category. So, the apparent 19.8% of the whole population classified as immigrants may be very misleading. CIC does not help a lot either by stating that permanent residents are less than 1% of Canada’s population every year since the 1960s (CIC, 2012, 3). Actually, these numbers are, or at least seem to be, entries per year and consequently do not represent the cumulative population of permanent residents. I came to this magic number of 5% of Canada’s population by playing with census tables from *Statistics Canada* and stats from the IRB as follows: *total population* [31,241,030] – (minus) *Canadian citizens* (single and multiple citizenship responses) [29,480,165] – *Non-permanent residents* [265,355], totalling 1,495,510 persons or 4.8% of Canada’s population. The remaining 0.2% to round it up to 5% of Canada’s population is related to the refugee claimants that are also under the jurisdiction of the tribunal. Around 25,000 refugee claims are referred to the IRB per year and there are currently almost 42,000 pending applications (IRB, 2012). The IRB finalized 34,257 claims in 2011, rejecting 16,122 of them (IRB, 2012), which does not mean that these foreigners have left the country because of their right of appeal and/ or judicial review. In other words, we can reasonably assume that the cumulative total of refugee claimants in the country (which are part of the non-permanent residents population) corresponds to 0.2% of Canada’s population (62,482 people), if not slightly over. Thus, around 5% is a fair estimate of the proportion of Canada’s population who is currently under the jurisdiction of the IRB.

epistemological and theoretical tools to move even further away from the borders of criminal justice and mainstream criminology. In other words, I will expose my theoretical approach and how I perceive the penal field as something beyond criminal justice, a model of the Penal that is composed by different normative systems and that is constantly changing through their interactions. These two chapters taken together do provide a better idea of where I am going with the study of the IRB practices on the regulation of immigration in Canada and how it can be related to a complementary way of doing criminology within the social reaction paradigm or even to a new approach to criminological justice studies.

CHAPTER II:

OPEN JUSTICES AND CONCURRENT SYSTEMS: BEYOND CRIMINOCENTRIC DOGMATISM³⁰

Criminology long struggled to establish itself as a discipline or even as a field of study. It took different paths in Continental Europe and in Anglo-American countries, being at times associated with law, psychiatry and/ or social sciences. Nonetheless, this proposed science of “crime” never achieved the alleged maturity of “normal science” (Kuhn, 1970) and in many ways, it spent the last century in a state of constant crisis and eternal transition trying to set up its own knowledge, methods and epistemology. A multi-disciplinary enterprise by definition, criminologists dispute space and resources with other academic fields such as law, medicine and other social sciences. This heterogeneous composition also made much more difficult the establishment of common methodological and epistemological grounds that usually characterize a discipline. Historically, these distinct knowledges and approaches were mostly organized around the idea of crime (Debuyst et al., 1998), either in term of acts, behaviours, persons (criminals), and penalties (*poena.*), despite the fact that other forms of regulations and sanctioning practices were already in place. The development of criminology as a discipline, a process of academic autonomization and distinction from other fields (Bourdieu,

³⁰ I published an earlier and shorter version of this chapter in Velloso (2013)

1967; 1969; 1984b), was fairly criminocentric, that is, centralized on the idea of crime – at least in the few countries where criminology was effectively established institutionally supporting justice institutions and correctional services and creating departments, institutes, degrees in academia³¹.

This chapter and this dissertation is neither the first nor the last tentative review of this fuzzy field of studies, questioning its objects and eventually proposing to widen its scope. In the last fifty years, criminology has experienced two major ontological turns 1) the aetiological crisis and the shift to social reaction studies, 2) the widening of policing studies, namely the shift from public police to private police and broader forms of governance and regulation. In this chapter, I want to suggest that there is potentially a third ontological turn emerging in criminology related to justice studies. This ontological turn, like the others, partially moves away from old topics (e.g. the criminal, the police, the prison) and reviews the roles that criminal justice and criminal law play in structuring the set of dominant conditioning questions (Bourdieu, 1967) in criminology. However, this turn has not been consolidated yet because most criminologists dogmatically take the “stuff” of criminology (Cohen, 1988) as crime-related. While this crime-related agenda can be seen as our own condition of existence, it is also certainly one of our main limitations as if the study of non-criminal forms of regulation and social reaction meant necessarily the academic development of something else that cannot be criminology. My objective here is to question such dominant criminocentric approaches in justice studies, usually framed as the criminalization of some activity or group of people while the conflict at stake is not

³¹ One hypothesis to explain this phenomenon is that focusing and narrowing on crime was a necessary process in order to distinguish criminology from other social sciences in Anglo-American countries. However, more research should be done in that sense and this is not the objective of this dissertation.

technically a crime, and to propose a broader conception of the penal field that also includes other justice systems using different legal logics, forms of punitive social reaction and institutional support apparatus (e.g. distinct police and “corrections”).

I argue that this new wave of justice studies is not necessarily restricted to criminal justice and is currently fairly diffused. This emerging literature is still pointing to different directions, approaches and explanations to the alleged increasing use of administrative law-based *apparatus* or *dispositifs* (Foucault, 1995; Agamben, 2005) and/ or “new” forms of punishment (i.e. *new penology*). Yet, I argue that the uses of such *dispositifs* are not historically new and that this third turn is much more a reinterpretation of the role of administrative law (and punishment) in social reaction and social control than new factual strategies. In that sense, I suggest that our traditional focus on criminal justice and (criminal) sentencing acts as an epistemological obstacle (Bachelard, 2002), being a major barrier to perceive such nuances. Instead, I propose a wider conception of the penal field which operates as a mobile (kinetic sculpture) and includes the criminal law realm, but also other institutional normative systems that configure “‘less’ prominent locations of punishment” (Galanter, 1991), such as: regulatory criminal law, civil courts, immigration law, military law, parole boards and other administrative-based normative systems. This extended conception of the penal field also relies on an enlarged conception of punitiveness that includes the carceral, but also other types of sanctions including for instance administrative sanctions and police measures. I should note that this is, at least for the moment and in the context of this thesis, a State-based model, that is, one that focuses of State forms of social reaction and punitiveness. Indeed, theoretically, it is an open model, but I chose to exclude non-State forms of regulation, social reaction and even punitiveness.

Before going further however, I should mention that this chapter should be understood as a theoretical introduction to my field results, clarifying how I had to review the contemporary criminological literature in order to make sense of field data and ultimately how I have framed administrative law-based forms of social reaction. In many ways, this theoretical debate and proposal can be considered as one of the most important findings and conclusions of this dissertation. It is a theoretical framework built in reaction to what I observed at the IRB, during and especially after my fieldwork. However, I chose to place it as part of the *Overture* for the same reasons mentioned in the methodological chapter. It situates why and how I want to claim immigration and refugee law as a legitimate criminological topic without being necessarily crime-related while discussing the theoretical implications of this claim for criminology. In doing so, it provides a sense of direction to the way in which the next chapters should be read. Institutional forms of social reaction are not exclusive to criminal justice. Immigration justice is just one example of the punitive use of these others and concurrent normative systems and I really believe that future theoretical developments in our discipline are intrinsically related to how we, as criminologists, will address and reconcile (or not) such forms of social reaction with more classical crime-related topics.

This chapter is organized in four sections. In the first section, *Critical, but criminology*, I will briefly expose the first two ontological turns, pointing to the contributions and limitations of elite deviance studies in decentering criminal law as a privileged locus of administration of conflicts and social reaction. In section II, *New / Old Administrative Strategies*, I will argue that the use of non criminal-based normative systems is not a new trend and that, therefore, we are not assisting to a “criminal contamination” of other justice systems, but to the re-emergence and consolidation of different punitive logics. In section

III, *The Penal as a Mobile*, I will propose a mobile shaped model of the penal complex, an ensemble of State-based normative systems and legal institutions participating in juridical social reaction and in the execution of their punitive outcomes. I will suggest that this mobile is constantly moving and is not centered on any of its intricate elements, including criminal law. Finally, in section IV, *A Grounded and Reactive Model*, I will explain how such a model was built in reaction to criminocentric literature and was inspired by ethnographic data on immigration conflicts in Canada, being initially set as a way to nuance social reaction and punitive practices at the IRB.

I) Critical, but Criminology: from the aetiological crisis to justice studies

Edwin H. Sutherland was probably one of the first to question the association between crime and poverty present in traditional criminology discourse, proposing multifactorial explanations (differential association) and widening the field (white-collar crimes), even if it was still restricted to a criminocentric perspective (1940; 1945; 1985). Often his writings were considered ahead of their time, at least within Anglo-American criminology, anticipating some trends that would become more popular in the 1960s and 1970s, but he was well situated in the sociological urban studies of his time (Chicago School and Frankfurt School). Later in the 1960s, driven mainly by critical scholars, constructivism and symbolic interactionism, a new way of doing criminology arose in the USA (Berkeley), Canada (Montréal and Toronto) and England (Cambridge) (Bertrand, 1986; 2008).

This new criminology movement was a major rupture in our field, as Alvin Gouldner suggested: it was an attempt to make “‘criminology’ intellectually serious” (Taylor et al., 1974: ix). Generally, new criminologists were both questioning mainstream applied criminology, that was still fairly positivistic and aetiological at the time, and proposing some epistemological breaks (Bachelard, 2002), mainly the shift from the offender/event-centered paradigm to social reaction. This shift can be considered as responsible for a first ontological turn in criminology, presenting a clear alternative to aetiological studies and opening considerably the horizons of criminology (Debuyst, 1985; Young, 1988, 1999). During the following decades, new topics and approaches emerged and established themselves in the field, including proposals that were potentially (creatively) destructive (Schumpeter, 1994) to criminology as a discipline, such as: abolitionism (Christie, 1977, 1993; Hulsman & De Celis, 1982; Mathiesen, 1974), anti-criminology (Cohen, 1988; Ruggiero, 2001) and, more recently, zemiology (Hillyard *et al.*, 2004; Bertrand, 2008; Vanhamme, 2010).

I am not trying to reproduce previous critiques or to redefine endlessly central categories such as crime, criminal or criminal justice, but to question why these categories still remain central in criminology. After the labelling contributions in the 1960s and 1970s, it does not really matter if we call the “stuff of criminology” (Cohen, 1988) crime, deviance, harm, problematic situation or whatever. The issue to be addressed is rather how we conceive the social reaction apparatus that administrate, punitively or not, certain conflicts in society either in terms of policing (Brodeur, 2010; Shearing, 1996) or legal institutions (Bohannon, 1965). While what is considered a crime is debatable and remains an important concern, we should also change focus and try to better perceive how the institutional mechanisms of conflict resolution in our society are set up, especially the punitive responses of judicial institutions.

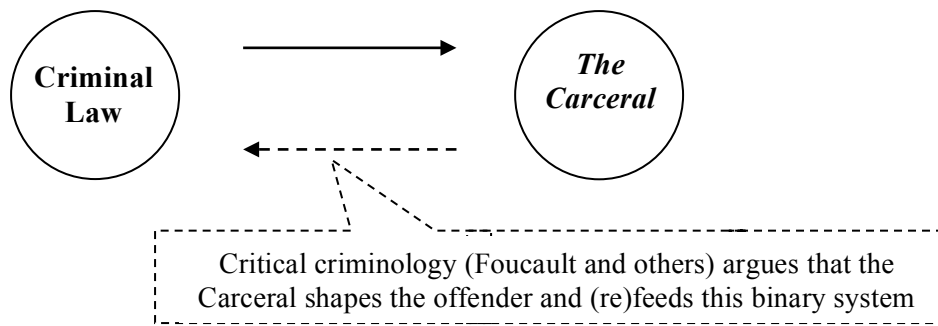
I speak of perceptions because we criminologists sometimes have problems in framing social reaction through judicial institutions. As a rule, when we talk about justice, we generally mean the criminal justice system, which is only one particular justice system among others in the State Law realm, and even many others if we take the perspective of legal pluralism, or any metaphysical conception of what justice should be. Here, I suggest that the discussion is quite different from the debate around the “stuff of criminology” because there are different legal and policy logics, procedures and practices coming into play. It is in fact analogous to Shearing’s argument concerning the necessary changes in the field of policing³². Non-criminal law-based normative systems translate events and sanction deviance in a substantially different manner than criminalization and sentencing processes. When analyzing it retrospectively, it is quite interesting that the new criminology of the 1970s (and 1980s) understood the idea of *selectivity of justice* as selectivity of criminal justice. They surely had their academic and political reasons to do so, but today it does not make a lot of sense to approach judicialization or enforcement like this.

Things are somewhat different in the realm of policing: studies do not only focus on crime, deviance, criminal justice or corrections. Policing is about order and security in a broader ontological sense (Elias, 1982; Giddens, 1991; Castel, 1995), but this is fairly recent. During the 1970s and 1980s, a second ontological turn happened in our discipline and allowed us to go beyond studying the public police (Shearing, 1983, 1987, 1989; Ericson & Haggerty, 1997), criminal law or even the idea of reaction (e.g.: prevention, risk management, etc.). A broader policing concept appeared to categorize this new wave of studies. This area of

³² “The problem is not solved by calling oneself a sociologist or a political scientist. The problem does not have to do with the perspective being used, or the lack thereof. The problem has to do with the way the topic of study is identified. The problem is that, whatever it is that unifies the topic, the family resemblance noted earlier, it is not crime.” (Shearing, 1989: 171).

studies first incorporated private police related subjects and then it became even broader by integrating topics and knowledge more traditionally associated to political science. Later in the 1980s and 1990s, Foucault studies in bio-politics (*governmentality*) had a great influence in this field and nowadays, policing can be easily considered as related to political economy (including neo-Marxists variants) and (nodal) governance studies.

The same options are not available to us when studying legal institutions in criminology. We tend to limit ourselves to the criminal justice, a criminocentric dogmatism that has occluded significantly our discipline and its development. Framing social reaction in terms of criminalizing, not criminalizing or decriminalizing is a quite simplistic reasoning and, I argue, a misunderstanding of how formal legal responses work. As a rule, we have consistently been looking to the criminal justice system and framing all institutional forms of conflict resolution through criminal law as if it structured all justice systems (State law-based or not). This seems to rely on a strongly held belief that crime organizes the “stuff of criminology” and as a result, we turn systematically to prisons and other institutional punishment and believe that they are a particularity of criminal law. According to this understanding, the criminal law and the carceral form a binary system that works more or less as the following graphic scheme shows (Figure 1):



This traditional criminological narrative operates as common sense and this conception of the penal system has become dogma. Overall we, as criminologists, suppose that social reaction is essentially a criminalization process, which also implies State law as the only valid system of law, and even when our inquiries lead us away from crime and State reaction, we insist on reframing the process as such. We criminalize the poor, immigration, terrorism, spaces and we even “govern through crime” (Simon, 2007). Instead of trying to make the empirical world fit within a predetermined set of categories and conceptual toolbox, we should rather explore how different forms of punitive social reaction are present in the field. In this dissertation, I deliberately focused on State law-based forms of social reaction, decentring criminal law within the State law realm only. However, in no way do I mean that other institutional forms of social reaction (legal pluralistic perspectives and approaches) are not present in such processes. On the contrary, as I will argue later in this chapter and later in chapter 6, the recurrent use of administrative law may be very well related to legal pluralism or at least to a certain level of pluralism through deference within State law (Arthurs, 1985).

Going back to orthodox criminology, by which I mean State-based criminology, it is important to note that not all schools of thought are restricted to criminal law. For instance, a good part of white-collar criminality and elite deviance studies scholars point to a certain legal polysemy and to the administration of conflicts through different normative systems (Acosta, 1988). While these studies were a first attempt to move beyond penal translation model (Acosta, 1987) (see Figure 1), most criminologists in this domain still framed these conflicts criminocentrically. First, these problematic situations are usually considered as crimes (white-collar crime, corporate crime, crimes of the powerful) or they fall into a

crime-related category, even if they barely access the criminal justice system. This flaw has been identified and addressed by some contemporary scholars (e.g. Lascoumes, 1997, 1999; Snider, 1993, 2000; Ruggiero, 1996, 2001; and others), but they tend to use the same criminocentric framework under different terms. Second, and more importantly, most criminologists seem to be more interested in identifying and denouncing these events, related harms and “criminals” rather than in understanding what happens with these conflicts outside the criminal justice system, exception made sometimes to Lascoumes and Ruggiero, how such events are legally translated and managed by official justice institutions (or pluralistically through the legal offices of corporations that negotiate their conflicts in their own private legal orders), the eventual sanctions that are inflicted, their justification, etc.

There are of course “exceptions”, and one good example of this is the work of Susan Shapiro (1985) about the U.S. Security and Exchange Commission (SEC). Shapiro was interested in understanding how the Enforcement Division of the SEC worked and she was totally open to perceive what they considered as problematic and how they administrated these situations by enforcing different pieces of legislation, settling non-judicial agreements and/or taking formal legal action. She clarified that in her work, “the term *prosecution* [wa]s used (...) to describe the decision to take formal legal action of any kind (civil, administrative, or criminal) against securities violators.” (Shapiro, 1985:147). It was an important explanation to a public that usually perceives these processes more narrowly, as if non-criminalization is a synonym for impunity, the lack of administration of conflicts or the failure of criminal justice and other regulatory regimes.

It is rare for criminologists to address punishment outside criminal justice. It is a taboo, even if we are able to recognize that fines are probably the most common outcome of

criminal justice (Robert & Faugeron, 1980; O'Malley, 2009a, 2009b). Curiously, it is okay to frame criminal fines as institutional punishment, but it is still quite controversial in criminology to call administrative fines a legal form of punishment. This criminocentric focus is essentially an ideological distinction and it acts as an epistemological obstacle (Bachelard, 2002), occluding the other realms of law and their forms of punishment³³. There is no need to use criminal law to arrest, detain, fine and/or exclude someone from society as there are a lot of non-criminal exclusive forms of social control (police measures, administrative sanctions, statutory damages etc.) that can be used alternatively. The idea of selectivity of justice is a much more complex process with many implications as to how we perceive and define the penal field.

I suggest that this extended conception of the penal field represents a third major ontological turn in criminology, one that focuses on accesses to justice and legal administration of conflicts, changing our conception of justice, accesses to justice and selectivity of justice. In the last forty years, criminologists have reviewed their own disciplinary boundaries, widened the frontiers of their knowledge and the possibilities of political intervention (either as professionals in the field, policy makers, activists and/or academics). In a sense, this turn is simply the logical consequence of the first two major ruptures. This process of widening the disciplinary field is still happening and open. Currently it is mainly focused on State law

³³ This does not mean that theories elaborated from this criminocentric perspective are ill founded, but that they are maybe incomplete or slightly biased. It is also important to emphasize the variety of works in the criminological and socio-legal field dealing with other forms of deviance and social control governed directly or indirectly by the State, including forms of confinement and surveillance (e.g. Castel, 1995; Ewald, 1986; Foucault, 1988; Goffman, 1961); and the literature on nodal governance and regulations in the fields of policing (e.g. the work of Clifford Shearing) and regulatory agencies (e.g. Hawkins, 2002).

as the main locus of social reaction, but it does not have to be restricted to it. The main issue is how criminologists, penologists, criminal law and socio-legal scholars framed social reaction in the past, perceive it today and will represent it in the near future. In order to do so, we will be able to rely on historical evidence.

II) New / Old Administrative Strategies

In this section, I provide two historical examples of how this epistemological obstacle has impeded criminologists from properly framing central issues in our discipline, taking them blindly as criminal law-related as if the realization of the obligation to punish infractions was only associated to it. These examples also serve to illustrate that we are not witnessing the emergence of new criminal law strategies or even the spread of such strategies in our field. Instead, we are simply observing a different accommodation of old provisions of social control.

The first example is related to the “birth” of the prison in the nineteenth century or to the idea of imprisonment as a form of punishment (Foucault, 1995; Melossi & Pavarini, 1981) and not as a bureaucratic police measure or a holding facility while awaiting a legal decision. I am not questioning that a new form of punishment arose, but that the birth of the prison as a form of sentence (*peine*) did not imply that bureaucratic police measures and administrative sanctions in use at the time disappeared or stopped their own historical developments. Quite on the contrary, most of the bibliography on the new penology and actuarial justice supports this

concurrent progress despite their fairly criminocentric perspective. Indeed, we usually forget that one of the main penal strategies of the rising “modern” carceral system, the *1834 Poor Law* and its *workhouses*, was not really criminal law, but rather related to administrative law. Furthermore, Bentham’s Panopticon full title includes: “applicable to any sort of establishment (...) in particular to penitentiary houses, prisons, houses of industry, work-houses, poor-houses, manufactories, mad-houses, lazarettos, hospitals, and schools”.

Actually, the *1834 Poor Law Amendment Act* introduced administrative law to England and Wales (Charlesworth, 2010), as Felix Driver reminds us:

“In 1836, Edwin Chadwick, one of the architects of the 1834 reform, almost casually described the new Poor Law as an ‘administrative law’. For Chadwick, the new Poor Law had effectively turned poor relief into an administrative question. The Act established quite new channels of authority, ‘transmission belts’ for the circulation of information between various levels of the state. At the hub of the new system was a central government body, the Poor Law Commission, which was responsible for the issuing of general regulations concerning administrative practice in the localities.” (Driver, 1989:271)³⁴.

The second example concerns the creation of organized public police forces during the 19th century in different colonial contexts. At the time, the main focus of the public police was controlling urban disorder and in particular certain people or groups considered dangerous either because they were poor, unemployed, slaves, not recognized as citizens by the colonial state, or simply because they gathered in public spaces. Criminologists typically frame these

³⁴ See also: Driver, 1993; Garland, 1981 & 1985; Radzinowicz & Hood, 1986; and Bartlett, 1999.

situations within a criminalization process as if, at the time, the idea of crime or criminalization had the same relevance that it has today³⁵.

In fact, in most of these cases, there was no reference to criminal law and in some cases there was no criminal justice at all: no legislation and no institutions. This absence can be explained in different ways. First, the idea of criminal law was still fairly blurred into the idea of civil law understood as city, republic or royal law (Berman, 1983; Blackstone *et al*, 1875; Foucault, 1974; Cockburn, 1977). Second, criminal law had not yet established itself as the dominant realm of legal punishment – something that eventually happened later by the end of the nineteenth century due to different institutional changes (Hay & Snyder, 1989; Radzinowicz & Hood, 1986; Steinberg, 1989). More radically, we may also argue that crime and criminal law were not what unified the topics of the rising science of crime; instead, it was poverty (*misère*), a very particular way to approach the urban-industrial poor, and its alleged association to vice (or the other way around). Crime was merely the symptom and the issue to be addressed was not legal, but moral (Hunt, 1999; Valverde, 1998; 2008).

A good example of this absence of references to criminal law and its related justice institutions is the creation of the public police in the city of Rio de Janeiro (Brazil), with the arrival of the Portuguese Royal court in 1808 and its policing activities and routines

³⁵ Edward Christian commented the use of the term “crime” by Blackstone as follows: “The word ‘crime’ has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the words *high crimes and misdemeanours* are used in prosecutions by impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge. When the word *crime* is used with a reference to moral law, it implies every deviation from moral rectitude. Hence we say it is a *crime* to refuse the payment of a just debt; it is a *crime* wilfully to do an injury to another's person or property without making him a satisfaction.” (Comments by Christian, in: Blackstone, 1875, IV: 4).

throughout the nineteenth century (Algranti, 1988; Holloway, 1993). There was no criminal code in Brazil before 1830 and the concrete existence of criminal justice institutions is quite questionable even during the second half of the nineteenth century. At the time, the public police were basically enforcing, if at all, the Philippine Ordinances of 1603 and by-laws in order to control the fluxes of urban slavery, small urban disorders and the proliferation of *cortiços*³⁶. Later, the Imperial Criminal Code (1830) technically substituted the Fifth Book (the “criminal” one) of the Philippine Ordinances, but some dispositions of the four other books remained in use in Brazil until the early twentieth century and by-laws are still used as major legal references by police forces. I do not know to what extent this argument can be generalized to other colonial contexts, but similar patterns arose in Northern Ireland (Palmer, 1988; Williams, 2003) and in Lower Canada/Québec (Dufresne, 2000).

These two examples do not constitute historical revisionism or an attempt at identifying every tiny non-criminal manifestation in the history of social control, which would possibly be an endless job, but they are an illustration of how the common place of legal punishment may not be restricted to criminal law. In fact, it may very well be that the criminocentric approach is an historical confusion or the collateral effect of a process of academic autonomization (Bourdieu, 1967, 1969, 1984b) in the Anglo-American world where criminology gained stronger disciplinary contours than it ever did in continental

³⁶ *Cortiço* was a type of collective urban housing where poor populations lived in deprived conditions and often considered by authorities as a site of sickness, disorder and danger. Sweeping undesirables based on health and safety condition is not that out-dated and was the main justification for removing Occupy Wall Street protesters from Zuccotti Park (<http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html>, last accessed 2011-11-16).

Europe and Latin America³⁷. Consequently, it means that the contemporary punitive use of administrative law is not necessarily the result of an essentially new trend (e.g. post 9-11 new normal) or the “widening of the carceral archipelago” as it is sometimes suggested (i.e. Cohen, 1985; Feeley & Simon, 1992; 2003). These forms of punishment were always available, but, until recently, they were rarely perceived as such by most criminologists and criminal law scholars. In that sense, I am not suggesting a conception of the penal field according to which criminal law would be expanding its logics and practices or contaminating others realms of the law. Instead, there is a concurrency and yet a complementarity among different normative systems (criminal law, regulatory criminal law, administrative law, etc.), resulting in diverse State-based penal configurations produced by their potential interactions. This proposition involves a certain rupture with contemporary hegemonic penal theories, the revival of an extended penal system model which is not necessarily governed by criminal law principles, but by a complex network of

³⁷ As argued in the previous chapter, Brazil criminology is still fairly associated to police academies and a sub-discipline of criminal law. As a rule, social scientists and socio-legal scholars will not claim the label criminologist, even if some of them are doing criminology, but they will rather call this knowledge socio-legal studies, sociology of law, of crime, of violence, etc. The situation in Latin America is not very different from that of Brazil and as a rule this field of studies is fairly diffused and not institutionalized (professionally and academically). In Continental Europe, there are different criminological traditions that vary substantially from country to country. Indeed, most of the time they are associated to law (e.g. Belgium, Germany, Italy) and sometimes it gains a clinical aspect as well (e.g. Belgium, Italy). Regarding the French case, it is worth reading Laurent Mucchielli’s “Vers une criminologie d’État ?” and “De la criminologie comme science appliquée et des discours mythiques sur la ‘multidisciplinarité’ et ‘l’exception française’” (2010a; 2010b). He wrote these articles in reaction to the tentative to formalistically institutionalize criminology in France during the Sarkozy government and the nomination of Alain Bauer to a tailor-made (and by decree) chair of Criminology at the *Conservatoire national des arts et métiers*. Mucchielli does a brief history of francophone “criminology” (France and Québec), focusing on the French context and criticizes the recent conservative attempt to institutionalize a field of studies and to control the production of knowledge on delinquency and security (Mucchielli, 2010a; 2010b).

normative systems, distinct legal logics, practices and intervention institutions.

I do say “a certain rupture” because my proposition suggests decentering the Penal (or punitiveness more generally speaking) from criminal law, while still restricting it to State law – at least for the moment, since after all, this dissertation is about the regulation of immigration from the point of view of the State and through its own legal institutions. In fact, I do not think it would be wise to propose two ruptures (the first, from criminal law and the second, from State law) at the same time at this stage of development of criminological thought and, in any event, it would be too much for one dissertation. We still have much to learn about how social reaction occurs through State institutions and I think that keeping such a focus for now is a more promising path than approaching punitive social reaction through pluralistic forms of regulation; a path that policing studies arguably took by focusing on private policing and nodal regulation (Clifford Shearing)³⁸. The bottom line is that State law is quite hegemonic when we are talking about punitive social reaction or penal institutions. It is interesting and important to talk about *Pasárgada* law or the rise of a new legal common sense (Santos, 1973; 1977; 2002), but when the police arrive at *Favela da Maré* (where Boaventura de Sousa Santos did his fieldwork) the habitants of *Pasárgada* know very well that social reaction (and law) is first and foremost about the State in its crudest forms³⁹.

³⁸ Burris et al., 2008; Shearing, 1996, 2007, 2011; Shearing & Johnston, 2010; Shearing & Wood, 2003, Wood & Dupont, 2010; Wood & Shearing, 2007.

³⁹ This is still valid today and even during protests. Last June the police killed at least nine *Pasárgadians* (sic) during a protest at *Favela da Maré* in the context of a series of demonstrations during the FIFA’s (International Federation of Association Football) *Confederations Cup*. Actually these were the first deaths caused by police interventions after almost two weeks of demonstrations throughout Brazil. See: <http://www.guardian.co.uk/world/2013/jun/25/shoot-out-rio-favela-protest>, last accessed June 26, 2013.

This conception of the penal system composed of multiple normative systems is already present in criminology, but it has been more developed by socio-legal scholars. It is present embryonically in Foucault's *Discipline and Punish* when he first borrows from Rusche & Kirchheimer (2003) their central propositions to think "penalty" beyond the "means of reducing crime"⁴⁰ in order to analyze "'concrete systems of punishment' (...) that cannot be accounted by the juridical structure of society alone" (Foucault, 1995: 24); and later in the same book when he develops the idea of a continuum dimension of the carceral and tries to trace a distinction between dominant illegalities and delinquency (1995: 285ss.). Although Michel Foucault considered the carceral archipelago, and his idea of punishment or control of bodies, as "well beyond the frontiers of criminal law" (1995: 297), he framed it within a socialization and/ or normalization perspective (disciplinary society) rather than as a conflict resolution/ access to justice perspective. In other words, the carceral continuum is conceptualized much more as a policing concept than as a justice studies concept, something, which is even clearer in Foucault's governmentality studies.

Interestingly, David Garland is maybe the author who first pushed forward this extended model. In his early writings about welfare sanction and penal institutions in the nineteenth century (1981; 1985), he presented the modern penal system as a welfare/control complex composed of a new disciplinary network that was not limited to criminal law or to its support

⁴⁰ I should note that the term "crime" is apparently used only in the English translation. The original in French is *délits*, a far more general category that is also used in other translations (e.g. Italian, Portuguese, Spanish). I think it is extremely symptomatic that *délits* became crime in the Anglophone world. For me, it is not only a question of language, but rather a question of how the Anglo-American tradition classifies social reality. Interestingly, this corroborates my hypothesis that criminocentric dogmatism is much more present in Anglo-American criminology than in continental Europe "criminology" (or sociology of deviance).

agencies. “They opened up a correctional system which policed not crimes but characters” (Garland, 1981:41), displacing justice questions (criminal and/or natural law principles) to a more administrative level (e.g.: indeterminate sentences, preventive detention, reformatory discipline and other forms of administrative sanctions and police measures). Unfortunately, possibly influenced by Foucault’s governmentality studies, Garland did not continue to develop this model in terms of justice studies, shifting to the already opened and well-paved path of governance and policing studies in his subsequent writings.

III) The Penal as a mobile: a non-criminal centered penal complex model

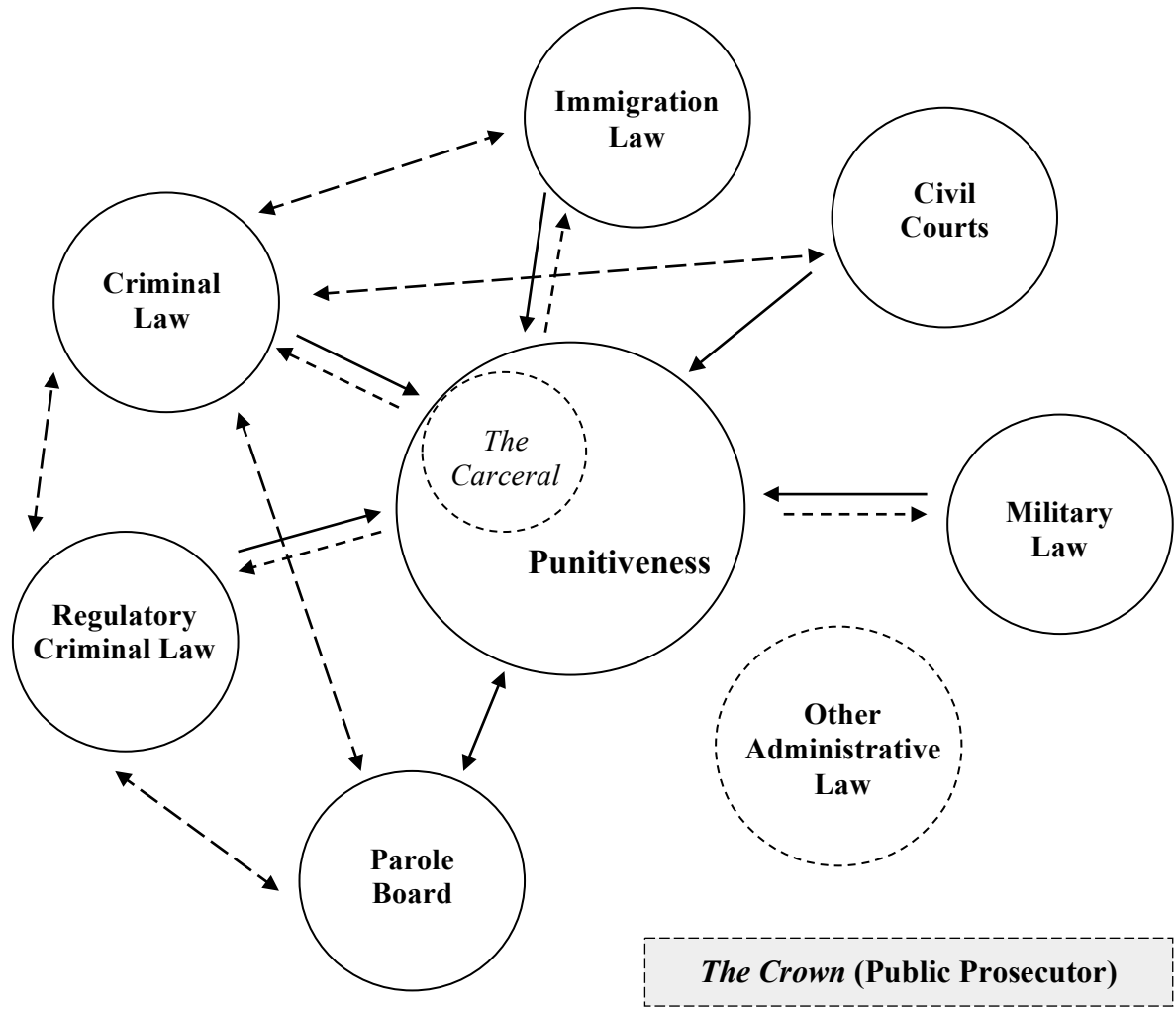
If a criminocentric conception of justice is not sufficiently precise to describe the historical constitution of Western modern penal systems and the infliction of pain by institutionalized authorities, this model seems to be even more problematic today. It is unable to encompass the increasing and recurrent use of non-criminal normative systems in administrating punitively different events and individuals in contemporary societies (Beckett & Herbert, 2008, 2010; Beckett & Murakawa, 2012; Bosworth & Kaufman, 2011; De Keijser, 2011; Duff, 2007, 2010a, 2010b; Hörnqvist, 2004; Velloso, 2013b; Velloso & Goudreau, 2014). This is especially true in North America where public prosecutors (or crown counsel) can “shop” between different normative systems more easily than in Europe⁴¹, avoiding criminal trials

⁴¹ The interpretation given to Article 6 of the European Convention of Human Rights (right to a fair trial), more

and their associated legal guarantees. Conflicts are not criminalized or even decriminalized and the State punitive apparatus and the “crime” control industry increase their tentacles. This punitive decriminalization (Velloso, 2005, 2006) sounds paradoxical, but in fact it is not. It is just a matter of appropriately framing institutional forms of conflict resolution and being open enough to perceive how people are being prosecuted and then eventually convicted and punished, yet not necessarily in this order (e.g. preventive/ pre-trial detention). We should not have a closed binary model formed by the criminal justice system and the carceral, but an open one, that is, a model that incorporates the different possibilities of legal processes and institutional forms of punishment. Such a model could be briefly summarized in Figure 2:

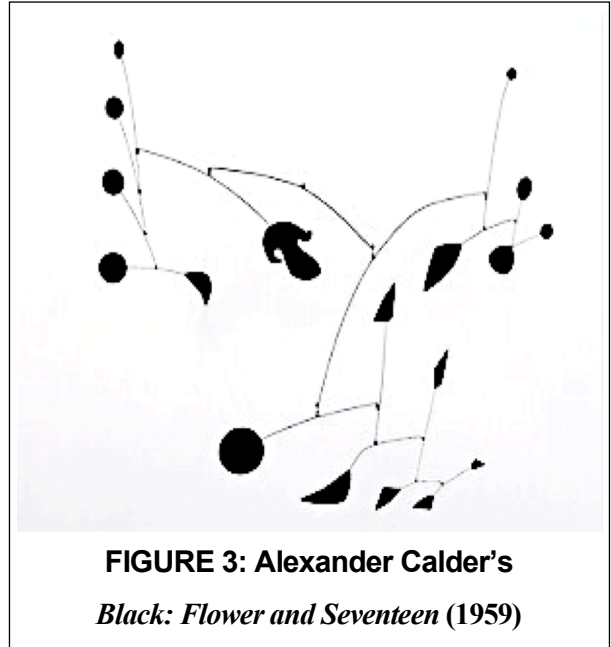
specifically to the idea of “autonomy” of the concept of ‘criminal’” (*Engel and Others v. the Netherlands*, ECHR, 1976, §§80-83; available at: hudoc.echr.coe.int/sites/eng/pages/search.aspx?i1/4001-57479 (accessed 15 January 2013)), makes it more difficult to punish someone by prosecuting her/him under administrative-based normative systems in order to avoid criminal trials. The severity of the sanctions that might be inflicted is what really matters to determine the level of legal guarantees of the accused, even if originally the offence was not labeled as criminal by the State-party. However, these provisions do not include immigration conflicts, which are regulated under administrative law terms.

Figure 2 - The Penal Complex Model:



I should clarify at the outset that this model is not centered on criminal law, on the carceral or punitiveness (as the scheme above may suggest) or on any other “independent” structure. Actually, it would be better schematized in 3D, rather than on the flat figure scratched on paper. This model should be perceived as a mobile (kinetic sculpture), see Figure 3; a Tocquevillian conception of structure undergoing constant change and settling in a different configuration every time any force is applied and/or each time one of its elements is altered, abolished or a new one is created. In other words, the penal complex is always changing and

criminal justice is but one of its components in terms of social reaction and punitiveness. The stability of the penal complex as a system is provisional and its configuration varies in accordance to several factors, including the logics and practices of different normative systems, the communications (or lack of) and the fluxes among them (see the arrows in figure 2), the policies, (and not only penal



policies as Garland has already suggested in his early writings), the key role of the public prosecutor in selecting different justice systems, the creation of new elements, such as policing institutions, specialized administrative tribunals and regulatory agencies, and broader external variables (Elias, 1982; most of Foucault; Garland, 2002; Rusche & Kirchheimer, 2003).

Methodologically, the penal as a mobile is at the same time a reaction to criminocentric approaches and an attempt to build, contextualize and relativize existing categories to better analyze and to help us think not only the actual context, but also previous ones where criminal justice institutions played, and maybe still play, a major role. Therefore, this mobile-shaped model is only a rupture in terms of decentring criminal law from the criminal complex and nuancing legal sensibilities (Ewick & Silbey, 1998; Geertz, 1983) that are more anchored in and from the field. In a way, it is the continuity of the new criminology and policing/ political economy (of punishment) enterprises in the sense that this multitude of regimes operates also as a whole. The nuance I am doing here is to push part of the social reaction realm back to where it probably always was: outside criminal law, while boldly

incorporating these “less prominent locations of punishment” (Galanter, 1991) into our legitimate field of studies. In short, it is a political economy of social reaction that is not restricted to the selectivity of criminal justice and a political economy of sanctions or legal punishment of any kind. Substantively speaking, it is a model based on access to justice(s) and procedure, anchored in anthropology and sociology of law and aiming to describe how different events are legally translated into different normative systems. In that sense, it fits and gives support to post-Fordist sociologies of punishment and confinement (Chantraine and Mary, 2006; De Giorgi, 2006). Paraphrasing Shearing (see footnote 32, p. 64), whatever it is that unifies the topic, it is not crime, but juridical social reaction and the resemblance of the forms of sanctions involved.

To be sure, the elements detailed in Figure 2 do not necessarily cover all realms of state-based punitiveness and were chosen in a very conservative way and excluding any legal institutions that are not related directly or indirectly to the State. The binary model described in Figure 1 composed by criminal law and the carceral is completely integrated in the mobile model, but the concept of punitiveness also includes sites and forms of punishment that are not restricted to prisons and corrections or related to criminal sentencing (e.g. administrative and regulatory fines, administrative detention, banishment, zone restriction orders, punitive and statutory damages, etc.). Regulatory criminal law and parole boards are presented as dissociated from criminal law and the carceral because they constitute distinct normative systems⁴², operating mostly in an administrative manner in terms of rituals, procedures,

⁴² In Canada, the Parole Boards are simply not criminal law-based, but administrative tribunals or panels. The same pattern is found in other Common Law regimes (e.g. United Kingdom and most of the United States of America).

standards and legal guarantees. The penal role of civil courts is also well known through punitive damages (Galanter, 1991). Military law and immigration law are administrative law-based normative systems that traditionally, and dramatically, regulate and penalize part of the population under their jurisdiction (military and foreigners). Other administrative law regimes may encompass by-laws that are not covered by regulatory criminal law regimes and other specialized areas and/or tribunals such as: land law, labour law, copyright law⁴³, mental health law, and others. Finally, the crown/ public prosecutor and arguably different police institutions, act as a filter, choosing among these different procedural options. While some work has already been done with respect to crime-related selectiveness (Acosta, 1987; Ericson, 1981; Grosman, 1969), more research is needed to understand how conflicts flow through different normative systems and which steps of penal translation (*mise en forme*; Acosta, 1987; Cousineau, 1994) and legal sensibilities are involved.

To summarize, this model suggests decentralizing criminal law and widening the scope of criminology in two distinct ways. First, it proposes to incorporate other normative systems along, beyond and in addition to criminal law within the penal complex. Second, it also suggests going beyond the carceral to include a renewed and enlarged conception of punitiveness, considering other forms of exclusive control operating (again) along, beyond and in addition to the carceral. Thus, we can preliminarily conclude, among other things, that our job as criminologists is much more complicated than we think it is, and that there is still a lot of work to do in order to understand minimally how penal institutions work. I will return to this point in the conclusion of this thesis, chapter 7, after exposing the necessary empirical

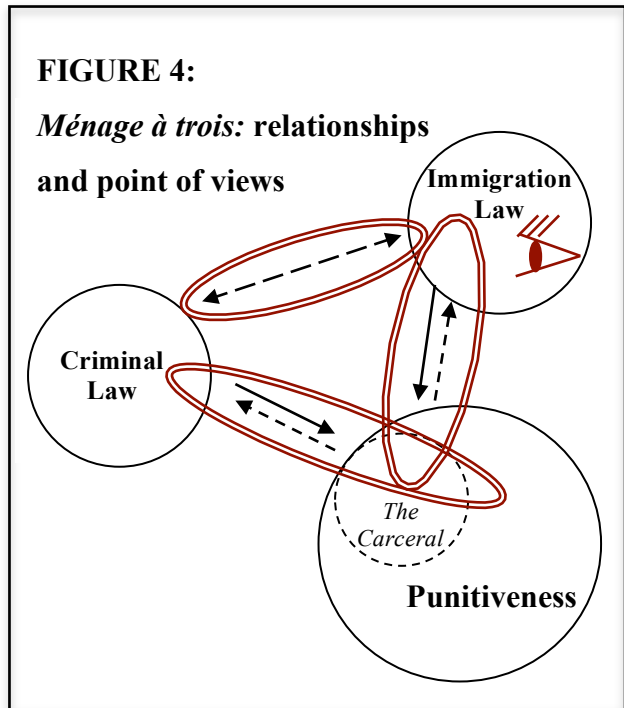
⁴³ In this sense, see Velloso and Goudreau, (2014) for the use of punitive and statutory damages in the Canadian copyright regime.

elements to push the penal complex as a mobile model even further.

My Ph.D. research is a first step toward a tentative penal complex model, which feeds into a broader research agenda on the political economy of social reaction and punitiveness. In the context of this dissertation, I think about how immigration law works in this scheme, providing empirical data to support the analytical model or at least part of it. As such, the empirical part of this dissertation is an illustration of a *ménage à trois* involving immigration law, criminal law and the realm of punitiveness; an example of a kind of relationship that is at the same time promiscuous, domestic, shared and fairly socially unacceptable. Promiscuous, domestic and shared due to relationships of normative regimes based on the same source of normativity, that is, State law; and fairly socially unacceptable because social reaction and punitiveness are enacted almost without any of the legal guarantees traditionally associated to the due process of law. My objective is thus to make this *ménage à trois* explicit, to illuminate a very particular institutional configuration which also makes possible, for instance, the imposition of a one year sanction that will ultimately be transformed in a seven year sanction – something that is apparently (and still) legally acceptable, but fairly socially unacceptable when presented in these terms.

I should also reinforce how and from which point of view I am observing this *ménage à trois* (see Figure 4). First of all, I perceive these interactions from an immigration law perspective by which I mean to refer to legal documents and immigration law practices observed at the IRB. During my Ph.D. research, I dealt with these data not only from a criminological point of view because this perspective was often insufficient to nuance what happened at the IRB. As presented in the previous chapter, I first did an immigration law course prior to my fieldwork at the IRB in order to learn the language spoken by jurists in the field and

principally their *weltanschauung*, their “principles of vision and division” (Bourdieu, 1991b, 1998), some glimpses of the legal sensibilities in place. It was a legal training to better analyze documents and to prepare me for the fieldwork. In fact, it was the fieldwork itself that helped me better identifying the relationships between different normative systems and not the other way around, what would be a “theoretical theory” approach (Bourdieu, 1977; 1990), being ultimately responsible for the development and especially the refinement of the *Penal as a mobile* model.



I observed this *ménage à trois* from the IRB, through direct observation and mainly with an immigration law perspective. Of course my personal and theoretical background can affect the way I perceive and represent the world, otherwise no thick description (Geertz, 1973) and no law or legal knowledge (Geertz, 1983) would be possible, but I tried to put aside these perspectives when observing and especially when describing what I observed. In that sense, I was very privileged to have the opportunity to present my views of the IRB practices to my peers in different occasions, sometimes to a more criminological public, but also to immigration law academics and practitioners. Interestingly, while criminologists typically received my work by remaining completely silent (and sometimes by being quite critical)⁴⁴,

⁴⁴ I think this was due mainly to the fact I am operating empirically and theoretically beyond the hegemonic criminocentric perspective. Most of the time no one asked me questions during my presentations and I usually

immigration lawyers or immigration law academics generally welcomed my remarks as very grounded and nuanced. Thus, looking backwards, I clearly see this theoretical model (the penal as a mobile) as the result of a process of reconciliation with criminology, a process through which it was necessary for me to revise the boundaries of the discipline internally. In other words, this dissertation, and especially its theoretical debate, is essentially reactive, a reaction first to the idea of criminalization of immigration, but also to the concept of criminalization more broadly. My role was to present the evidence from the IRB, making a thick description sense of it and when I realized that it did not fit into the categories of mainstream criminology, my role was also to refine and to complexify the categories used in the debate on social reaction and punitiveness, even if to do so I had to work with terms and literature from other disciplinary contexts.

received feedback only in person afterwards with comments such as: “it’s intimidating”; “you’re doing a different kind of criminology”; “you were clear, it was very interesting and I don’t know how to approach it”; “it was extremely thought-provoking for my theoretical framework”; “I was questioning myself and the categories I used”; “it looks very obvious after you present it” and so on. These informal comments surely explained part of the silence, but I should add that I have also received negative reactions as if I was embarking in a “merely terminological debate” or as if “in the end it’s all about punishment” or even that “criminalization is a shared category in our field” and consequently that it was preferable to use this category among criminologists even though it might not be exactly accurate to describe what was going on.

IV) A Grounded and Reactive Model: nuancing immigration control in Canada

My conception of the Penal as a mobile should not be taken as primarily theoretical or purely abstract, but as an open model built from fieldwork and adaptable to other contexts. It is an empirically grounded and procedural model, which can be first traced back to research conducted in the field of elite deviance and regulatory studies interested in the different fluxes of legal responses (Shapiro, 1985; Acosta, 1988; Lascoumes, 1997, 1999; Hawkins, 2002; Velloso, 2005, 2006). However, elite deviance studies alone were not sufficient to nuance and theorize “less” prominent locations of punishment for two reasons. First, these studies keep the model at a more descriptive level without problematizing or linking it to a broader punitive scheme. While it may not be explicitly presented as such in these studies, they (only) constitute a first step in realizing how the old criminological and penological conceptual toolbox is not precise enough to perceive the conflict resolution dynamics and more importantly to recognize that decriminalization, either by law reforms or through non-enforcement, “paradoxically” implies more punishment⁴⁵. Secondly, elite deviance studies did not seem sufficient because they are too linked to criminal justice, even when they are not criminocentric. The truth is that elite deviance – including corporate crime, white-collar crime or other similar category⁴⁶ – is crime-related by definition. Such illegalities are on the

⁴⁵ This punitive decriminalization process (Velloso, 2005, 2006) is similar to what Ashworth and Zedner (2010) refer to as the problem of undercriminalization. In fact, the idea of a punitive decriminalization is only paradoxical if you presuppose a criminocentric conception of the penal complex. If punishment is not restricted to the criminal realm, there are no contradictions or paradoxes at all.

⁴⁶ These categories are not uniform and most of the time they refer to financial and/or economic offences. I

margins of criminal justice and criminology, and therefore they cannot provide sufficient elements to contrast such practices. They are framed within the criminal justice system or something very close to it (i.e. non prosecution), blurring criminal and non-criminal forms of social reaction. In other words, they are not “non crime” as other illegalities might be (e.g.: immigration, military, etc.). In that sense, the penal as a mobile model is somehow a radicalization and extension of these approaches to other areas by trying to identify broader and recurrent punitive processes and to theorize these above-mentioned “less prominent locations of punishment” (Galanter, 1991).

The socio-historic context of my research, the post 9-11 scenario, was very important to the conceptualization of the Penal as a mobile model and provided further empirical material. The North American war on terror was and still is mainly operated through military law and immigration law and this obviously helped me to establish links among different normative systems. New and broader actors appeared in the political and juridical fields, such as *Homeland Security* (USA) and *Public Safety Canada*, reshaping significantly the penal complex mobile. These super national security departments concentrate numerous state agencies⁴⁷, which

prefer to use elite deviance (Simon, 1996) essentially because it is a broader category to label the delinquency associated to elites, ruling class and/or the powerful, including non-economic offenses (e.g. corruption). I chose not to develop further such categories or to extensively distinguish them because this is not really relevant to this chapter and dissertation. My main point is that all those characterizations are fairly empirical and inductive, being most of the time only descriptive and denunciatory of such delinquency that is fairly characterized only as crime or criminal behavior (criminocentrism). As a rule, these studies were not built to theorize social reaction more broadly nor to show how the mechanisms of social control of these kinds of deviance are set, but to point that deviant behavior is not a monopoly of the poor and that the social and economic consequences caused by such crimes are often more harmful than “street crimes” (e.g. Sutherland, 1940, 1941, 1944, 1985; Shapiro, 1987, 1990; Simon, 1996).

⁴⁷ The *Department of Homeland Security* is composed of seven agencies: US Immigration & Customs

have a whole range of enforcement possibilities: some are criminal, but most are administrative where the executive branch of the State has even more discretionary power. The immigration law asymmetric incorporation of criminal justice norms (Legomsky, 2007) is a totally new configuration of the penal mobile and probably the result of new policy and enforcement structures⁴⁸. Public order and security policies in Western societies go way beyond criminal borders. Guantanamo Bay detention camp is still in operation and it is probably the most visible and brutal example of administrative detention in the Western world today. The use of administrative forms of punishment is not something new, but the punitive use of administrative law is much more visible today than it was in the last century. A vast field of studies is arising and in general we are, as criminologists, only starting to explore this punitiveness and to develop better categories to analyse and thickly describe it (Geertz, 1973).

Enforcement (ICE), US Customs & Border Protection, Transportation Security Administration, US Citizenship & Immigration Services, US Secret Service, Federal Emergency Management Agency, and US Coast Guard. On the Canadian side, *Public Safety Canada* has five agencies: Canada Border Service Agency (CBSA), Royal Canadian Mounted Police, Canada Security Intelligence Service, Correctional Service Canada, and National Parole Board. These super agencies are very similar in their mandate and scope, and curiously they emerge in the same context. Still, I would not go as far as to claim that they are equivalent to each other on their respective sides of the border. Quite on the contrary, in the U.S., there are some major security players under the Homeland Security umbrella, such as: the National Security Agency (NSA), operating under the jurisdiction of the Department of Defense; the Federal Bureau of Investigation, which is part of the Department of Justice; and the Central Intelligence Agency, which in theory reports to the presidency via the Director of National Intelligence. In comparison, the Canadian super-security agency (Public Safety) rather concentrates the high-policing (Brodeur, 1983) apparatus and the correctional aspects of social control under the same portfolio as opposed to its American cousin (Homeland Security). Nevertheless, the exclusionary effects and the weight of such new institutions on the penal complex are probably very similar in terms of creating alternatives in order to avoid traditional criminalization processes.

⁴⁸ The CBSA in and the ICE were both created in 2003 and since then they play an increasing role in the policing of immigration and in the administrative translation of such events. Presently, a great number of individuals detained in carceral conditions in North America are in detention and/or under surveillance directly because of their activities.

Finally and perhaps more importantly than the influence of elite deviance studies and of the post-9/11 social-historical context (i.e. war on terror) in which this research was first set, it is the time spent in the field, at the IRB, that cultivated and developed a different outlook on punitive social reaction and ultimately helped me theorize the broader penal complex model encompassing the administrative law realm as a privileged site of punishment.

Let me illustrate this further by introducing preliminarily some of my observations on immigration control based on my fieldwork in order to situate them in this theoretical framework. I will of course give more details in the following chapters. In short, immigration control in Canada and probably elsewhere is not about criminal justice, but administrative law. Moreover, the forms of punishment available are not economic sanctions, as it is usually the case in administrative law-based systems (fines) and pointed by elite deviance scholars, but they are mainly related to different forms of deprivation of liberty (detention, surveillance and removals). Immigration justice is a tough social reaction system but it should be distinguished from the criminal justice system both in terms of policing⁴⁹ and of courts, including the sanctions involved. How should we characterize what is going on in immigration control at a normative level? For criminologists, it is very tempting to approach it criminocentrically, trying to make field data fit into our established theories. However, criminalization approaches do not really describe what is happening as social reaction in the

⁴⁹ The CBSA police immigration, but they have a broader mandate than traditional public police institutions. In addition to a policing role, CBSA officers also act as public prosecutors at the tribunal (IRB) as well as judges because they have jurisdiction over non-permanent residents and they do not need to refer to the IRB to deal with them. In other words, illegal immigrants and temporary residents can be arrested, detained and/or deported directly by CBSA as a result of their own discretion – without *making crime* (Ericson, 1981; Acosta, 1987) or without accessing any kind of tribunal. This will be further discussed in the chapters 4 and 5.

ground level nowadays and this is not restricted to immigration, but to public order and security more broadly (Hörnqvist, 2004).

The reaction to the hegemonic criminalization approaches was fairly intuitive when I started dealing with my research topic, that is, immigration conflicts. As I mentioned in the previous chapter, I learned some lessons during my masters research on how the label “crime” is not always really equivalent to a criminal translation of events (*mise en forme pénale*: Acosta, 1987) and that “criminalization” of such kind of deviance are often related to administrative law-based forms of social reaction (Velloso, 2005, 2006), which is corroborated by most of the elite deviance literature referred throughout this chapter. Thus, the choice of immigration control on the juridical level implies somehow a methodological move towards beyond the frontiers of criminal law and in a second moment a possible break or critique of the idea of criminalization as a central explanatory category to social reaction and punitiveness. Five years ago this was not evident and actually I did not know what exactly I would find and especially to what extent I would question the limit of such criminocentric approaches. Finally, despite my prior knowledge of elite deviance studies and the post-9/11 social-historic context, the war on terror, it was the time I spent at the Immigration and Refugee Board of Canada that made me sharpen a different outlook on punitive social reaction and eventually theorize the broader penal model encompassing the administrative law realm as privileged site of punishment.

It is in that sense that I opened this section stating that the Penal as a mobile should not be taken as primarily theoretical or purely abstract model. On the contrary, it is grounded and highly reactive by using field data and an administrative law point of view to rethink social reaction and criminology itself. I had to start learning this different outlook prior to fieldwork

through formal immigration law courses and to continue grasping these logics in the field. As Malinowski, Geertz and many others already taught us, the importance of such movements is not only to describe the other by their own terms, but also to improve the understanding of our own symbolic system⁵⁰. Actually, thinking about immigration control and the IRB through administrative law lenses is fairly normal: this is how lawyers and consultants practice it in the field, how one formally learns it in law school and how most jurists write about it. The difficult and most interesting part is being able to look back to criminal justice and to criminology through administrative law lenses, “widening our own” perspective (Malinowski, 1922). And more than that, how criminal, regulatory, immigration and legal pluralistic regimes communicate to each other, shaping the penal complex mobile differently according to the situation and legal sensibilities in play. This will be discussed in further details in *Act II: Heterogeneities* and *Act III: Seeing the real you at last*. Ultimately, the shift from an essentially empirical dissertation to a more theoretical one and development of an analytical model to identify, classify and think social reaction, punitiveness and penal policies at large is the very best result of a methodological and epistemological process of widening my own criminological perspectives.

Denaturalizing one’s own categories is not an easy methodological process, especially when doing such unorthodox research in criminology or penology. It is tempting to approach immigration control criminocentrically, trying to make field data fit into established theories (critical criminology included). The notion of carceral archipelago is not that far from a mobile-shaped penal complex. The main difference is that the first is broadly conceptualized in function of crime / criminal law while the other is not. Oddly enough, the criminalization

⁵⁰ “In grasping the essential outlook of others, (...) we cannot but help widening our own.” (Malinowski, 1922: 518).

of everything by whatever means available is a quite acceptable argument in our disciplinary field. Criminological contemporary literature on policing, risk, new penology supports some *post 9-11* criminological common sense ideas, such as: *crimmigration* (a fusion of immigration and criminal law; e.g. Miller, 2005; Stumpf, 2006; Aas, 2011), *criminalization of immigrants* (the most common one⁵¹), *criminalization through counter-law* (certainly the most sophisticated one; Ericson, 2007) and so on. However, this idea of criminal contamination of other justice systems did not seem to be supported by field data and administrative law perspectives⁵². Actually, “contamination arguments” does not make a lot of sense in a mobile-shaped model. This will be even clearer after the reading of the following two chapters and I will return to this point in the last chapter of this thesis: “Bringing Politics Back into the Discussion”.

Ericson’s appropriation and development of the Foucauldian counter-law idea is very interesting to think such broader penalization processes. He suggested that there were two types of counter-law: *counter-law I*, which “takes the form of laws against law” and which he associated to Agamben’s *state of exception*; and *counter-law II*, which “takes the form of surveillance assemblages” (Ericson, 2007:24ss.). Later in his book he argues that:

“This new wave of criminalization is enacted through counter-law. Counter-law I

⁵¹ Just to list a few key and recurrent scholars on the contemporary debate that use such terms: Sayad, 1998; Palidda, 1999; Wacquant, 1999; Mathieu, 2001, 2006; Miller, 2003, 2005; Bosworth, 2008; Bosworth & Guild, 2008; De Giorgi, 2010; Zedner, 2010b; Bosworth & Kaufman, 2011.

⁵² In fact, if any “contamination argument” can be made, it is the other way around with administrative law strategies increasingly influencing the criminal justice system (e.g. preventive orders, preventive detention, zoning restrictions, security perimeters). I would not include corrections here because in Canada (and in many U.S.A States) parole boards are simply not criminal law based, but administrative tribunals.

entails the creative development of laws that counter the traditional principles, standards, and procedures of criminal law. Through new forms of criminal law, as well as new uses of civil and administrative law, counter-law seeks to reduce or eliminate due process protections that create uncertainty in investigations. It also increases the discretionary capacity for pre-emptive strikes against the suspicious, including incapacitations and severe punishment. (...). Enabled by counter-law I, counter-law II seeks to make legal process unnecessary. It does so either by making suitable enemies uncomfortable to the point that they go elsewhere, or by making their suspicious signs and harmful behaviour visible in ways that make exclusion and punishment seem obvious and necessary.” (Ericson, 2007:207).

Ericson is right, but for his categorization of this phenomenon as “criminalization” (*ibid.*). The problem is that he is still too attached to traditional crime-related references. First, most of what is happening today is not exceptional or an emergency, but the everyday routine of a normative system that works with less guarantees. Second, the idea of criminalization through counter-law is simply a contradiction by definition. This form of prosecution is made possible precisely by creating access to other normative systems⁵³ and the notion of *legal holes* seems to be more appropriate to describe the process of dodging criminal law in order “to reduce or eliminate due process protections” (*ibid.* Ericson)⁵⁴. Therefore, the term

⁵³ This can be explained by various non-exclusive reasons: prosecutorial discretion, policing strategies, decriminalization, non-enforcement of criminal norms, citizenship status and/or criminal background of the offender, undercriminalization and even overcriminalization (e.g. mandatory minimum sentences may push actors in the field to use other normative systems).

⁵⁴ See chapter 5 “Punishment: Administrative Style”, where I will take Legomsky’s hypothesis of immigration justice as an *asymmetric incorporation of criminal justice norms* (2007) a step further by making use of the notion of *legal holes* (Steyn, 2004, Dyzenhaus, 2006; Vermeule, 2009).

penalization, or other broader category, would be more appropriated to describe this process. It is very interesting to note that the post-9/11 literature produced many categories to think social reaction and that even the most sophisticated criminological ones (i.e. Ericson's counter law) were fairly marked by criminocentric dogmatism. On the other hand and coincidentally, legal scholars were those who produced more nuanced categories (e.g. *legal holes* and *asymmetric incorporation*). Finally, as I argued throughout this paper, administrative law and other institutional forms of conflict resolution never stopped their own historical development. The criminocentric model of the penal complex was a criminological invention⁵⁵. Other forms of legal punishment and legal translation of events were always out there, but we were not paying attention to them or framing them through our own preconceptions.

As I will describe in more details in Chapter 5 ("Punishment: Administrative Style"), administrative law has its own fundamental principles of "vision and division" (Bourdieu, 1991b). For instance, some instruments in the immigration justice system can be accurately associated with punishment and exclusive forms of social control (e.g. detention and deportation), but they are not equivalent to the traditional notion of punishment in criminal law (*poena*). Administrative sanctions (e.g.: fines) and police measures are two examples of these non-criminal forms of social reaction, despite the fact that the former are considered repressive whereas the latter are rather preventive. This may look as a game of words, as they all inflict pain somehow, but such distinctions are necessary to understand the logics and the legal

⁵⁵ This invention possibly happened during the nineteenth century with the decline of the then hegemonic conflict resolution models (the constable/parish and the justice of the peace models), the rise of criminal justice institutions (Steinberg, 1989; Radzinowicz & Hood, 1986) and obviously the birth of criminology in the context of the Italian positivist school (Debuyst at al., 1998).

reasoning of criminal and administrative punitiveness. On one hand, administrative sanctions are similar to punishment (*poena*) in that they are framed as an *a posteriori* response to a given illegality (repressive); but on the other hand, they do not require *mens rea* and have a more strict liability criterion. Moreover, there are less procedural guaranties in administrative law in comparison to criminal law (e.g.: lower standards of proof; see Chapter 4: “Standards and Burden of Proof in Immigration Law”) and this produces even harsher effects in those subject to administrative social reaction.

Police measures are used in the context of immigration control and they follow a totally different logic of intervention. They are not an *a posteriori* response, but an *aprioristic* one aiming to maintain public order (preventive). The legal reasoning is not to inflict a sanction to the “offender”, but to take the necessary measures to prevent chaos. Someone is considered inadmissible to Canada, and therefore deportable, not necessarily to be punished, but not to endanger Canadian society, in the perspective of the State obviously. In other words, a person does not necessarily need to commit an offence to be sanctioned in an administrative style, it is only necessary that there be reasonable grounds to believe that the foreigner is a danger to society or that she or he will be a danger in the future.

Thinking of the penal complex as an intricate mobile allows the researcher to make connections that were not available before in the criminocentric model, such as considering law reform or policies that are not directly connected to criminal justice or crime control. Regarding immigration control, it allows us not only to observe a process of punishment along, beyond and in addition to the criminal law, but also to realize the impact of broader social policies in

the penal field⁵⁶. The most apparent use of immigration law to legally punish and manage populations is not a direct effect of *9-11 attacks* or law reform, at least in Canada. As I will argue in the next chapter, the actual *Immigration and Refugee Protection Act* (2002) was already in an advanced processing stage in the House of Commons when the attacks happened and its punitive instruments are basically the same already present in the older *Immigration Act* (1976), including the security certificate provisions. However, the reactions to the *9-11 attacks* produced various effects in the penal field, immigration control included, by the creation of norms and policies such as the *Patriot Act* and the *Homeland Security Act* in the USA, the *Department of Public Safety and Emergency Preparedness Act* in Canada, and screening policies all over the Western world. We cannot forget also the effects in terms of broader cultural changes (e.g. perceptions of security and insecurity), which help shaping law locally in different institutional and informal context through legal sensibilities.

This analytical penal model does not only apply to immigration. It is a general and open model that helps accommodating different manifestations of legal punishment in our society. I already mentioned some historical and contemporary examples: the Poor Law and its work-houses, elite deviance (slavery in Brazil), *Guantanamo Bay* (military law) and the use of ordinances or municipal by-laws to control urban disorder which is currently one of the most common forms of punitive regulation in our cities⁵⁷. Regulatory criminal law is also an amazing nodal element in the penal complex and it is frequently used as an alternative to

⁵⁶ Punitiveness moderation is not just about criminal law and full legal guarantees should not be restricted to citizens. Paraphrasing Duff: “we should aspire to a ~~criminal law~~ [rule of law] that is apt for ~~citizens~~ [humans]” (2010a: 305). Otherwise, no republicanism or punitiveness moderation is really possible.

⁵⁷ Among many others: Beckett & Herbert, 2008, 2010; Blomley, 1994; Sylvestre, 2007, 2010; Ranasinghe & Valverde, 2006; Valverde, 2005, 2009.

criminal justice. Assuming that decriminalization represents depenalization is simply naïve. Institutional and/or social changes do not happen in a sociological vacuum and once a problematic situation is not criminalized, usually it is conducted to alternate paths where the ideological obligation to punish will be eventually achieved.

The empirical part of this dissertation, which will be presented in the next three chapters, should be read through this mobile-shaped model, a set of lenses that decompose social reaction like a prism decomposes light. Immigration justice and its forms of punishment will be described in their specificity as a complete normative system, but taking in consideration that they are part of a broader social reaction and punitive spectrum. This gaze was developed in the field, from the field and for the field, but it could only be developed from a post-aetiological criminological perspective. As Clifford Geertz argued in his famous essay about thick description (1973): a description is thick not only because the ethnographer interprets meanings within a context, but also and especially because of the theoretical background of the observer⁵⁸. The aim of such a movement, he argues, “is to draw large conclusions from small, but very densely textured facts; to support broad assertions about the role of culture in the construction of collective life by engaging them exactly with complex specifics” (Geertz, 1973, 28). I am doing exactly that here: my description of the IRB is more the act of an author (Geertz, 1988) than of a scribe.

⁵⁸“Such a view of how theory functions in an interpretive science suggests that the distinction, relative in any case, that appears in the experimental or observational sciences between ‘description’ and ‘explanation’ appears here as one (...). Our double task is to uncover the conceptual structures that inform our subjects’ acts, the ‘said’ of social discourse, and to construct a system of analysis in whose terms what is generic to those structures, what belongs to them because they are what they are, will stand out against the other determinants of human behavior. (Geertz, 1973, 27)

My role as a criminologist and legal anthropologist is not to describe everything I observed throughout the 18 months I spent at the IRB or the details of things I considered exotic or curious as if I were acting like the explorers who reported to their sovereigns during the navigations, or as missionaries and early anthropologists insisted on doing. As a matter of fact, observation is not the same thing as ethnography, rather, it is an act of writing about a cultural group or context based on direct observation, participant or not, or other research techniques to gather data. Marcel Mauss was a great anthropologist and ethnographer, one of the greatest, and he never did fieldwork. Moreover the act of writing what was observed is necessarily delimited by the ethnographer, his or her research questions, objectives, (sub) disciplinary constraints, influences, etc. Ethnography is not ‘scribeology’ (sic) and this is fairly common sense in the cultural/ social anthropological field since the contributions of Malinowski, Franz Boas, Evans-Pritchard, Margaret Mead and many other pioneers in the early 20th century – and we could definitely include the work of some sociologists as well, especially in urban sociology, such as Georg Simmel, Robert Park, William Foote Whyte and others from the Chicago School. A good ethnography is not about the level or the quantity of details, but about how an author borrows and develops categories to think the other and to widen his or her own perspectives. Sometimes it may look overly personalized, either the methodology or the ethnography, but it is not. As Mariana Valverde reminds us:

“After all, great ethnographers write as if theoretical insights grew directly from local observation (cf. Clifford Geertz’s (1973) famous, misleadingly first-person account of the Balinese cock fight). But the great ethnographers were and still are avid readers of historical and philosophical works written at very different scales. Similarly, Foucault at his best wrote as if the notion of ‘discipline’ grew directly

out of his encounter with a 19th-century prison schedule, when of course he would never have noticed the famous schedule without many years of extremely broad reading and study.” (Valverde, 2012: 252).

The following pages (*Acts I and II*) are densely textured inscriptions from my fieldwork and that is the reason why I chose to place the “penal as a mobile” model, which is a very important finding and conclusion of my research, here in my theoretical chapter and not at the end of my thesis. “(...) It is not only interpretation that goes all the way down to the most immediate observational level: the theory upon which such interpretation conceptually depends does so also” (Geertz, 1973, 28). The “penal as a mobile” model was nowhere to be found at the IRB and it was not in criminology either, quite on the contrary. I made such connections and they are very important to a criminological native. I brought the model to the description of the IRB and to some extent I focused on the IRB because I was able to perceive it as an ideal lab to observe certain kinds of social reaction based on my repertoire of criminological, sociological and anthropological concepts. After all, I had to use academic vocabulary in order to express what the IRB actors had to say about their practices not only to make my descriptions thicker, but also to make that reality intelligible to interlocutors from different contexts and more particularly to criminologists. These two initial chapters thus constitute a roadmap to my description of the IRB, a description made in a very particular context: a Ph.D. thesis in criminology about social reaction in administrative justice systems and its implications for the discipline.

ACT I:

THE IMMIGRATION AND REFUGEE

BOARD OF CANADA

[The IRB] mission is to make well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law.

- A sign first observed at the entrance of the IRB in Ottawa

Whilst in ordinary life every shopkeeper is very well able to distinguish between what somebody professes to be and what he really is, our historians have not yet won even this trivial insight. They take every epoch at its word and believe that everything it says and imagines about itself is true.

- Karl Marx: *The German Ideology*

CHAPTER III:

THE IMMIGRATION AND REFUGEE BOARD ORGANIZATION:

NORMS, JURISDICTION AND ENFORCEMENT

In the last decade, different forms of regulation arose in response to the *9/11 Attacks*, especially regarding (in)security, characterizing what former U.S. vice-president Cheney called in a speech just after the attacks, “the new normalcy”⁵⁹ (Loader, 2002; Ericson, 2007; Hörnqvist, 2004; Larsen & Dos Santos, 2006; Wood & Shearing, 2007). These measures affected more directly foreign nationals who were already facing exclusionary effects of the securitization of borders in developed countries during the 1990s (Bigo, 1998; Calavita, 2003, Simon, 1998; Wacquant, 1999). While migrants were already among the most vulnerable (Calavita, 1998; Simon, 1998; Pratt, 2005), these new policies led to an important degradation of their limited rights in the United States, and more broadly in the West. This was also true in Canada and a good inventory of such degradation of rights may be found in Crépeau & Jimenez (2004).

In an attempt to describe the nature and effects of newly adopted pieces of regulation and practices, social and legal scholars almost unanimously suggested that immigration control

⁵⁹ In: Bob Woodward, *CIA Told To Do "Whatever Necessary" to Kill Bin Laden*, Washington Post, 21-10-2001, Also available at <http://www.pulitzer.org/archives/6612> , last accessed on 2012-02-28.

had become a matter of *crimmigration*, a fusion of immigration and criminal law (e.g. Miller, 2005; Stumpf, 2006; Aas, 2011) or, more commonly, that what was happening corresponded to a *criminalization of immigration* (e.g. Sayad, 1998; Palidda, 1999; Wacquant, 1999; Mathieu, 2001, 2006; Miller, 2003, 2005; Bosworth, 2008; Bosworth & Guild, 2008; Di Giorgi, 2010; Zedner, 2010; Bosworth & Kaufman, 2011). These concepts oversimplify the regulation of immigration conflicts, relabeling them as “crimes”, and hide the most disturbing aspects of immigration control. In fact, immigration control is primarily, if not exclusively, based on administrative law. And interestingly, most of the concerns raised by legal scholars with respect to the lack of legal guarantees provided in the immigration justice system are related to the fact that immigrants are not “criminalized”, but dealt with through administrative law regimes.

The Immigration and Refugee Board of Canada (IRB), our main character in *Act I*, is a key legal institution regarding immigration control in Canada. The IRB is the entry-level tribunal dealing with immigration conflicts in the country. It is fairly representative of immigration justice in Canada: there is a relative lack of possibilities of appeal to higher courts and whenever one of its decisions is reviewed by the Federal Court, the case is generally sent back to the IRB for hearings anew (this will be discussed later in this *Act* and in the *Act II*). In terms of social reaction, there are a few similarities between immigration justice and criminal justice. First, the place occupied by the IRB regarding immigration control is relatively equivalent to that of criminal courts with respect to crime control. What is considered a conflict at the IRB is defined by State law normatization (i.e. *primary criminalization*) as well as by actors working within the immigration regime (i.e. *secondary criminalization, making crime, mise en forme pénale* or similar category). Moreover,

immigration control (like crime control) starts way before reaching the IRB through *policing* by the Canada Border and Service Agency (CBSA) and/or by Citizenship and Immigration Canada (CIC)), and the administration of imposed sanctions happens elsewhere in corrections, sometimes being operationalized jointly by the same correctional institutions of criminal regimes (Larsen & Piché, 2007, 2009; Pratt, 2005). In other words, there are several selectivity mechanisms and not all cases will reach the tribunal. Illegal immigrants and visitors, for instance, are strictly a matter of policing and they are dealt almost exclusively by the CBSA.

In that sense, the IRB and criminal courts are legal spaces where processes of judicialization occur, but all comparisons stop here. Everything else is different: norms, procedures, practices, etc. Actually, even when we consider these legal spaces *per se*, they are very distinct because the IRB is less bounded by the rulings of higher courts than criminal courts, and in this sense, the IRB is much more representative of immigration justice than trial courts are of criminal justice. In short, the IRB is where conflict resolution occurs in the justice level of immigration control and it is fairly discretionary as a justice system when compared to its criminal counterpart.

One of the first lessons students learn in immigration and refugee law classes is that any possibility of adjudication is better than having to deal only with the immigration bureaucracy; which is good for foreigners as it represents more means of defense and resistance to punitiveness. As mentioned above, a substantial part of immigration control and of the penalization of immigration is simply policing. The CBSA is the main institution policing immigration in repressive terms, but they have a broader mandate than traditional public (State) police institutions. In addition to a policing role, CBSA officers

also act as public prosecutors at the tribunal (IRB) and as judges because they also have jurisdiction over non-permanent residents, in which cases they do not need an IRB decision to deal with them. In other words, illegal immigrants and temporary residents can be arrested, detained and/or deported directly by CBSA at their own discretion – without *making crime* (Ericson, 1981; Acosta, 1987) or accessing any kind of tribunal. CBSA is however not the object of this chapter or of my thesis. I focus on the IRB. Moreover, exceptional extra-judicial procedures such as *security certificates*, which allow for the detention and removal of foreigners, are completely outside the scope of the IRB and consequently of my research. Therefore, in the following chapters, I will focus on a more limited facet of immigration control: what kind of justice system manages migrants with stable status in Canada? I will briefly portray how the IRB deals with conflicts related to immigration and refugee determination. This will help clarify how certain events are penally translated (Acosta, 1987) in the immigration justice system and how this process differs substantially from criminalization.

My objective in *Act I* is not to do an extensive description of the IRB, to describe its “turtles all the way down” (see epigraph to *Overture*; Geertz, 1973: 29), but to do a thick description of an administrative tribunal also from a criminological perspective, that is, looking to the administration of conflicts as part of a social reaction process involving different possibilities of punitiveness. The IRB will be described taking in consideration its context and particularities but also the context of my fieldwork, including its limits in terms of what an external researcher could observe and what I was interested in observing while at the tribunal. I should emphasize that a thick description means more than a rich contextualized description; it means that I also brought my perspectives and models to the

field. It is my description of the IRB, my ethnographic authorship (Geertz, 1988), a set of texturized inscriptions of certain aspects, which were intrinsically present in the field as well as those which might not have been explicitly there. It is a description that reinforces the particularities and legal sensibilities of a penalization process that occurs in an administrative tribunal, a process of making events into legal constructions with very concrete consequences to those under the jurisdiction of the IRB. This was not explicitly there at the IRB, nor was my proposed *penal complex as a mobile* model or the confusion of normative systems. I brought them to the IRB as I tried to make sense of it during and after my fieldwork, which does not mean that I imposed categories to the field; quite on the contrary, bringing concepts to the field is the condition of possibility of developing a research object. For instance, the official self-professed institutional discourse present in the field is that the IRB “make well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law” (see epigraph to *Act I*). This was taken in consideration, it is part of the field, of what the tribunal imagines about itself, producing concrete effects. But it does not end there. Indeed, the routines of the IRB are much more nuanced and complex than that statement affirms and legal actors involved in this process know it very well.

As Geertz suggests: “Anthropology, or at least interpretive anthropology, [and I would say interpretative criminology] is a science whose progress is marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other” (Geertz, 1973, 29). In this sense, the main contribution of my description of the IRB to the immigration field and to criminology is a refinement of the debate: it is to nuance the categories used to describe penalization processes in Canadian immigration and

refugee law and to stress how these cultural systems (or sub-systems) of social reaction are connected to a broader mobile structure of culture of control⁶⁰ that is essentially punitive and based in State law, or at least much more present in such kinds of legal institutions.

This description, and contribution, is presented in two parts: in *Act I*, I focus on the IRB and in *Act II*, I link the administrative style of penalization to the broader penal complex model that I already presented at the end of Chapter 2. More specifically, I will argue throughout *Act I* that immigration control in Canada can be accurately described as a continuous state of exception within the rule of law (*Rechtsstaat*). It is a very particular description of the IRB and I should add that what I observed there is not related to what Carl Schmitt theorized in *Die Diktatur* (1999) and *Political Theology* (1985). There is such a thing as “emergency” in the Canadian immigration regime, namely in the case of suspects of terrorism and security certificates, but these situations are “exceptions” in a justice system that is already working within the exceptional. In the following pages, I will rather focus on the ordinary, briefly describing this “new” normal and non-emergency state of exception, and explaining how the tribunal operates in this grey zone that is part of our usual legal order. Chapter 3 focuses more on the normative description of the IRB and on what kind of conflicts it deals with; it is a broad picture of our main character, pointing to its main traces and environment. Chapter 4 is about the IRB in action, how everyday-life events are processed in the

⁶⁰ This should not be confused with David Garland’s argument in *Culture of Control* (2001) where he argues that there is a culture of control at a broader societal level in Western industrial societies. The word culture here is much more anchored in legal anthropology studies, which approach law as a cultural system. Also, by “mobile structure of culture of control”, I refer here to the interconnection of different normative systems in such a way that it resembles a kinetic sculpture (mobile) – see chapter 2. While this could be easily associated to Garland’s argument, I restrict my argument to the institutional and organizational levels of justice systems.

tribunal; it is a more dynamic description of immigration justice, concluding the *setup* (exposition) of our main empirical topic in a way that aims to let very clear how legal translation in administrative law differs substantially from criminalization processes and why I consider the immigration regime as a sort of *legal hole* (Steyn, 2004; Dyzenhaus, 2006b; Vermeule, 2009).

This chapter (3) is organized in three sections. In the first section, *Norms, Jurisdiction and Enforcement*, I talk about the legal norms ruling the Canadian immigration system as well as what and who exactly is under the jurisdiction of the IRB. This will provide an initial contextualization of what this tribunal is about and what I mean by immigration conflicts. In section II, *The Organization of the Immigration and Refugee Board of Canada*, I describe how the IRB is dispersed spatially throughout the country (i.e. regions) and how it is organized internally (i.e. divisions), presenting what happens in each of its division in terms of cases being processed and of conflict resolution dynamics. Finally, in section III, *Enter the Legal Hole*, I present the concepts of legal black hole and legal grey hole, using them to nuance and characterize the Canadian immigration regime. The objective of this first empirical chapter is to provide the essential elements to better perceive the tribunal in action in the following chapters. It is a broad picture of our personage (the IRB), but a picture without which the reading of the two or three following chapters is seriously jeopardized.

I) Norms, jurisdiction and enforcement

Formally, the Canadian immigration justice system is ruled by the *Immigration and Refugee Protection Act* (IRPA; 2001, c. 27)⁶¹, an Act of Parliament assented to November 1, 2001; and its statutory *Regulations* (IRPR; SOR/2002-227)⁶², assented to June 11, 2002. The IRPA and IRPR are the main pieces of legislation regulating immigration to Canada, immigration control and judicial responses to immigration and immigrants while in Canada. Thus, the IRB has a federal jurisdiction and is a tribunal that deals with conflicts related to the application of these laws. I added their assent dates intentionally to draw attention to the fact that the main piece of legislation (the IRPA) was not the result of the *9-11 Attacks*. In fact, the IRPA was first deposited as Bill C-11 at the beginning of 2001 and it passed through the House of the Commons and had its First Reading in the Senate on the 14th of June. When *9-11* happened, Bill C-11 followed its path without any amendments until Royal Assent was given on November 1, 2001⁶³. Therefore, we should not consider the IRPA as one of the “new normal” pieces of legislation, even if the way it deals with security issues fits perfectly within the post-9-11 discourse (Larsen & Dos Santos, 2006).

⁶¹ Available at: <http://laws.justice.gc.ca/en/i-2.5/index.html> , last accessed on 2010-09-11.

⁶² Available at: <http://laws.justice.gc.ca/eng/SOR-2002-227/index.html> , last accessed on 2010-09-11.

⁶³ “Upon second reading on 27 September 2001, the bill was referred to the Standing Senate Committee on Social Affairs, Science and Technology. The Committee held hearings with witnesses through October and reported the bill back to the Senate with no amendments on 23 October 2001. To its Report, the Committee appended detailed Observations outlining its concerns. On 31 October 2001, the bill received third reading in the Senate; Royal Assent was given on 1 November 2001.” in: *LS-397E – Legislative History of Bill C-11*; available at <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/LS/371/c11-e.htm> , last accessed on 2011-09-11.

I should also mention that exceptional legal instruments such as security certificates which were and are still used to arrest, detain and eventually remove suspects of terrorism in the post-9-11 context were indeed part of immigration law long before the claimed time of emergency arrived. In fact, security certificates were already present in the old *Immigration Act* (1976) and they are being issued since 1978 when the old act came into force along with its statutory *Regulations*. One of the first Supreme Court of Canada's decisions on security certificates, which dealt with several Canadian Charter rights issues, *Suresh v. Canada* [2002], was decided under the old *Act* and not under the IRPA. These legal grey-holes do have a normative existence in our regular legal order and they are independent from times of emergency. The question of whether they are used or not, according to what basis, are questions which need to be assessed on a case-by-case basis. Therefore, the normative basis of the most exclusive and punitive part of the current immigration regime existed before 9-11 and what we experienced after that was not the result of a process of legislative production of norms in reaction to the attacks to regulate immigration under new terms. Instead, what we experienced corresponded to new uses and reinterpretations of old and long-existing norms as well as to the creation of accessory legislation to complement them and to act in that sense.

While the IRPA and the IRPR are major normative references, other norms regulate how different organizations and institutional actors proceed in the immigration justice system and they must be taken into account. These "related regulations", and especially those ruling the routines at the IRB, normatively shape the ways in which the immigration justice system presents itself. However, legal regulations are not the only sort of norms in the field and, generally, they are not the most determinant normative references regarding how

institutional forms of conflict resolution will be practiced in the tribunal. Policies play a key role. Immigration lawyers typically say: “when I have a client, I want to know what the policy is” or “it is better to know the policy than the IRPA”. By policy, they mean federal government policies or provincial ones in the case of Quebec, the IRB internal policies and guidelines,⁶⁴ including its persuasive decisions and its institutional practices. Indeed, do not wonder why there was no need to change the law after 9-11: the impact of the *new normal* discourses is more strongly felt and more determinant in these related regulations and norms, whether they are statutes, policies or practices, especially those regarding the enforcement of the IRPA and the policing of immigration.

The *Canada Border Services Agency Act* (2005, c.38)⁶⁵ and the *Department of Public Safety and Emergency Preparedness Act* (2005, c.10)⁶⁶ are good examples of this. Both statutes created the new structure of Public Safety Canada and they changed the role of the enabling authority played by the federal government at the IRB and enforcing the IRPA. The IRPA had always stipulated a dual jurisdiction concerning its enforcement, administration and policymaking responsibilities, but the federal departments dealing with immigration conflicts changed over the years. Back in 2001 and 2002, Citizenship and Immigration Canada (CIC) was responsible for the administration of the IRPA and IRPR and its mandate was shared with the Solicitor General. Considering that border control and enforcement

⁶⁴ IRB, 2002a, 2002b, 2003b, 2004a, 2005a, 2008a, 2009b

⁶⁵ The Act is available at: <http://laws.justice.gc.ca/eng/C-1.4/index.html>; and its legislative history at www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C26, last accessed on 2010-09-11.

⁶⁶ The Act is available at: <http://laws.justice.gc.ca/eng/P-31.55/index.html>; and its legislative history at www.parl.gc.ca/LEGISINFO/index.asp?Session=13&query=4212&List=stat, last accessed on 2008-09-11.

personnel were mainly under CIC, it was in fact this Ministry that enforced and administrated the Act and its regulations. In December 2003, Prime Minister Paul Martin created the Canada Border Services Agency (CBSA) and staffed it with the personnel of CIC and of the former Customs and Revenue Agency, keeping CBSA as part of CIC and not of Public Safety Canada created at the same time. The CIC was still “ruling” the Act, but CBSA was already becoming more independent from CIC in terms of budget, personnel, etc. In 2005, this scenario changed. First, the position of the Solicitor General was abolished, becoming part of the jurisdiction of the Minister of Public Safety. Consequently, Public Safety became tacitly one of the enabling authorities along with CIC. Later CBSA became formally part of Public Safety and as a result, the main federal department with jurisdiction to enforce the IRPA and to represent the government at the IRB ceased to be immigration-related, and became just another agency in the federal government security portfolio⁶⁷.

There are no coincidences at all in the structural changes of this organization chart. The Canadian government followed more or less the same institutional developments that occurred in the United States after the *9-11 attacks* with respect to the implementation of penal policies that are not necessarily related to the criminal justice system. Before *9-11*, immigration issues were managed by the *Immigration and Nationalization Service*, a federal agency related to the *Department of Justice*. In 2002, the US government adopted the *Homeland Security Act* previewing the creation of new institutions such as the *Department*

⁶⁷ Public Safety Canada works with five agencies: CBSA, Royal Canadian Mounted Police (RCMP), Canada Security Intelligence Service (CSIS), Correctional Service Canada and National Parole Board. All these institutions are united in a single portfolio and reporting to the same Minister. In this context, it is quite clear how the management of borders and immigrants became more an issue of security than one of citizenship and immigration.

of *Homeland Security* (DHS) and giving them jurisdiction over immigration. In March 2003, the *Immigration and Customs Enforcement* (ICE) appeared as a major player in this new security scenario and as the main enforcing branch of the DHS⁶⁸.

Today, the DHS is responsible for managing immigration in the United States, but it does not have the same agencies as Public Safety Canada in its portfolio. For instance: the Federal Bureau of Investigations (FBI) and Corrections are still part of the Department of Justice and the CIA is part of the National Security Council, reporting directly to the president. The main institutional difference, maybe, is that here in Canada all of the major federal security-related agencies fall in the same portfolio (see footnote 67, p. 110) while in the USA, they are diluted in three different portfolios. Again, it is worth remembering that none of this is something exceptional, totalitarian or extraordinary. Instead, it is an inherent part of our everyday democratic institutions. *Act I*, and more generally speaking, this thesis, is about an ordinary normative system specialized in immigration working with administrative law principles. That is what it is about: ordinary laws, regulations, policies and practices. There is no need to invoke a state of emergency and, therefore, to temporarily suspend rights and civil liberties to regulate immigration or military issues because by definition these parcels of the population do not generally enjoy the same rights and civil liberties that are available to ordinary citizens. Thus, if the exception is the rule and most of it existed prior to the 9-11

⁶⁸ “Created in March 2003, *Immigration and Customs Enforcement* (ICE) is the largest investigative branch of the *Department of Homeland Security* (DHS). The agency was created after 9/11, by combining the law enforcement arms of the former *Immigration and Naturalization Service* and the former *U.S. Customs Service*, to more effectively enforce our immigration and customs laws and to protect the United States against terrorist attacks. ICE does this by targeting illegal immigrants: the people, money and materials that support terrorism and other criminal activities. ICE is a key component of the DHS ‘layered defense’ approach to protecting the nation.” (In: <http://www.ice.gov/index.htm>, last access 2007-10-14).

attacks, the “times of emergency” argument that often justifies such regimes of social reaction is simply inaccurate.

The Federal Court decision *Khalil v. Canada* [2007] F.C. 923 provides a good example of this at the organizational level. This case relates the brief history of the CIC Security Review. During the 1980s, the Court reports that CIC Security Review “was primarily concerned with counter-intelligence and counter-surveillance due to the activities of the Soviet Bloc” and in 1985, the unit was comprised of only six people. “In the late 1980s, it became part of the CIC Enforcement Branch and in 1991, it was transferred to the CIC Case Management Branch”. After the fall of the Soviet Bloc in the 1990s, “the unit's focus shifted to increased emphasis on counter-terrorism”. At the time, “it was staffed by ten people and was responsible for handling the files for both Security Review and War Crimes”. The Security Review unit remained in these terms until 2001 when the *9-11 attacks* “and the case of Ahmed Ressam⁶⁹ led the government to alter its approach to admissibility and screening. In November of 2001, front-end screening was introduced”. This changed their approach of screening from filing visa applications to a more proactive action that required obviously more resources and personnel. Still according to the Court, “In March of 2002, CIC created the Intelligence Branch”, incorporating “Security Review, Organized Crime, War Crimes, Research and Intelligence Co-ordination and the ‘more traditional’ intelligence area (review of trends and analysis of improperly documented arrivals)”, which was their job originally. By that time, “the Security Review unit employed 20 people” but by May 2003, the CIC Intelligence Branch was comprised of 25

⁶⁹ An Algerian-Canadian al-Qaeda member who was detained in 1999 in Port Angeles, WA, USA and convicted in 2001 of planning a terrorist attack (bombing) at the Los Angeles International Airport.

people. In December 2003, the whole unit was transferred to the newly created CBSA and in 2005, “Security Review was renamed the ‘Counter-Terrorism’ unit within CBSA” (*Khalil v. Canada* [2007], excerpts from paragraphs 36 to 47). Today, CBSA is a huge security agency, comprised of “approximately 13,000 employees, including over 7,200 uniformed CBSA officers”⁷⁰. While not all of the employees occupied the same functions than those available in the original CIC Security Review, they are all still working on security issues in a broader and more capillarized way.

This brief history is not only important to illustrate the shift from a set of normative references related to Citizenship and Immigration to another set of norms explicitly labelled as Public Safety. It also shows that, in the last two decades, the security dimension of the immigration regime evolved more at the organizational and policy levels than at the normative level. The legislative changes and the amendments made to the Act just reinforced the changes that were already occurring at the organizational level. While the IRPA and the IRPR are officially the main legal references on the regulation of immigration in Canada, there are other pieces of legislation and other norms which shape immigration and refugee law in the field in a more determinate and significant manner. Accordingly, what have changed in the *post-9-11* scenario are not necessarily the main norms. Instead, what has changed is the enforcement of such norms, the enabling authority⁷¹, as well as a cultural shift in our perceptions of the appropriate balancing to be reached between rights and security where public safety ended up being invariably

⁷⁰ Retrieved from: <http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html>, last accessed 2013-09-03.

⁷¹ This change in enabling authority (which Ministry is responsible) was implicit at first and then explicit in the IRPA after 2005.

preferred. The legal sensibilities are different, more security-oriented, and this obviously play a role on how law is (re)created locally (Geertz, 1983) at the IRB.

Finally, these cultural and interpretative changes and the creation of new security players in the immigration control field have had important consequences for the administration of conflicts at the IRB. For instance, CBSA hearing officers do not have an expertise in the areas of each enabling authority (whether it is Public Safety or CIC) and they end up representing both departments in their working routines at the tribunal. It would be like having a public prosecutor acting in criminal and family cases on an everyday basis. It is not impossible to do, but the legal sensibilities are not necessarily the same in both contexts. After observing some hearings at the IRB, I easily concluded that these hearing officers were not able to simply change their normative, ontological and ethical references when shifting from a Public Safety case to a case in which they represented Citizenship and Immigration Canada (or *vice versa*). Most of the time this made their approach very security-biased, even in essentially “civil cases”⁷², such as marital determination in sponsorship appeals (i.e. “fake

⁷² Actors in the field (CBSA hearing officers, members of the IRB, immigration and refugee counsels) make a distinction between “civil” and “criminal” cases. Generally speaking, by criminal cases they mean something related to detaining or removing a foreign national, especially regarding removal order appeals. Despite the criminal label however, there is no requirement for the immigrant to have a criminal record or to have had any passage in the criminal justice system. It is a matter of “looking like criminal”, as I frequently heard, because of security issues and of the sanctions involved. In turn, the civil cases, a category they use less often, refer to cases that are less related to the idea of danger to the public. Sometimes the sanction is exactly the same for both types of cases (i.e. removal order), but the actors put more emphasis on technical aspects of breaching the IRPA and/or the IRPR (e.g. not respecting residency obligations, inadmissibility on health grounds, etc.). According to these actors, immigrants involved in civil cases are not “criminals”; they are people trying “to take advantage of our immigration system”. Interestingly, this distinction roughly reflects the more formal division between Public Safety and CIC cases. Normally, all “criminal cases” fall within the jurisdiction of Public Safety whereas “civil cases” are dealt with by CIC.

marriages”). We will discuss other consequences of this schizophrenic authority situation at the IRB as we move into the description of the IRB.

II) The organization of the Immigration and Refugee Board of Canada

The IRB is Canada’s largest self-proclaimed independent administrative tribunal⁷³. It is a specialized federal tribunal distributed throughout the country and responsible for the judicial administration of conflicts regarding immigration and decisions for refugee protection claims in Canada. Before going further, it is important to distinguish bureaucratic matters from judicial matters in the immigration system and consequently to clarify the specificity and the limits of the IRB, of my research and of this dissertation. First, IRB members are not necessarily those who decide who will enter or leave the country. The immigration bureaucracy (CBSA and/or CIC visa officers) has its own administrative procedures and its agents have a relative autonomy to decide whether a foreigner should enter or leave Canada. These actors are bound by the law and by policies, but they have sufficient discretion to proceed and to justify their acts internally following their own

⁷³ Until recently, the real independency of the IRB was questionable because members had only temporary mandates (usually for three years; renewable) and “political motivations” played an important role in appointments and renewals, as revealed by different members during my fieldwork and by other scholars (e.g. Crépeau & Nakache, 2008). The combination of these two variables is highly problematic because it placed members in a vulnerable position to keep their jobs. As one of my interlocutors said: “if you don’t ‘perform’ (do you know what I mean?), you won’t get a renewal... a friend had an one year [renewal] and she got the message”.

representations and practices. Technically, the IRB deals only with permanent residents and refugee claimants who are already in Canada, leaving out of its jurisdiction a good part of the population also managed by the immigration system. As a result, the IRB only administrates certain conflicts related to disputes between foreign nationals and CBSA or CIC. In terms of numbers, the IRB has jurisdiction over roughly 5% of the Canadian population (see footnote 29; Ch. 1, pp. 56). Obviously this does not mean that the IRB will deal with all of the problematic situations involving such residents. After all, immigration justice is also and according to its own terms, as selective as the criminal justice system is and only a small portion of the immigration conflicts under its jurisdiction reach the tribunal. Indeed, this relatively small justice system has a lot to teach us, providing elements that help nuancing social reaction and punitiveness in administrative regimes and at large, that is, in the penal complex as a whole. We need to understand how social reaction and punitiveness take diverse shapes and adapt to different contexts and situations if we are to resist legally and politically to State-based penalization processes, or at least to empower those who are currently resisting through more nuanced and complex knowledge.

Currently the IRB is organized in four specialized divisions: the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), the Immigration Division (ID) and the Immigration Appeal Division (IAD). Each division has its own members⁷⁴, guidelines,

⁷⁴ IRB members are appointed to one of the four IRB sections and they work mainly in their geographic region, although they are not restricted to it. Some members will renew their mandates in the same division they used to judge whereas others will opt to apply for positions in other sections or even in the higher administration of the IRB. Many members revealed that renovations were not automatic, but subject to internal evaluation processes and “political motivations”. Some members did not feel comfortable with such processes and considered that it may affect their independence (see previous footnote).

procedures and practices. I will not discuss the Refugee Appeal Division in this thesis, because it was not in force at the time of my fieldwork at the IRB. The RAD was already created by the IRPA (ss. 110, 111 and 171) since 2001, but it only came into force on Dec. 15, 2012, about six months after the *Protecting Canada's Immigration System Act*⁷⁵ received the royal assent and about three years after I completely left the field. The *Protecting Canada's Immigration System Act* also brought some changes in the refugee determination process, including for instance stricter deadlines for foreign national; but I chose not to discuss them because I did not do any observation while these new rules were in force. In the following paragraphs, I will describe the kinds of conflicts each division administrates, their respective methods of exposing evidence and key particularities regarding conflict resolution. This will help to clarify what is judicial in the immigration system and will introduce some evidence aspects that will be better developed in the next chapter (IV).

The Immigration Division

The Immigration Division (ID) conducts two kinds of hearings: (in)admissibility hearings and detention reviews. Inadmissibility hearings are held to decide whether a foreign national or a permanent resident is inadmissible in or removable from Canada. Detention reviews consists in reviewing the grounds for detention, or deciding whether a foreigner should remain in detention or not (and if not, under which conditions he or she should be released). The IRPA establishes that the first detention review should be held within 48 hours, the

⁷⁵ Available at: http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_17/FullText.html, last access 2013-06-08.

second within a week after the first, and after that, the reviews must take place at least every thirty days (s. 57). The law in the books often sounds much fairer than it is in action. Both hearings are adversarial with a possibility of cross-examination and other legal procedures associated to a due process. However, the standards of proof and the credibility issues significantly affect the balance of power between the constituted parties.

In this division, the key issue is the application of the strict liability criterion used in admissibility hearings and detention reviews to assess the immigrant's responsibility for the violation of immigration rules. There is no requirement for *mens rea* and, based on field observation, I consider that this criterion is similar to absolute liability and not to strict liability⁷⁶. The Minister is credible by definition and the defendant's intent is not relevant. Actually, this symbolically structures the division in such a way that there is not a lot of room to settle a case and, in practice, there is nothing to be disputed. As a good illustration of this, let me recount that at the beginning of my fieldwork different actors strongly discouraged me from conducting any observation at the ID, arguing that it would be a complete "waste of time". The appellants' counsels suggested that "there is not a lot to do there [at the ID] because you have already lost" whereas the Minister's counsels reported that "it is really fast [compared to appeals] (...) ID members do not have a lot of jurisdiction [power to influence]". Not surprisingly, the outcomes of the ID are highly exclusionary in terms of remaining in detention and removal orders (see chapter 4). Most litigants take a

⁷⁶ All these standards of fault (*mens rea*, strict liability and absolute liability) refer to the rules of responsibility established by Canadian courts in the context of criminal or regulatory offences. The possible violation of article 7 of the Charter (based on *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486) was raised in *Mohammed v. Canada (M.C.I)* [1997] 3 F.C. 299, but the Federal Court found that there was no "absolute liability" involved because the applicant was not charged with "a penal or a regulatory offence".

negative outcome at the ID for granted, especially in admissibility hearings (i.e. removal orders), and they concentrate their efforts and resources on the appeal.

The Immigration Appeal Division

The Immigration Appeal Division (IAD) follows the same procedural system and rules of evidence. However, in this division the adversarial system surprisingly works, at least as it is supposed to work in a normative system with low standards of proof. What makes a difference is that the IAD can take humanitarian and compassionate grounds (H&C) into consideration⁷⁷. This is a key issue regarding conflict resolution dynamics, re-establishing adjudication. The possibility to consider H&C completely changes the rules of the game, creating room to build a case and consequently, to debate or dispute. Thus, although technically or legally, the liability standard is still the same (i.e. there is no requirement of *mens rea*), the appellant's intentions play a key role when accessing H&C. When there are humanitarian and compassionate grounds of appeal, the parties can dispute different things. For instance, they can debate how the appellant has been dealing with breaches of the IRPA or Criminal Code (remorse, rehabilitation), or whether the appellant complied with the conditions imposed by any constituted authority, or any other circumstances of the case (e.g. the question of the best interests of an appellant's child). Actually, H&C constitute the only

⁷⁷ There are three criteria to allow appeals at the IAD (or at least to stay a removal order): “(a) the decision appealed is wrong in law or fact or mixed law and fact”; “(b) a principle of natural justice has not been observed”; or “(c) (...) sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case” (in: IRPA; s. 67.1).

judicial moment when it is possible to observe disputes at the IRB, by which I mean counsels acting more actively in the courtroom, “real” cross-examinations (i.e. criminal justice style), etc. H&C are also perhaps the only moment when it is possible to perceive how other variables such as rules of evidence or “exotic” legal references (e.g. Islamic law) play a determinant role in the processes of conflict resolution (see chapter 6).

The IAD deals with different kinds of conflicts, including hearing appeals from rejected sponsorship applications⁷⁸ (sponsorship appeals), failures to comply with the residency obligation⁷⁹ (residency obligation appeals) and appeals of ID admissibility hearings decisions (removal order appeals and Minister’s appeals, which are extremely rare because the Minister statistically wins on average in 97% of the cases at the ID⁸⁰). The conflict resolution dynamics are quite different in each situation. In sponsorship cases, appellants are Canadian citizens or well-established permanent residents. Sponsorship appellants have, by definition, “more rights” either legally and/or symbolically⁸¹ than permanent residents in other types of appeal, including for instance the right to an alternative dispute resolution

⁷⁸ Canadian citizens and permanent residents have the right to sponsor a foreign national who is considered a member of the family class (*IRPA*, s. 13) and is not inadmissible to Canada (*IRPA*, ss. 34 to 37).

⁷⁹ Section 28 of the *IRPA* establishes that permanent residents have to comply with a residency obligation for at least 730 days out of every five years, either living in Canada or outside the country under certain conditions.

⁸⁰ In the last decade, only approximately 3% of admissibility hearings, on average, resulted in a permission to enter or to remain in Canada (IRB, 2001, 2002c, 2003a, 2004b, 2005b, 2006, 2007, 2008b, 2009a).

⁸¹ Considering what I observed (and interpreted) in the field, there are numerous factors that affect the empathy IAD members and Minister’s counsels will have in relation to appellants in sponsorship cases, but the most recurrent are: 1) their own background (e.g. their relationships), 2) citizenship status (also with a certain nuance between born and non-born Canadians) and 3) the age difference between partners. A thorough analysis of these factors is beyond the scope of this dissertation..

conference (ADR). This is also true for residency obligation cases, even if these appellants are symbolically in a worse position than the sponsors because they are often considered not well-established immigrants or “quitters”. The appellants of removal orders are in the worst symbolic position because they were already labelled inadmissible by the IRB (i.e. at the ID). They are considered as people who should not remain in Canada. Often, they also have a criminal label, which makes his or her situation even worse. As a rule, these appellants are perceived as bad immigrants and their counsels have to work these identity aspects as well when appealing.

Overall, let us say that it is easier for the immigrants to appeal a decision made by the immigration bureaucracy in the cases of sponsorships and residency obligations appeals, because IAD members may find that a visa officer or the CBSA made an error of law and/or of fact or that they did not observe a principle of natural law (IRPA, s. 67.1(a) and (b)). However, it is very rare to appeal an ID admissibility decision based on ss. 67.1(a) and/or (b) because law and facts are almost indisputable at the ID. Thus, for individuals who appeal removal orders, the only viable option is H&C (IRPA, s. 67.1(c)) because in such cases there is something to be disputed. These dynamics were recurrent during my fieldwork. In the few cases that I have observed in which the appellant believed that the ID made an error, he or she usually dropped ss. 67.1(a) and/or (b) during the pre-hearing conference and continued the appeal only on the basis of H&C. Interestingly, when looking at both divisions more broadly, we realize that it is the exception (H&C) that re-establishes the main characteristics of legal institutions (“settle disputes”: Bohannan, 1965) and provides the most effective arguments to avoid or reduce punitiveness.

*The Refugee Protection Division*⁸²

The Refugee Protection Division (RPD) is totally different from the previously described divisions. First, it only deals with determining whether a foreign national claiming refugee protection in Canada is actually a refugee. Refugee determination is institutionally very different from immigration determination (visas). Refugee determination is not controlled by the immigration bureaucracy, but by the IRB at the RPD. Thus, once the refugee status is claimed in Canada (for instance, at the airport), the only thing the immigration bureaucracy (often a CBSA officer) can do in terms of residency status determination is to give the claimant a Personal Information Form (PIF) and state “you have 28 days to fill it and submit it to the RPD”⁸³. If the PIF is not submitted on time and no justification is presented to the IRB, the claim is considered “abandoned” and a removal order will be automatically issued by the CBSA without a right of appeal.

Second, the procedural system is not adversarial, but inquisitorial (sometimes referred to in

⁸² I am not taking into consideration changes in refugee determination that occurred after the implementation of the *Protecting Canada's Immigration System Act* (December 2012) because it is beyond the scope of my research. Despite sometimes considering recent legislation (post field) in my analyses, I did not observe the RPD under such normativity. Therefore, I prefer not to discuss the current refugee determination regime, which includes the possibility of appeal as well, because I did not observe it and I do not know the practices and legal sensibilities at play.

⁸³ This does not mean that the refugee claimant may walk away freely as the CBSA may detain the refugee claimant to establish his or her identity or on security grounds (danger to the public, health, etc.). The recent *MV Sun Sea* case is a good example of this as the CBSA detained 443 of the 492 Tamils smuggled in the boat; some of them for months (Nakache, 2011: 58-62). The deadline to file the PIF dropped to 15 days after the implementation of Bill C-31 (*Protecting Canada's Immigration System Act*) in December 2012.

the field as “non-adversarial”) because the RPD will also investigate the claimant in order to make its decision. This is a very interesting comparative dimension in relation to the two other IRB divisions and to criminal courts. In inquisitorial systems, the decision-maker (the judge) inquires, examines the claimant or the accused, sometimes using specialized bodies of knowledge (either persons or databases) and techniques that helps him or her establishing the truth. Thus, the interpretive authority is more concentrated in the figure of the decision-maker and not diluted in the procedure as it usually happens in adversarial systems (Merryman, 1969; Kant de Lima, 1995a, 2000, 2010; Garapon, 1997). The decision-maker does not argue against the claimant or cross-examine the evidence (as a prosecutor would do), but ultimately she or he holds the truth and when this truth is more truthful than the claimant’s narrative, the claimant loses his or her case and credibility⁸⁴.

There are three kinds of refugee determination processes: 1) a fast-track expedited process which consists in a pre-hearing interview with a refugee protection officer (RPO) that accelerates the treatment of easier cases when the recommendation is favourable; 2) fast-track hearings, “held for claims that appear to be simple because they may be decided on the basis of one or two issues”⁸⁵; and 3) full hearings, “held for claims that involve more than two issues and may be complex”⁸⁵, following the general tribunal process. Refugee hearings are inquests conducted mainly by RPD members, even if the RPO may assist the member during full hearings. For instance, the RPO may question some evidence in a way that looks

⁸⁴ It would be very interesting to observe the refugee appeals in the newly enforced RAD and particularly, to pay attention to the credibility issue. While this was not possible in the context of this thesis, I hope to be able to address this question eventually at a different moment of my career.

⁸⁵ <http://www.irb.gc.ca/Eng/brdcom/references/procedures/proc/rpdspr/Pages/rpdp.aspx>, last accessed on 2010-11-11.

like a cross-examination, but it is the RPD member that determines what is truthful as he holds the interpretive authority.

The hearings are confidential and generally the only persons present are the claimant, his or her counsel (if any), the RPD member and an interpreter when it is necessary. In some cases, a Minister's representative can also be present, particularly in the case of claims referring to "secret" information from CSIS (Canada Security Intelligence Service) regarding security. During the hearings, the member inquests the claimant based on his or her knowledge of the case seeking confirmation of what they consider to be the truth through an inquisition. The member's knowledge of the case is the result of a comparison between on the one hand, the claimant's narrative in his or her PIF, which may or may not be true, and on the other hand, the content of the National Documentation Packages (NDP)⁸⁶ and the member's experiences regarding refugee claims from that country or region, which are both considered truthful. If the claimant's narrative matches the member's previous knowledge (taken from the NDP and from his own experience), the refugee status will be granted. At the time of my fieldwork, the unsuccessful claimant could only turn to the Federal Court of Canada for judicial review because the appeal division was not enforced⁸⁷.

⁸⁶ National Documentation Packages are a series of documents about a given country compiled by the IRB. They can be consulted at: http://www.irb-cisr.gc.ca:8080/Publications/index_e.aspx, last accessed on 2010-11-11.

⁸⁷ I will not comment on the working of the RAD in this thesis. While there are some provisions stating how it should work (e.g. Chapter 6 of the *Legislative Guide for the Refugee Protection Division*), there are no specific guidelines for its procedures and, most importantly, there are no practices and legal consciousness since the RAD was not implemented until recently (December, 2012). As a criminologist and a socio-legal researcher, I do not feel comfortable speculating about law concerning a tribunal division that is only half "law in the books" and no "law in action". Moreover, I chose not to deal with Judicial Reviews (JR) in this research for

A former Refugee Protection Division member who was working in another IRB division during my fieldwork described the refugee determination process (and justified why he had quitted that Division), by saying that it was “a guess game”. By “guess game”, he meant that ultimately he felt that his job as a RPD member was to simply guess if the claimant was a true refugee or not⁸⁸. I think the expression “guess game” reflects perfectly an inherent discomfort with the RPD procedures, their inquisitorial character and the concentration of the interpretive authority in the figure of the RPD member. I would myself describe this process as “a confirmation game”, because usually the member has already an idea of what a refugee is or should be before the hearing. As Alfred Schütz argued in the first half of the twentieth century and Peter Berger and Thomas Luckmann (1989) argued later in the sixties, these constructions (the “truth”) about the other are made through “stocks of knowledge”. At the RPD, these “stocks of knowledge” have two distinct forms. As a rule, the truth about the refugee claimant is established aprioristically based on the NDPs and the RPD member’s own experiences and the refugee narrative is only a version that needs to be confirmed.

Cognitively speaking and from the point of view of the RPD member, the refugee determination process is a very realistic dynamic, reinforced by the inquisitorial system in place, that is, the fact that the interpretive authority is concentrated in the figure of the RPD member, and the pre-existence of a database containing the “truth” about relevant conditions of almost every country in the world (NDPs). Of course, RPD members do not

methodological reasons. While there is a possibility of JR at the Federal Court of Canada (FCC) when there is an error of law or fact, or when a principle of natural justice or procedural fairness has been breached, if granted, the case is sent back to the IRB for rehearing.

⁸⁸ I asked him what he meant by “guess game” and he responded more or less in the same terms: “a guess game... you play the game and you guess”.

explicitly and/or officially refer to the process in those terms, that is, a “confirmation game”. I do it as an interpretative legal anthropologist and criminologist; it is my view of the “guess game”, my authorship as an observer and ethnographer. The confirmation approach becomes more visible when RPD members accept the refugee claimant’s narrative (otherwise, it would be easily reviewed). For instance, after a full hearing of one day of refugee claimants from Colombia, one RPD member stated the following: “I had a lot of Colombian hearings before and I know how the FARC⁸⁹ work (...). I will not ask [the refugee counsel’s name] to do any submissions; it is not necessary...” and then the member concluded that the claimants were conventional refugees. On the other hand, RPD members are much more protective or careful when they refuse claims. They cannot simply state that it is not necessary to hear any submissions because they already know that the claimant is not a refugee. They need to follow the whole procedure to avoid the possibility of a judicial review by the Federal Court.

I shall make two remarks to conclude this section and chapter. First, I interpret the different styles of conflict resolution present in the three divisions as something related to the interaction between law in the books and law in action or to law as practice (Ewick & Silbey, 1998; Bourdieu, 1987, 1991; Calhoun, 1989, Nader, 1965, 1997; Falk-Moore, 1969, 1978, 2001). Indeed, all of the IRB divisions are bounded by the same legislation and general rules of evidence, and two of them have the same adversarial procedural system. In the books, they are quite similar; but when you are in the courtroom, it is easy to perceive that the administration of conflicts is totally different from one division to another. My provisory explanation for this phenomenon was briefly exposed in the

⁸⁹ *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia).

previous paragraphs: there are key structural issues in each division (the application of the strict liability criterion at the Immigration Division, the adjudication on humanitarian and compassionate grounds of appeals at the Immigration Appeal Division and the “guess game” at the Refugee Protection Division) with which the legal actors have to cope and which have the effect of restructuring their respective symbolic systems at the micro level. These key issues are determinant to the understanding of the legal consciousness and sensibilities (Ewick & Silbey, 1998, 2002; Silbey, 2001; 2005) of each division and of the IRB as a whole.

Thus, it is not very difficult to conclude that the IRB’s self-professed institutional mission of being an independent tribunal “making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law” (see epigraph to *Act I*) does not necessarily correspond to what the IRB actually is as a result of its everyday routines (see epigraphs to *Act I*). Actually, the idea of “well-reasoned decisions” and of fairness may sound even more absurd in the next chapter in light of our discussion of procedural guarantees and rules of evidence. However, to be fair with my interlocutors in the field, the IRB legal actors believe that this is the IRB’s mission. This is consistent with Pierre Bourdieu’s conclusions on the specific force of law (see chapter 1, p. 34, Bourdieu, 1991a, pp. 98-99). The IRB legal actors really believe that it is worth playing the legal game and this belief in turn produces very real effects on those practicing law, just like any other self-fulfilling prophecy does.

We also need to turn to Marcel Mauss’ theory of magic, referred to by Bourdieu in the same article, in order to make sense of the IRB practices. According to Mauss, “*La magie n’agit que dans un champ, c’est-à-dire un espace de croyance à l’intérieur duquel il y a*

les agents socialisés de manière à penser que le jeu auquel ils jouent vaut la peine d’être joué” (Bourdieu, 1991a, p. 99). The legal actors believe so much in the IRB official mission that when an IRB member (a judge) did not feel sufficiently comfortable with the Refugee Protection Division’s dynamics where he used to work, he applied to a position in a different division (i.e. the IAD) – a position where he believed he was not participating in a “guess game” anymore. Let us remember that it is a former, as opposed to a current, RPD member who made the comment about the RPD being a “guess game”. He did that from his new “*espace de croyance*”, where he could pursue fairness, justice or whatever magical category that let him continue playing such a legal game. None of the RPD members that I met during my fieldwork mentioned anything related to this “guess game” being played. They kept a distance with their daily routines and eventually talked about their experience in knowing how to recognize a “true refugee” and/ or about the National Documentation Packages, stating how “everything [they needed to know] was there. Therefore, as a rule, all of the decision makers from all of the IRB divisions believed in the legal game and that it was worth playing it. They truly believed in their institutional mission of making “well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law”, and this produced concrete and symbolic effects in the juridical field. There is no necessary correspondence between what the IRB professes to be and what actually happens in the tribunal, contrary to what is generally suggested by legal positivists. Yet, the legal actors do indeed try to do so and they will even sometimes divert from legal formalism and legal technicalities to comply their mission, as we will see more explicitly in chapter 6.

A second critique can be levelled against the “exceptional” approaches in the rule of law (*Rechtsstaat*) literature according to which normative systems working with low levels of legal guarantees are “exceptional”. Such systems are part of the rule of law, but they are designed this way and usually administrative law-based (e.g. military and immigration tribunals). There is also a paradox between legality and exceptionality (and *vice versa*). As mentioned above, there is rarely or never a dispute at the ID; this will mainly occur at the IAD. Moreover, at the IAD, appeals from ID decisions (i.e. removal order appeals) are not based on errors of law or on principles of natural justice that were not observed in the division below (ID). Instead, these appeals are based on an exceptional procedure, H&C grounds, allowing disputes over representations of the appellant and on the impact of the removal order on him or her as well as his or her family. In other words, appeals against removal orders at the IAD are not symbolically organized around the law in the sense of appealing based on “errors of law” or based on “principles of natural justice”, but around exceptional circumstances provided by the IRPA and its regulations. This is not a bad thing; quite on the contrary, as H&C are in practice the only concrete possibility of being successful in a removal order appeal. Yet paradoxically, it is the exception that re-establishes the main characteristic of legal institutions (Bohannan, 1965). When there are just technical “lawful” issues at stake, such as the procedures at the ID, the justice system sounds exceptional due to the impossibility of disputes (strict liability criteria). This is better understood when referring to the concept of legal hole.

*III) Enter the Legal Hole*⁹⁰

The use of administrative law as a non-criminal quasi-legal repressive form of social control is not necessarily something new. Johan Steyn (2004) reminds us that the use of administrative law, and especially military law, is in fact a recurring theme throughout history in times of crisis. For instance, he notes that during the Second World War, the use of detention without charges or trial, and the courts' significant deference to the executive were the norm. Also, as I argued in the previous chapter, it is worth remembering that the *1834 Poor Law Act* was not really criminal law, but administrative law (Driver, 1989; Charlesworth, 2010; among others). However, it is reasonable to say that the punitive use of administrative law (whether military or immigration-based) became more explicit in the post-9/11 scenario as the most prominent legal instruments and super security federal departments used in the war on terror.

Johan Steyn, David Dyzenhaus and Adrian Vermeule, among others, have referred to these conflict-resolution strategies emerging in the post-9/11 scenario as a sort of lawless void, naming them *legal black holes* or *legal grey holes*. The concept of legal holes was originally developed in the context of military law by Lord Steyn, using *Guantánamo Bay* as an example, and later nuanced as *black and grey holes* and extended more broadly to

⁹⁰ The wording of the title of this section is a reference to the movie *Enter the Dragon* (1973), starring Bruce Lee. The movie has no pertinence whatsoever to the discussion. I just decided to use the same style of wording in the title to present the concept of legal hole. *Enter the Legal Hole* sounds much more dramatic and brutal than *Here Comes the Legal Hole* (la, la, la, la), nothing against The Beatles, especially because cannot say it's all right when referring to legal holes.

administrative law by Dyzenhaus and Vermeule. According to these authors, legal black holes consist in explicit judicial deference to the executive as if the matter were a prerogative of sovereign power only, whereas legal grey holes consist in setting limits to sovereign action via legal rules and decisions that are so insubstantial that the executive may act as if there were no constraints at all. Vermeule summarizes very well Dyzenhaus' (2006b) definitions as follows:

“Legal black holes arise when statutes or legal rules ‘either explicitly exempt [] the executive from the requirements of the rule of law or explicitly exclude [] judicial review of executive action’. Grey holes, which are ‘disguised black holes’, arise when ‘there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases’. Grey holes thus present ‘the façade or form of the rule of law rather than any substantive protections’.” (Vermeule, 2009, p. 1096).

These legal holes should not be understood as referring to absolute regulatory vacuums (no law at all or outlaw⁹¹), although situations like the *Guantánamo* regime could be fairly characterized in that way. Rather, there is a certain consensus among contemporary legal scholars that these legal holes are presented (and disguised) in different shades of grey, somehow ruled by law, but not necessarily considered as part of the rule of law (*Rechtsstaat*).

⁹¹ I use outlaw in its classic meaning: outside the protection of a given legal regime (Law), implying that the subject (individual or group) becomes a pariah, an outcast, a *Homo Sacer* (to use the pre-modern legal term from Roman and Germanic law) or simply an outlaw in the sense of “social bandits” (Hobsbawn, 1985). Interestingly, and not by chance, Agamben used the term *Homo Sacer* to name his series of books on sovereign power, focusing on this legal notion in the first book and on the “State of Exception” in the second.

The Schmittian idea of *exception* (state of emergency) (Schmitt, 1985, 1999) is often used to illuminate the situations where courts are way too deferential to the executive (Agamben, 2005; Dyzenhaus, 2003, 2006a, 2006b, 2007, 2008; Vermeule & Posner, 2007, and Vermeule, 2009). Moreover, while most scholars agree that *legal holes* exist and that they are mostly manifest in administrative law, they dispute whether these legal holes should be allowed to exist in our legal tradition. Adopting primarily a Diceyan approach⁹², Dyzenhaus argues that legal holes are not desirable and that the law should be able to respond to all dilemmas within the rule of law (*Rechtsstaat*). Vermeule, on the other hand, takes a more Schmittian approach and considers that legal holes are not only part of, but also in a way inevitable, being necessary to the maintenance of the legal order⁹³.

I partially agree with both of them at different levels when looking at the IRB and the role of administrative tribunals in punitive social reaction. The concept of gray hole is very interesting to make sense of the IRB. It fits very well at the descriptive level. The IRB is not only the largest administrative tribunal in the country; it is also possibly the largest legal grey hole. This will become even clearer in the next chapter. At the normative level, while I share Dyzenhaus' ideals, I also acknowledge that a legal system cannot work without

⁹² More specifically, he criticizes Schmittian legal and political theory also based on Hermann Heller (and Hans Kelsen as well in a minor way).

⁹³ "(...) the main point I [Vermeule] want to suggest is not that black and grey holes are desirable; it is that they are inevitable. Black holes arise because legislators and executive officials will never agree to subject all executive action to thick legal standards, because the inevitability of changing circumstances and unforeseen circumstances means they could not do so even if they tried (...) and because the judges would not want them to do so in any event." (Vermeule, 2009, p. 1133).

recurrently breaking its own rules⁹⁴, as Vermeule suggests. However, I reject the formalistic aspect of both approaches and especially their emphasis on the idea of exception. In other words, I consider that this contemporary debate is essentially formalistic and emergency-biased. Both positions are perfectly valid if you take a critical socio-legal perspective and consider that law is not necessarily the “coherent whole” legal formalists usually assume it is. But I argue that we should move beyond the Schmittian idea of a state of emergency because the available data clearly shows that legal holes are not characterized by their exceptionality, but rather by their commonality, based on everyday normal practices⁹⁵ (at least in administrative law). In that sense, the idea of *Homo Sacer* (Agamben, 1998) is much more interesting, useful and precise to think about legal gray holes – especially when it is not understood as outlaw, but as a particular legal regime where most of the legal guarantees, if not all, are absent; it is an in-law outlaw situation.

Finally, and this is something that I learned at the IRB, legal formality and the technicalities of the law do not guarantee fairness or that legal institutions will fulfill their most obvious

⁹⁴ A good example of this “necessity” from a criminal law perspective is the use of plea-bargaining instead of full trial procedures. Plea-bargaining is a condition of existence of an adversarial justice system with protective evidence rules and other procedural guarantees (e.g. jury). This does not mean that we cannot imagine a justice system without plea bargaining (this is not a functionalist argument), but that it plays a necessary role in the system as it is currently organized and structured. Historically, the development of the common law of evidence, the possibilities of appeal and the shifts from private police and prosecution to public police and public prosecution, came with a plea system designed to avoid criminal trials (Langbein, 1973, 1979, 2003; Hay et al, 1975; Duff, 1986; Duff at all, 2004; among others). Without plea-bargaining the criminal trial system of Common Law countries would simply implode.

⁹⁵ As Vermeule suggests in his conclusion: “Indeed they are inevitable; no legal order governing a massive and massively diverse administrative state can hope to dispense with them, although their scope will wax and wane as time and circumstances dictate.” (Vermeule, 2009, p. 1149).

institutional role, namely to settle disputes. The paradox of the legality of the exceptional and the exceptionality of the legality illustrates this perfectly as well as the relativity of the notions of exceptional and legal. The fact is that the exception is part of the legal regimes of most democratic societies. It is pointless to discuss if the *Rechtsstaat* (rule of law) looks like a roll (cake), a continuum, or as a bagel⁹⁶, with the hole defining its shape, as Ben-Asher (2009) puts it, referring to the debate between Dyzenhaus and Vermeule and Posner. In practice, law is very fluid and if any food-related category is required to characterize the rule of law, the image of a Swiss cheese seems much more appropriated: from the exterior it looks like a coherent continuum, but when you look more closely there are holes everywhere. Judicial deference to the executive (which is represented at the IRB by CBSA) characterizing a legal hole is part of the legality inherent to administrative law. This should become even clearer when considering rules of evidence. The paradox between exceptionality and legality (i.e. in H&C grounds of appeal) is somehow a systemic attempt of illuminating legal grey holes by moving away from legal formalism and by reinforcing beliefs of fairness that seems to be shared by various IRB members and even embodied by them.

⁹⁶ The bagel metaphor is also used by Ronald Dworkin in *Taking Rights Seriously* (1977) referring more specifically to discretion, which became well known in the legal field as the “Dworkinian doughnut” analogy. Dworkin argues that: “The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority. It makes sense to speak of the discretion of a sergeant who is subject to orders of superiors, or the discretion of a sports official or contest judge who is governed by a rule book or the terms of the context. Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, ‘Discretion under which standards?’ or ‘Discretion as to which authority?’ Generally the context will make the answer to this plain, but in some cases the official may have discretion from one stand-point though not from another.” (Dworkin, 1977: 31).

CHAPTER IV:

STANDARDS AND BURDEN OF PROOF IN IMMIGRATION LAW:

PENAL TRANSLATION IN AN ADMINISTRATIVE STYLE

Rules of evidence are at the core of any normative system. They constitute its epistemological basis: a set of procedures, techniques and practices orienting how knowledge is or should be built. Generally, these rules are structured through three major questions or principles. First, what can be brought and received as data? Secondly, who has the duty to prove a disputed assertion, or who has the burden of proof? And thirdly, what is the level of verification required to validate a given position and/or a piece of information, or what is the standard of proof? The arrangement of these epistemological questions, added to the liability criteria and the procedural system in place, relatively determines a tribunal's ontology. And, finally, if you add jurisprudence and practices, this melting pot constitutes a tribunal's worldview (*weltanschauung*), how its actors interpret, define and represent social reality in that particular field.

This chapter is designed to add more complexity to the description of our main character in *Act I* (i.e. the IRB). The analysis of standards and burdens of proof will first present the IRB as an even more dynamic space, shedding light on the game played by the legal actors in that particular institutional space. This will provide an even better picture of how different

institutional forms of conflict resolution coexist at the IRB and to what extent the lack of legal guarantees affects their administration. In the last part of chapter three, I generally discussed what was happening in each division of the IRB and how (constructivist) interactions occurred in order to build truth and/or consensus (i.e. the procedural system). Now we will see more specifically what kind of evidence can be brought in that legal space and how such evidence is translated into legal fictions based on their “view of” and “solution to” immigration conflicts. In phenomenological terms, this chapter is about how something from the lifeworld (*Lebenswelt*) is legally translated at the IRB.

I should note that by “lifeworld”, I do not only mean to refer to what is happening at the street-corner or to any events at the more societal and micro levels. The lifeworld that enters in contact with the IRB may very well be (and most often is) related to or mediated by different entities and/or institutional contexts (i.e. criminal justice, immigration bureaucracy, etc.). The process of legal translation starts way before the IRB by a series of successive interactions and interpretations at different levels and by different actors. The rules of evidence used at the IRB act more like a filter, a selective one, that will set what can be considered reliable, what is “within the true”⁹⁷ in the IRB discursive order (Foucault, 1970, 1971, 1972).

This chapter is organized in two parts. The first section is about evidence: the standards and the burden of proof. In the second part, “Seeking Alternatives to Criminalization”, I come back to two concepts (*criminalization of immigration* and *crimmigration*) which were only briefly introduced in the previous chapters. These concepts emerged in the

⁹⁷ Michel Foucault borrowed this notion from Georges Canguilhem (1968). This notion was also present in Gaston Bachelard’s constructivist epistemology (e.g. Bachelard, 1985).

socio-legal academic field at the time I was doing fieldwork and influenced how I perceived and classified the penalization processes I observed at the IRB and ultimately the role of this administrative law-based regime in a broader social reaction scheme. To conclude this chapter and *Act I*, I propose an immigration counterpart to criminalization-related ideas such as *making crime*, *mise en forme pénale*, indicating what I considered as the most distinctive aspects of the immigration style of penal translation and the particular role of the CBSA in this justice system.

I) Standards and Burden of Proof in play at the IRB

According to the IRPA, the IRB “is not bound by any legal or technical rules of evidence” and “may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances”⁹⁸. In other words, the IRB may receive anything! The choice not to accept common law rules of evidence, which were historically developed in the context of criminal law in order to protect the accused against sovereign power, is considered by the actors in the field to be beneficial to the immigration regime, mostly for reasons of efficiency but also for fairness. This is especially true regarding refugee determination where the actors often argue that the lack of strict

⁹⁸ In: *IRPA*, respectively ss.170 g) and h) (regarding the RPD proceedings), 173 c) and d) (for the ID), and 175 b) and c) (for the IAD).

evidentiary rules is a good thing for refugees. However, it is pretty hard (not to say impossible) to demonstrate how beneficial this principle really is for refugee claimants given that in refugee cases, the RPD member's previous experience and the NDPs are considered truthful (as opposed to the claimant's narrative which is contrasted to this knowledge). Regardless of whether this is true or not, the response to the first three epistemological questions about the structuring of the rules of evidence (what can be brought and received as data?) is that the IRB may receive anything its members consider credible. More specifically, the IRB general guideline on weighing evidence stipulates that the Board may receive any evidence including evidence that would not be admissible otherwise under common law rules. It specifies the following:

“Since the Board is not bound by the rules of evidence, it may receive into evidence, evidence which would not be admissible under those rules. Nevertheless, the rationale for these rules may be used in assessing the reliability of that evidence. One or more rules may be relevant to any particular piece of evidence. HOWEVER, the Board errs in law if it gives no weight to a document because its contents were not proved in accordance with the rules of evidence. Thus, the assessment of the evidence should be framed in terms of the credibility and trustworthiness of the evidence, as that is the test set out in the *Immigration and Refugee Protection Act*.” (IRB, 2003b, p. 2-2)

As mentioned in the previous chapter, we should always remember that the attorney representing the Ministry (i.e. CBSA), IRB members, National Documentation Packages (NDPs) and any other authority related to the State (e.g. the police) are credible by definition. Therefore, the fact that “the IRB may receive anything credible” means in practice, that CBSA may bring whatever it wants as pieces of evidence, even non-disclosed

or otherwise inadmissible information, provided that it observes certain deadlines before the hearings. Moreover, this principle reinforces substantially the interpretive authority and the discretionary powers of the decision-maker in refugee cases (i.e. the RPD). Only in very rare occasions will this rule be beneficial to a foreign national in the ID and the IAD, regardless of the fact that these two divisions are responsible for reviewing the excesses of the immigration bureaucracy and at the heart of the juridical social reaction of the immigration regime. However, and to be fair, the RPD could probably not function otherwise due to the characteristics inherent to refugee cases and the difficulties that these claimants have in providing tested evidence. Indeed, refugee claimants very often arrive in Canada with nothing, sometimes even without proper identity documents, and they have limited means to request or to test formal documents either due to the context of their arrival or that at their country of origin.

Concerning the second question (who has the duty to prove a disputed assertion?), the formal rule is that the burden of proof lies on the claimant, whether he or she is claiming a refugee status (the 'refugee'), a removal order (the Ministry), a sponsorship appeal (a citizen who is sponsoring), etc. This is especially true at the ID and at the RPD. In the case of the ID, this is so because there are no disputes at all, due mainly to the application of the strict liability criterion, which is reinforced by the fact that the Ministry is credible. At the RPD, refugee determination being basically an inquisitorial "guess game", or "confirmation game" as the "truth" is previously established in the NDP and the RPD member stocks of knowledge, the refugee claimant is responsible to convince the decision-maker that his or her narrative is credible. As a rule, the claimant and/or the refugee counsel will fulfil this burden by building a refugee narrative that fits in the NDP of the country of origin of the

claimant and the RPD member stock of knowledge. Taking in consideration what we discussed so far, we have already a very interesting (and exclusive) conflict resolution scenario: those claiming at the ID (CBSA) are credible by definition and their assertions are indisputable; and those claiming at the RPD (refugee claimants) are struggling to dispute their assertions against pre-established truths – their narrative from the lifeworld (*Lebenswelt*) are not necessarily considered to be “within the true” (Bachelard, 1985; Canguilhem, 1968; Foucault, 1971) and they have to be particularly good at performing it, but not too much.

Refugee counsels are not stupid and they know what is at stake at the RPD. Everything is a matter of credibility and not necessarily of authenticity. This means that a genuine narrative may be interpreted as something not credible. So, they practice, they do a rehearsal with the refugee claimant – I observed a couple of them and they were very instructive for me and for the claimant. They are not abusing the system by doing that. It is part of the game, a “guess game”. Building a specific form of narrative and performing it in a specific way, helps the decision-maker in the process of matching the claimant’s narrative to his or her beliefs of what a refugee is about. These rehearsals are not very different from preparing witnesses or training clients before their appearance in court. Lawyers do that all the time and in every area; they frame conflicts, but by doing so, they are professional conflict thieves (Christie, 1977). What may be specific to the preparation of refugee claimants however is that the screenplay, or at least part of it, is written in the NDP and not only in the case law.

In the IAD, the manifestation of this principle is quite different due to the H&C issue and the dynamics of disputes. In practice, the burden of proof alternates from one side to the other, not necessarily following the formal rule that puts the burden on the side of the claimant. For

instance, sometimes the Minister's counsel is clearly not comfortable when the appellant counsel is flagrantly weak or not well prepared for the appeal, and he or she will produce evidence for the appellant as well. At some occasions, the Minister's counsel approached me during breaks and/or at lunchtime saying: "I feel bad when [the appellant's] counsel is not doing his job" or "Did you see? I had to produce evidence for him. I am not here to do his job, but it is not fair when a counsel sits there and does nothing". Moreover, as an examination technique and dispute strategy, the appellant counsels anticipate the Minister's counsel cross-examination by questioning their own clients. Appellant counsels proceed like this because it allows them to adduce evidence that would in any case be brought forward by the Minister's counsel, but in a manner that is much more softer, nuanced and favourable to their clients. For example, during removal order appeal hearings, appellant counsels phrase questions about criminal records in a way that emphasizes their clients' knowledge and remorse about their past wrongdoing, letting them contextualize the original conflict, how they have rehabilitated since then and their plans to avoid this kind of behaviour in the future. It is a way of neutralizing questions which would most certainly be asked by the Minister's counsel in a much harsher way by emphasizing the extent of the criminal record, the recurrence of the appellant's wrong or dangerous behaviour (charges), how this past record demonstrates his or her lack of integration to Canadian society or to its main values and so on. Ultimately, it does not really matter *a priori* who has the burden of proof in the Immigration Appeal Division; what is important is how the burden of proof is managed in the proceedings.

Finally, regarding the third principle, the IRB works with the civil standard of proof and not the criminal one ("beyond any reasonable doubt", which requires more certitude). The general standard of proof for all IRB divisions is the "balance of probabilities" (it is more

likely than not that this is true), but the standard can vary according to the legal issue before the board. Sometimes, the *IRPA* specifies what the applicable standard of proof is, but jurisprudence and practices also play a major role. For example, lower standards of proof such as “serious possibility” or “reasonable grounds to believe” are also used in the tribunal: the first standard of “serious possibility” can be applied to the danger of torture (*s. 97(1)(a)*) at the RPD; and the second, an even lower standard, that of “reasonable grounds to believe” is usually applied in cases of organized criminality (*s. 37(1)(a)*) at the IAD.

The criterion of “reasonable grounds to believe” is somewhat problematic, being just above that of “mere suspicion”. This particularly paradoxical (and tragic) because the lowest possible criterion is applied specifically to criminal law-like offences (e.g. gang member or organized criminality), which would require much higher standards of proof if these foreigners were to be pursued in the criminal justice system. This leads to paradoxical situations where the Crown cannot substantiate a criminal accusation due to the lack of evidence, but charges laid by the police are enough to satisfy administrative standards for the purposes of detaining foreigners, prosecuting them through the IRB, and eventually removing them from Canada.

A good example of this is the definition of gang member used at the Board. To consider someone a gang member in the immigration justice system, there is no need to have a criminal decision establishing that a foreign national is a member of a gang or of any related group involved in organized crime. You just need to satisfy the criteria elaborated by Criminal Intelligence Service Canada and that are “used by every police force throughout Canada” (2002 *Jean-Yves Brutus v. CIC*; file no. 0018-A2-01385):

“1) Information from a reliable source (that is, inside gang member or rival gang member, community resource, school authority, member of the business community, citizen); 2) A police surveillance report confirming that the person associates with known gang members; 3) An admission from the person; 4) The person’s direct or indirect involvement in a gang crime; 5) Judicial findings that confirm the person’s membership in a gang; 6) The person displays gang identification marks, has performed initiation rituals, or possesses gang paraphernalia and symbols (tattoos, weapons, clothing).” (*ibid.*).

Basically, if the police have a little bit more than a “mere suspicion” that a foreign national is involved with gangs or organized criminality, it may be enough to arrest, detain and/or deport him or her.

Let us consider the following hypothetical example. There are four young individuals with no criminal records: a national citizen, an illegal immigrant, a temporary resident and a permanent resident. They are together at a street corner wearing bandanas, rings etc., talking to each other using slang and so on. The police pass by. They consider their behaviour suspect and decide to arrest them under the accusation of being part of a gang (*Criminal Code*, s. 467.1(1)). They have nothing against these individuals but the fact that they were dressed in a hip-hop style, they wore what is believed to be gang symbols, and the fact that there was allegedly a new gang in that neighbourhood. What do you think will happen to each of them in terms of social reaction?

The only one who will be detained is the illegal immigrant. This is so, not due to the gang

membership issue, but because she or he has no status in Canada and will be detained while waiting for a deportation order, with no right of appeal. It is fair to consider that all the others will be released without any conditions and that no criminal accusations could be formalized because the evidence presented would not meet the criminal law criteria. The case is over for the Canadian citizen, despite the unpleasant (and shall we say too common) experience. However, the two remaining foreign nationals can still have some troubles with immigration authorities if the police decide to send their reports to CBSA. Theoretically, both temporary and permanent residents could be detained by CBSA and also be considered inadmissible to Canada, facing a removal order as a consequence.

This sounds absurd, but it is not. It is about two different streamlined social reaction systems that may share certain institutional actors, but are in fact working with very distinct logics. Fundamentally, there is no need for a conviction or for a formal criminal accusation to be considered inadmissible to Canada. It is sufficient that a decision-maker from the immigration justice system has reasonable grounds to believe that a foreign national is a member of an organization that is or has been engaged in a crime-related activity under the definition quoted above. CBSA has the competence to detain the last two individuals and the ID (IRB) most likely will review the detention of the permanent resident; this process is not practically guaranteed in the case of the temporary resident as he or she may lose such status and be ordered to leave the country. The main difference is that in the case of the temporary resident, CBSA can issue the removal order immediately without an admissibility hearing at the ID or a right of appeal. In the case of the permanent resident, an admissibility hearing is required and the person may have the right to appeal the decision at the IAD depending on the nature of the charges imposed. Therefore, we can fairly argue that different individuals participating in the

same activity may have different outcomes based uniquely on their citizenship status. This reasoning makes social reaction much more complex and nuanced than argued by constructivist criminology (critical criminology included). After entering in contact with a policing institution, their cases may take different bureaucratic and judicial paths, never really accessing the criminal justice system. In fact, the selectiveness of justice also occurs at the normative system level and problematic situations may be managed by any justice system comprising the penal complex (see ‘the penal as a mobile’; chapter 2).

This process of penalization without criminalization is a well-paved alternative to punishing while avoiding criminal trials. Unfortunately, these alternatives to punishment are not only theoretical or hypothetical, but also sometimes very real. Moreover, despite the fact that the determination of gang membership in the immigration justice system sounds like mere suspicion or how the IRB takes it, this reasoning was confirmed by higher courts as legally valid in judicial review cases such as in *Thanaratnam v. Canada (2004) F.C.* and *(2005) F.C.A.*

Mr. Thanaratnam, a Sri Lanka citizen, was arrested and charged several times, but none of the criminal charges went to trial. In short, his application for judicial review was allowed, sending his case back to the IRB for a hearing *de novo* because “the Board's conclusion that Mr. Thanaratnam was a member of a gang was not supported by the evidence”. However, the federal government appealed from that decision and won at the Federal Court of Appeal a year later, restoring the initial decision of the Board. The Court’s reasoning is both instructive and clear. The Federal Court should only interfere with the Board’s decision if it was “obviously irrational” or “patently unreasonable” for the Board to conclude that there was evidence supporting its conclusions:

“The Court's function is to decide not whether, on the evidence before the Board, there were ‘reasonable grounds to believe’, but only whether it was obviously irrational for the Board to conclude that there were. In the absence of an allegation that the Board erred in law, or that its procedure was unfair, it was difficult to establish that the Board's conclusion that ‘reasonable grounds to believe’ existed was patently unreasonable. A conclusion is not patently unreasonable merely because inferences different from the Board's could reasonably be drawn from the evidence. While no single piece of evidence was determinative in this case, the overall evidence was sufficient to ensure that the Board's decision could not be characterized as patently unreasonable.”⁹⁹ (Emphasis mine)

Contrary to what one might assume from criminal law principles, the presumption of innocence is not the relevant governing principle here. This is not a situation in which the maxim *in dubio pro reo* (in doubt, on behalf of the accused) applies, but rather one where that of *in dubio pro rex* (in doubt, on behalf of the king) applies. The administrative style of penal translation (and administrative punishment) is grounded in this inversion of principles and on the lack of legal guarantees, making this immigration legal grey hole even more visible exactly in these situations where there are no real possibilities of criminal forms of punishment. This process of punitive decriminalization (Velloso, 2005, 2006) or *undercriminalisation* (Ashworth & Zedner, 2010) has been a frequently used alternative to punishing immigrants while avoiding criminal trials since at least the nineteenth century (Walters, 2002).

⁹⁹ *Thanaratnam v. Canada* (2005) F.C.A.

II) Seeking Alternatives to Criminalization

When I first entered the IRB, I knew that what I would be observing could hardly be described in terms of criminalization. After all, my immigration law courses had prepared me to the fact that criminal law and criminology were not the main references. However, it was only after a couple of months of fieldwork at the IRB that I realized the magnitude of the differences between criminal law and administrative law adjudication. This was a second turning point in my research. Remember that the first turning point happened when I realized that the tribunal did not deal with illegal immigrants and that, accordingly, I had to change my research topic. The first turning point was however not a big deal as such a change was only a matter of adjusting my object to reflect more appropriately my research question. The second turning point was more important. It implied a lot of things empirically, theoretically and epistemologically. Retrospectively, I can say that it was the first time when I fully perceived how problematic the concepts of *crimmigration* (e.g. Miller, 2005; Stumpf, 2006; Aas, 2011) and *criminalization of immigration* (e.g. Sayad, 1998; Palidda, 1999; Wacquant, 1999; Mathieu, 2001, 2006; Miller, 2003, 2005; Bosworth, 2008; Bosworth & Guild, 2008; De Giorgi, 2010; Zedner, 2010; Bosworth & Kaufman, 2011) which pervade the field, actually were. These concepts do not only oversimplify the regulation of immigration conflicts in a very criminocentric way, but they also do not really address how and why penalization processes occur mostly when and where traditional criminalization is not possible or practically not considered as an option.

The main problem of the concept of *criminalization of immigration* or *crimmigration* is that immigrants are being detained, deported and kept under surveillance without having access

to the package of rights generally associated with the criminal process¹⁰⁰. Empirically and theoretically speaking, these terms do not provide an accurate description of social reaction processes in the immigration regime. In that sense, it is more accurate to suggest that: “immigration law has borrowed the enforcement components of criminal justice without the corresponding adjudication components”, as Stephen Legomsky puts it (2007, p. 473). Reading Legomsky’s article was a big relief for me when I was in the field. Legomsky is a professor of immigration law and of criminal law at Washington University School of Law, in the United States and he knows both justice systems well. It was the first time I really felt I had some support in questioning most of the hegemonic literature on immigration control, critical criminology included, and I think his writings pushed me to move even further.

Legomsky’s concept of an *asymmetric incorporation of criminal justice norms* (2007) is particularly interesting. It clearly emphasizes the selectiveness with which immigration law has retained certain punitive aspects of the criminal justice system without incorporating the corresponding legal and procedural guarantees. However, it can also be misleading. Indeed, the notion of incorporation presupposes that punitiveness is located solely in the criminal justice system and that it radiates to other normative systems. In his 2007 article, he writes:

“Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication in particular, the bundle of procedural rights recognized in criminal cases-have been consciously rejected. Rather than speak of importation of the criminal *justice* model, then, a more fitting observation would be that immigration law has been

¹⁰⁰ This was one of the issues raised before the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9. The Court held that it was valid to use immigration law for domestic security.

absorbing the theories, methods, perceptions, and priorities of the criminal *enforcement* model while rejecting the criminal *adjudication* model in favor of a civil regulatory regime” (Legomsky, 2007, p. 472).

Legomsky’s concept is empirically very solid and I could use it to describe what we saw here in the *Act I*. Actually, his concept fits very well with criminologists’ cultural and academic representations of criminal law, criminal justice, the penal system, etc. We, as criminologists, take for granted that punishment only exists in the criminal justice system and not in civil regimes, administrative law included – and I am humble enough to acknowledge that I was thinking exactly like this from the time I did my Masters back in Brazil up to almost the end of my fieldwork at the IRB. The only (and big) problem is that this “contamination argument” is historically questionable. While I started to have doubts about a possible contamination while I was in the field, it was very difficult to challenge it empirically. This was so mostly because punitiveness is often blurred and that legal actors at the IRB also shared the same cultural and academic beliefs than criminologists about legal punishment being exclusive to the criminal law. To be more precise, their relationship with criminal law is paradoxical: on the one hand, they make a clear and sharp distinction between criminal and administrative regimes, but on the other hand, they sometimes use terms from criminal law to exemplify or even to justify some of their practices, especially when they are dealing with sanctions, as we will see next chapter.

The concepts of *criminalization of immigration/crimmigration* and *asymmetric incorporation* are problematic concepts but for different reasons and at different degrees. The first two concepts are problematic in every possible sense and the last concept is more questionable in theoretical and epistemological terms. All of them however were critical to the development

of my own argument. The critique of the idea of incorporation present in Legomsky's work actually represented a third turning point on how I perceived the penalization processes in the immigration regime because this critique implied questioning the "criminocentric dogmatism" and thinking the Penal differently.

While it would have been easier for me to use concepts such as *crimmigration* and *asymmetric incorporation* in this thesis, I was not comfortable doing so. First, it was clear to me that there was nothing related to the criminalization of immigration at the IRB and that social reaction in the immigration regime was not about *crimmigration*. Second, I was tempted and curious to see where this path, thinking about a (punitive) immigration regime that was not necessarily contaminated by criminal law, would lead me. Thus, in the following paragraphs of this chapter (4) and in Chapter 5, I will take Legomsky's approach a step further, challenging both fronts of the criminalization of immigration consensus. In particular, I conclude in this chapter that immigration control is not about crime, but rather about the process of administrative translation of conflicts (*mise en forme administrative*), which is not that distant from Legomsky's conceptualization. Next chapter, I will demonstrate that immigration punishment is also not really about criminal penalties (*poena / peines*), but about police measures.

In order to do so, I go back to the concept of legal hole introduced earlier in Chapter 3. Framing immigration control and the IRB as a *legal grey hole* (Dyzenhaus, 2006b; Vermeule, 2009) seems to be even more nuanced than Legomsky's idea of *asymmetric incorporation*. The immigration regime is a justice system specialized in immigration that is based on administrative law principles and does not necessarily incorporate criminal justice enforcement or theories. Not only does the immigration model reject criminal adjudication,

but it also does not consider more fundamental legal guarantees. What we discussed in this chapter regarding rules of evidence is only the continuity of a process of rights degradation, which we started to explore in the previous chapter. The fact that the IRB operates with lower standards than those from criminal law only makes it more deferential to the executive. Judicial review technically exists, but most applications end at the “leave” stage. When cases are actually heard, the Federal Court barely set limits to executive action, which can only be partially explained by the limited purview of judicial review itself. Moreover, there is no need to invoke the Schmittian idea of *exception* (Schmitt, 1985, 1999) and, therefore, temporarily suspend rights to regulate immigration because, by definition, foreigners do not enjoy the same procedural rights that are available to ordinary citizens. That is what the immigration regime is ultimately about: ordinary laws, regulations, policies and practices. It is a harsh and very discretionary social reaction system, very different from the traditional criminalization process bounded by criminal law.

The description of the IRB as a continuous state of exception within the rule of law, or to be more precise as a legal grey hole is not an exaggeration or an attempt to impose such categories to the field. My reasoning is not to make the field match the concept of legal grey hole, but to use this concept to help thinking the IRB because there are some elements in the field that fit with the concept. The force of concepts and theories are not to encompass the objective properties of the tribunal. I am not a realist and this thesis is so constructivist that it focuses and theorizes social reaction beyond the boundaries of criminal law. Concepts and theories are used in interpretative terms, as I argued earlier in this *Act*: they dialectically gave me the necessary conditions to elaborate a thick description of the IRB. This description is my description, it is based on empirical data and reflects what happens in the

tribunal, but it is also a criminological and social-legal construct. If my goal were to develop a science marked by “the perfection of consensus”, in realistic terms, I would be confronted with two options: I would either have to agree with the hegemonic academic perspective according to which we should “criminalize everything”, which does not make any sense at all, or I would have to believe what was professed in the tribunal by the actors, the normative references and the decisions. But I am not the shopkeeper from my epigraph, nor a positivist. Ultimately, I do not care what the IRB is really about because reality, if such a thing exists, is much more complex than any version of it, including mine. My contribution is to nuance, refine the debate by borrowing and developing categories to think social reaction and the legal sensibilities at the IRB in more complex terms.

The concept of *asymmetric incorporation of criminal justice norms* is useful and very pertinent to nuance the American and the Canadian immigration regimes. However the concepts of legal black holes and legal grey holes allow me to refine even more the debate in light of what I observed at the IRB. There are four characteristics of legal holes that make them particularly interesting in this context. First, legal holes are linked to administrative law more broadly and not only to immigration and refugee law. Second, they are completely dissociated from criminal law, being ruled by a different set of references that may communicate or not with criminal justice. Third, they embody a very particular regulatory regime where the executive is explicitly or implicitly exempted from legal constraints. And fourth, the concept of legal holes sheds light to the different logics governing immigration regimes, namely executive supremacy (Schmitt, 1985) or royal prerogative, which differ drastically from that of criminal law, namely supremacy of law (Dicey, 1964). According to the logic of executive supremacy, the “judicial branches of government, although charged

with the duty of standing between the government and individuals, are often too deferential to the executive in time of peace” (Steyn, 2004:1) and even more in times of crisis and/or regarding (national) security and foreign policy.

Ben-Asher brilliantly summarizes (2009: 9-11), Eric A. Posner and Adrian Vermeule’s work (2007a, 2007b, 2007c) who suggested that there are three justifications for this judicial deference to the executive: first, institutionally both the legislative and the judiciary defer to the executive in times of emergency; secondly, the judiciary owns an “epistemic deference” to the executive even in times of peace and by this they mean that “deference has to do with knowledge of certain facts to which the deferring judge allegedly has lesser or no access” (Ben-Asher, 2009: 10) – this fairly matches and explains the immense level of discretion and credibility the CBSA has in immigration cases; and thirdly, courts have historically always deferred to the executive in times of emergency (i.e. the same argument made by Steyn, 2004) and for them this is related to Carl Schmitt’s political theory according to which the sovereign is the executive branch of the State. These four aspects of legal holes emphasizing their relation to administrative law and in particular, judicial deference towards executive actions are not developed in Legomsky’s concept; his debate and argument was different.

The process of legal translation (*mise en forme*) at the IRB appears different and shocking to someone with criminal law (and constitutional law) lenses because such process stands in sharp contrast with what we are used to in the rule of law, in law’s supremacy. The IRB looks like the police and not like the judiciary; the whole process is about discretion and police power (Dubber, 2005; Dubber & Valverde, 2006). This is probably the reason why Legomsky identified that “immigration law borrowed the enforcement components of

criminal justice” (*ibid.*) and framed the whole process as an “incorporation” process. The notion of legal holes however allows us to realize that such “enforcement components” are fundamentally about administrative law, in times of crisis like in times of peace. Exceptional regimes in the immigration justice system such as the security certificates¹⁰¹ are perhaps only the most brutal and Schmittian radicalization of such social reaction processes in times of crisis: it is the *Leviathan* or at least a reconstruction of it (Hallsworth & Lea, 2011), a raw and fairly unconstrained¹⁰² sovereign power centered in the executive. It is a pre-liberal form of rule rather than any form of neoliberal governance. This is something that is quite explicit when considering the immigration regime.

The immigration style of legal translation can be summarized in considering the following elements discussed thought *Act I*. First, on the immigration side of the IRB, facts and law are not disputable due to the strict liability criterion; this is particularly evident in the ID and a bit less in the IAD because disputes are re-established regarding H&C. On the refugee side (RPD only), disputes are different due to the inquisitorial system in place and the cases dynamics – technically what happens in the RPD are not disputes between opposing parties, but an *inquest* conducted by the RPD member (Merryman, 1969; Foucault, 1974; Kant de Lima, 1986, 1991, 1995a, 1995b, 2010). Thus, in both scenarios, there are no disputes and this may be considered as more problematic in the ID due to fact that the CBSA structures the cases. Second, the tribunal is not bounded by any technical or legal rule of evidence and

¹⁰¹ The security certificates regime is explicitly political: the Ministry writes the name of a foreign national in a security certificate, making him or her detainable under strict conditions and inadmissible to Canada. The IRB is more subtle and nuanced than that as it is a tribunal operating in a justice system, indeed a legal grey hole, even if the exclusionary results are practically the same.

¹⁰² Constraints will always exist, but they are much more institutional or organizational than legal.

anything considered credible may be presented. As we discussed, this will rarely favour the foreign national due to credibility, even in refugee determination cases, which leads us to the next element. Thirdly, the Ministry and the IRB are credible by definition. In the refugee side, it changes the dynamics of a “guess game” into a “confirmation game” – the RPD member inquires the claimant in order to make the narrative fit in a pre-established truth about refugees from his or her country of origin. The result in the immigration side is the reinforcement of the judicial deference to the executive (i.e. CBSA), mainly in the ID, but also in the IAD as we will discuss later. Fourth, the use of lower standards of proof are nefarious, especially in the immigration side of the tribunal as it allows a punitive social reaction that would not have taken place under a criminal justice regime. And finally, if there remains any doubt in this already very unbalanced game, the State, and not the foreigner accused of a breach of the IRPA, should benefit from it (*in dubio pro rex*). Refugee claimants are in a different situation because as a matter of fact doubts do not exist at the RPD. If there are any doubts at the RPD, they will be resolved by the member in terms of “guesses” or confirmations, being framed more as a credibility issue.

The combination of these five epistemic and/or classificatory elements produces a justice system that is very discretionary when compared to the criminal justice system or even to mixed regulatory regimes (e.g. regulatory criminal law). But who has discretion? Or to be more precise and to borrow Dworkin’s words: “Discretion under which standards?” or ‘Discretion as to which authority?’” (see footnote 96, p. 134; Dworkin, 1977:31). In refugee determination cases, the answer is plain and simple: the IRB has discretion as the norms explicitly state that refugee determination is out of the scope of the CBSA, being an

exclusive matter of the Board, especially regarding full hearings¹⁰³. It is interesting to note that the old *Immigration Act* provided that two members decided together refugee determination. This provision had the effect of neutralizing discretion at the individual level. The IRPA changed that and limited the hearings to only one member considering that there would be an appeal division – in the meantime however, many refugees did end up having the worst of both worlds with one member and no possibility of appeal. The one RPD member has institutional and organizational constraints, but he or she can fairly do whatever he or she wants – it is a guess game, but members need to play it safe.

The locus of discretion is however not as straight forward regarding immigration social reaction in the ID and the IAD. We already know that immigration control starts way before the judicialization at the IRB and that the immigration bureaucracy, mainly CBSA as a policing institution, is responsible for it. What we will now understand is that immigration justice is also about policing and police power. Indeed, the CBSA has control over the judicial part of immigration control as well. Actually, and despite the role of IRB members as decision-makers, the CBSA, as the immigration bureaucracy and not as the prosecutor, structures the whole social reaction process. This is due to the fact that the CBSA is the representative of both Ministers (i.e. the executive) in the IRB, acting as a prosecutor and as the police who initially filter the events that may be characterized as immigration offences.

¹⁰³ As discussed in the previous chapter, there are three processes of refugee determination and we can argue that RPD members interpret much more the lifeworld (*Lebenswelt*) in full hearings. In fast-track hearings, the case is partially set and there are fewer issues to consider. Finally, in the fast-track expedited process, which deals with easier cases, the construction of facts is done by refugee protection officers (RPO) or even external actors (e.g. the United Nations High Commissioner for Refugees),

To understand what is at stake, we need to go back to criminalization studies (Ericson, 1981; Robert, 1984, 1985; Lévy, 1984, 1985; Acosta, 1987; Cousineau, 1994; among many others). Constructivist criminologists argue that secondary criminalization, which consists in enforcement and judicialization, is the result of a sequential interpretative chain composed by different actors and contexts (e.g. police patrol and detectives, prosecutors, trial dynamics, judges, etc.) as opposed to norm creation (which is conceptualized as primary criminalization). This is something fairly in line with Geertz's conception of law as local knowledge and his notion of legal sensibilities (Geertz, 1983).

In theory, any actor may change how events, or the lifeworld, are interpreted throughout the sequence of this chain (e.g. the prosecutor revising the version of the police and so on). However, there is a certain consensus in the criminological field stating that in criminal justice the original classification made by the police is determinant, especially the work of the detective (*enquêteur* or *police judiciaire*). As Richard V. Ericson argues in his classical study *Making Crime*:

“Within the organization of the criminal process, discretion varies inversely with formal status. Detectives have effective control over the process because of their positional advantage in relation to other agents and agencies. Their control over information production, selection and use allows detectives to substantially influence what becomes a ‘crime’ and who becomes a ‘criminal’. This is of major importance in understanding the way the criminal process differs from the way it is conceived by some socio-legal theorists.” (Ericson, 1981: 214)

This does not necessarily mean that what a detective considers a crime will become a crime after passing through criminal justice, but that their interpretations of the kind of offence (i.e. events transformed into crimes) and the offender (i.e. people transformed into criminals) will not change throughout the process. What the police interpret from the lifeworld remains fairly intact. They are the first to steal conflicts; they take them as “property” (Christie, 1977), framing them in legal terms, or at least a temporary tutelage until such property is transferred to “professional thieves” (i.e. lawyers). The police charges may not concretized into an indictment and the accused may not be found guilty, his or her lawyer may negotiate and change the classification in exchange for a guilty plea, etc. But, as the evidence brought by the studies of Ericson (1981), Lévy (1984), Acosta (1987), Cousineau (1994) and others suggest, the legal translation performed by detectives, the “facts” they selectively constructed, will remain and substantially influence the framework of the case in the judiciary¹⁰⁴. As a rule, public prosecutors do not conduct investigative work themselves although they might of course ask for specific evidence or participate in the structuring of certain (important) investigations. Moreover, in criminal adversarial systems, the interpretive authority is more diluted in the rules of evidence, and the criminal justice system operates with higher standards of proof, which set clearer

¹⁰⁴ “The principle of legality is supposed to function to provide effective limits on the power of State agents to judge and punish. However, as we have seen, many laws are written and used in a manner, which enables detectives to do what they want to obtain what they want. Detective practices are facilitated further by the low visibility conditions of their work, which allow them to be the definers of reality about a case, and to construct ‘facts’ about the case which are treated as legitimate because they take into account the rules, which are supposed to govern the process. In sum, detectives are typically able to work *within* the legal provisions of their office to accomplish their mandate. These legal provisions, and the other organizational elements we have analyzed, help to ensure that in conjunction with their patrol officer colleagues, detectives have great power to judge and punish.” (Ericson, 1981: 214)

limits about what can be interpreted as facts and how events can be interpreted as facts, bounding even the detective work.

In the immigration regime, all of this is very different because of the ontological structure of the regime, which is oriented by lower standards of proofs and an adversarial system where accusations made by the Ministry are not really disputable, neither in fact nor in law. As we learned in *Thanaratnam v. Canada* (2005) F.C.A., anything that is not “obviously irrational” or “patently unreasonable” may be very well valid in the IRB. Consequently, the CBSA may be very imaginative in the process of legal translation, including in the original selectiveness during enforcement/policing. Based on Ericson and Acosta’s contributions and on what I observed at the IRB, I can thus argue that the CBSA, as an enforcement agency, also has the discretion in the judicial part of immigration control.

This finding is very disturbing for me as a criminologist (and principally as a permanent resident who is subject to this social reaction regime). Of course, I just got glimpses of the “detective work” aspect of the initial translation dynamics in my interactions with CBSA hearing officers and I cannot assess how fair, reasonable, good or bad it is. But I can assume that this initial translation process most probably exists. For instance, CBSA hearing officers mentioned sometimes that they were not preparing the cases themselves or that the cases were already ready. In some of my interactions with them before or in between hearings, CBSA officers sometimes commented that they had received X number of cases that day and that one of them in particular would probably interest me (typically because the case was crime-related, but also sometimes because it raised complex issues in sponsorship appeal cases). The focus of my research was the IRB and I had to delimitate somehow how far I could and should go into such issues. I simply could not investigate

CBSA outside the context of the Board and surely more research needs to be done focusing specifically on the CBSA “detective work”¹⁰⁵.

Ultimately, the fact that CBSA as an agency controls the judicial social reaction process is more related to its detective work and to the legal translations performed by its officers during the enforcement (i.e. outside of the IRB), rather than to the fact that CBSA officers also act as prosecutors at the IRB. The fact that both policing and prosecution activities are located in the same institution only guarantees that the initial translation of events remains the same at the judicial level, granting even more discretion to the CBSA institutionally speaking¹⁰⁶. Therefore, when higher courts hold that they should be deferring to the IRB in immigration matters, they are actually being deferential to the immigration bureaucracy, that is, the executive branch of the State in its purest form.

When this aspect is analyzed in conjunction with the immigration style of legal translation, we can easily conclude that the judicial social reaction on the immigration side of the IRB is, as a rule, immigration control under CBSA terms legitimized by the judiciary. Therefore, the IRB may not only be interpreted as a legal grey hole, but also as a political tribunal,

¹⁰⁵ Anna Pratt touches some of these aspects in her book *Securing Borders* (2005) (e.g. chapters 7 to 9) and in posterior articles (Pratt & Thompson, 2008; Pratt & Sossin, 2009; Pratt, 2010), but her work does not really focus on how CBSA translates events into legal categories, that is, on their “detective work” as conducted by Ericson, Acosta, Lévy and many others regarding criminal social reaction.

¹⁰⁶ Paradoxically, the fact that CBSA has institutionally a lot of discretionary power does not imply that CBSA agents’ and/ or hearing officers’ have that much discretion individually because strict organizational constraints usually apply. This argument was often raised by CBSA hearing officers and IRB members during my fieldwork and it has also been brought to my attention by provincial and federal prosecutors in informal contexts unrelated to this research. It seems that greater institutional discretion in any given organization also comes with greater internal control of its agents at the micro level.

something akin to the Vichy regime (Lochak, 1989, 1994, 1996). In other words, if the IRB ceased to exist, not a lot of things would change in terms of immigration control because CBSA would continue doing its job without the tribunal. The outcomes would be the same, but the timing and symbolic effects would be different. If immigration control were only to exist as an enforcement procedure, it would be way faster, but the totalitarianism and exceptionality of the regime would also be much more exposed, including the practices of its detectives and the relative invisibility of their work (Ericson, 1981). Symbolically speaking however, it looks much better to have a social reaction regime that is controlled, at least in part, by Canada's largest independent administrative tribunal with the entrusted mission of making "well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law".

The Ministry, i.e. Public Safety Canada via CBSA, has the best deal in town: social control policies that may be easily implemented, and they are, with a legal stamp of approval on them. It is not a surprise that the executive branch of the Canadian government stopped issuing new security certificates when these measures gained more media and political attention and the frenzy around the 9/11 slowed down – this happened before the Charkaoui decision (*Charkaoui v. Canada*, 2007 SCC 9). The same results can be achieved through the regular social reaction process (CBSA enforcement plus IRB) without the need for special advocates and other still tenuous boundaries of the post-Charkaoui regime (from Feb. 2008 onwards), but it takes more time. In the end, it is probably more economical to use the regular regime, especially when considering that almost every security certificate case dragged on to the Federal Court has ended up invariably at the Supreme Court of Canada in recent years. As Dyzenhaus (2005, 2006, 2013) has argued, legal grey holes are even more

dangerous for the rule of law than black holes since they look legal and “a little bit of legality might, that is, be more lethal to the rule of law than none.” (Dyzenhaus, 2013: 99).

Now, let me nuance this conclusion just a little bit. At the beginning of this *Act (I)*, I mentioned that, “any possibility of adjudication is better than having to deal only with the immigration bureaucracy”. This may sound very bizarre after all we saw throughout the last two chapters (3 and 4), but I insist: it is much better for at least three reasons. First, time. When deportation is lined up, buying time is a very good strategy. While extra time gained in the immigration justice is essentially punitive time (see chapter 5), it is much better than being restricted to the immigration bureaucracy both in terms of procedures and punishment. Secondly, the IRPA creates the possibility of raising humanitarian and compassionate grounds (H&C) on appeal from a removal order. This is a substantial benefit compared to having to deal only with the CBSA for immigration control, or even with the ID. Last but not least, the legal actors involved in the immigration justice system believe in the rules of the game, that is, the fact that the Board “makes well reasoned decisions efficiently, fairly and in accordance with the law”. They would not play the legal game if they believed that it was not worth playing it. And this produces concrete effects as legal actors are in that particular belief space (*espace de croyance*) (Bourdieu, Mauss). As Dyzenhaus put it, judges working within legal grey holes make the most out of it in order to provide whatever legal protections they can:

If judges find that they are operating within what the government may have intended to be a grey hole, they should not insult Parliament by attributing to it an intention that they should decorate decisions taken by the executive with the legitimacy that comes from judicial certification of a decision as according to

law. Rather, they must take the legal regime that Parliament has provided and read into it whatever legal protections they can using the resources that will be made available to them, because they are working as judges within a legal order, and not as some other kind of official in some other kind of order (...). Put differently, judges must always operate with the assumption that they are never in a legal grey hole, one that is in substance black with some trappings of the rule of law. (Dyzenhaus, 2013: 113-114)

This is true at the IRB, especially considering the practices and legal sensibilities in play at the IAD. As we will see in Act II, the legal actors believe so much in the IRB's institutional mission as an independent tribunal that *they* will use H&C appeals as a form of resistance (to deference), using their discretion in a very different sense¹⁰⁷. In the following chapter (5), I will discuss the kinds of punishment that may be inflicted on foreign nationals, showing how immigrants going through such a system are almost always punished in some way.

¹⁰⁷ To my surprise, even minister counsels (i.e. CBSA hearing officers) will resist by consenting to H&C grounds of appeal as if this mechanism were an escape valve to their own institutional constraints.

ACT II:

HETEROGENEITIES

Joao, on ne peut pas faire confiance à l'État...

- Louk Hulsman

CHAPTER V:

PUNISHMENT: ADMINISTRATIVE STYLE¹⁰⁸

In the previous *Act*, I argued that the Immigration and Refugee Board (IRB), the main actor of the immigration justice system, can be characterized as a legal grey hole, being a very discretionary legal space due, in great part, to its normative and ontological structure and to the general deference to the executive branch of the State. Additionally, I have shown that the Canada Border and Service Agency (CBSA) plays the most determinant role in the process of social reaction to immigration conflicts, not only regarding bureaucratic immigration control, but also in the juridical part at the IRB. In this chapter, I will analyze the kinds of legal punishment that may be imposed in the immigration regime as well as how those sanctions manifested themselves at the IRB considering the administrative style of penal translation in place and the differences between the immigration regime and the conventional criminalization process. I will conclude in arguing that immigration control and punishment raise a number of theoretical and methodological challenges for criminology and penology, suggesting that these forms of penalization should be conceptualized in their own

¹⁰⁸ This expression is borrowed and adapted from Marc Galanter's famous article: "Punishment: Civil Style – Punishment Outside the Criminal Law in the Contemporary United States" (1991), which was an important source of inspiration to this chapter and to a good part of my research on the "less prominent locations of punishment as a social institution" (Galanter, 1991: 759).

terms. This aspect will be further explored in the conclusion of this thesis (*Act III*, chapter 7).

Generally speaking, the exclusive and punitive forms of control or sanctions¹⁰⁹ used in the immigration justice system in Canada can be classified in three broad groups: 1) arrests and detentions, 2) control of admissibility (entry and removals), and 3) surveillance (terms and conditions imposed in detention releases or in a stay of removal orders). Nominally, these sanctions sound very similar to criminal penalties (*peine / poena*), but their logics are very different. As I mentioned in *Act I*, the immigration bureaucracy (CBSA and CIC visa officers, but especially CBSA) plays an important role in this justice system and they are directly involved in all these forms of punitive control during the policing and enforcement phases of social reaction and in the administration of sanctions (or corrections). I will focus, however, only on the judicial part of immigration punishment¹¹⁰.

For convenience reasons, I chose not to deal with refugee claims in this chapter. While there is judicial control of entry in the case of refugees and while the consequences of rejected claims

¹⁰⁹ While I argue in this chapter that administrative sanctions are a form of state-imposed punishment or punitive forms of control, I chose to use the broader term “sanctions” in order to distinguish administrative punitiveness from criminal punitiveness.

¹¹⁰ Anna Pratt (2005) uses the concept of “immigration penalty”. This concept fairly covers the same forms of punishment discussed in this chapter and it is perceived as a “distinct penalty” throughout her book/ PhD thesis. It is surely a very inspiring and powerful concept. However, I prefer using the broader terms of “immigration punishment” or “immigration punitiveness” because such forms of punishment are not necessarily penalties and the term penalty may confuse even more a debate that is already criminocentrically charged terminologically speaking. Pratt’s work was done much more from policing (governance) and carceral perspectives and the idea of immigration penalty may have been enough to nuance the debate she engaged in. This is not the case for the debate in which I am engaged in this dissertation due to its focus on social reaction and legal sensibilities at the IRB. The idea of penalty present in her concept will more often will different logics of legal punishment present in the field rather than nuance them (see next section: *‘L’expulsion n’est pas une peine; c’est une mesure de police’*).

for them are practically equivalent to removal orders, rejected refugee claims are not legally framed as sanctions and they are not the result of a punitive social reaction. In the context of refugee determination hearings, a rejected claim means that the claimant is not considered a refugee; it is that simple. Moreover, a rejected claimant, who stays in Canada without any legal status will not be dealt with by the Refugee Protection Division, but by the CBSA, which has jurisdiction to impose and manage immigration punishment in such cases. In the context of this chapter, I am considering as admissibility-related sanctions only the exclusionary results of admissibility hearings, that is, the removal orders issued by the IRB. In this sense, I excluded from my analysis the refusals to entry or to remain in Canada made by the immigration bureaucracy, as well as those made in the context of refugee determination, despite the similar effects of such decisions in terms of exclusion.

Similarly, I decided not to include security certificates within the three groups of sanctions above because these measures are a non-trial (and non-judicial) variation of these usual instruments with lesser legal guarantees and harsher “carceral” conditions. Security certificates are a kind of process and not a form of punishment. When a security certificate is issued by the Minister (Public Safety Canada or Immigration and Citizenship), a foreigner is considered inadmissible to remain in Canada and he or she will necessarily be subject to one or more of the three sanctions mentioned above as well as to a differentiated punitive regime in practice (i.e. super-maximum security detention while the foreigner remains in Canada). In other words, security certificates are extra-judicial processes, the exception within the already exceptional immigration regime and they are completely out of the scope of the IRB and of my Ph.D. research.

In the following pages, I clarify how punishment should be understood in an immigration

law context as it differs substantially from criminal punishment, and I then link these particular forms of punishment or sanctions to the procedures described in the previous *Act*, focusing on detention review processes, admissibility hearings (removal orders) and removal order appeals. In the first subsection, *'L'expulsion n'est pas une peine; c'est une mesure de police'*, I discuss and emphasize the preventive logics of immigration punishment, suggesting that most of the time the sanctions are not imposed following the criminal-law based sentencing principles. In the second subsection, "Exclusive forms of social control used in Immigration", I introduce some of the immigration law forms of punishment that look similar to criminal forms of punishment, namely detention, removals and surveillance, and I analyze their particularities. I suggest that the outcomes of the immigration regime may sometimes be more exclusive than those of the criminal justice system. In the third subsection, "On the Punitive Surplus Value: Punishment Along, Beyond and in Addition to Criminal Law", I introduce the notion of punitive surplus value to discuss the combined effects and interactions between immigration sanctions and other forms of legal punishment, including criminal punishment. Finally, in the last subsection, "Lightening Legal Grey Holes", I first conclude that it is possible to preventively punish a significant part of the Canadian population while avoiding criminal trials or other criminal justice strategies. Then, I point to a possible solution to the unfairness of trials in immigration law by introducing the arguments used by the European Court of Human Rights in *Engel v Netherlands* [1976] 1 EHRR (647, 678-9). In that binding case, the Court ruled that the nature and the severity of the penalty should also be taken in consideration to establish the right to a fair trial, and consequently in providing criminal-like procedural legal guarantees before non-criminal tribunals.

I) 'L'expulsion n'est pas une peine; c'est une mesure de police'

Some of the measures used in the immigration justice system can be associated to the notions of punishment or exclusive forms of social control. However, they are not exactly equivalent to the criminal notion of punishment (*peine / poena*), or even to other types of sanctions imposed in administrative law more generally speaking (e.g.: fines). In administrative law, there are two types of legal interventions that can have a punitive dimension: administrative sanctions and police measures. The main distinction between them is that administrative sanctions are considered repressive, and police measures, preventive. On the one hand, administrative sanctions are similar to criminal penalties (*peine / poena*) in that both are framed as an *a posteriori* response to a given illegality (repressive). On the other hand however, the legal guarantees involved are weaker in the case of administrative sanctions: no *mens rea* is required, strict liability is often sufficient and lower standards of proof are applied.

The punitive instruments used in immigration law in Canada are not administrative sanctions (there are no fines imposed in such regime), but exclusively police measures (*mesures de police*). Police measures follow a totally different logic of intervention than penalties and administrative sanctions. They are not an *a posteriori* response to an alleged offence, but an *aprioristic* response aiming to maintain public order¹¹¹. The legal reasoning is not to punish the wrongdoer, but to take the necessary measures to prevent chaos, guaranteeing the peace

¹¹¹ Paolo Napoli (2011) links the origins of police measures to the development of state bureaucracies during the Ancient Regime, based on a different rationale than contemporary liberal forms of criminal law.

and public order regardless of whether such preventive measures can also have punitive effects. For instance, the logic behind refusing the entry or removing someone who is considered inadmissible to Canada is not necessarily oriented towards the infliction of punishment, but rather towards the necessity to protect an ordered Canadian society from someone who has endangered this society or can potentially offend it in the future. There are several grounds of inadmissibility to Canada as stated in the *IRPA* (ss.34 to 42), including security, health, financial reasons, violation of human rights, criminality (organized or not), etc. All of them are oriented towards the maintenance of a certain conception of order. It is a matter of prevention. The *security* and *health* grounds are quite explicit in this sense:

“34. (1) A permanent resident or a foreign national is inadmissible on **security grounds** for: (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might en-danger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).”; and: “38. (1) A foreign national is inadmissible on **health grounds** if their health condition: (a) is likely to be a danger to public health; (b) is likely to be a danger to public safety; or (c) might reasonably be expected to cause excessive demand on health or social services.” (*IRPA*, emphasis is mine).

In other words, a person does not need to commit an offence to be legally punished in the immigration regime. It is sufficient that there be reasonable grounds to believe that the

immigrant is a danger to society or will possibly be a danger or offend in the future. It is not a coincidence that one of the major immigration detention centers in Canada, located in Laval (QC) is called the Immigration Prevention Center (*Centre de prévention de l'immigration*). In fact, this makes a lot of sense in an administrative law perspective and is coherent with what was presented in *Act I*. As William Walters argued, we are after all dealing with pre-liberal “forms of rule”¹¹² and “deportation [wa]s anticipated by the local police of the poor in sixteenth and seventeenth century Europe” (2002: 281; see also Paolo Napoli, 2003a, 2003b, 2011), when criminal and administrative law were still blurred in municipal and royal law. Walters clarifies very well the punitive logics present in the field suggesting that from the nineteenth-century, at least, deportation was already understood as a police measure rather than a penalty:

“(…) in the latter part of the nineteenth century, as administrators come to reflect on the problem of aliens, and to rationalize the use of deportation, they will understand it in its modern sense as a form of national police. ‘*L’expulsion n’est pas une peine; c’est une mesure de police*’ (Martini, 1909, p. 3). (…). Although the twentieth century will witness the juridification of deportation within national and international law, in its inception it is an administrative not a juridical measure. It is an instrument to protect and sustain public order and tranquillity, akin to the removal of a nuisance.” (Walters, 2002, p. 281).

Interestingly enough, the nature of the punishment used in immigration regime represents a

¹¹² “Unlike liberal forms of rule, which define themselves in part through their political critique of police, police does not see order as spontaneous or natural, but the effect of regulation. Police sits alongside other totalizing arts of government such as cameralism and mercantilism. Security is attained through detailed administration and ordering.” (Walters, 2002: 181)

second counter-point to Legomsky's argument about the *asymmetric incorporation of criminal justice norms*. In contrast, there seems to be a certain discursive suitability between the notion of *legal holes* and police measures: both refer to pre-liberal forms of rule and are based on police power and administrative law. In this sense, the immigration regime in Canada, and most likely in the West, is a sort of anachronism, a justice system out of its time, a missing link which developed so differently from criminal law in the short history of bourgeois societies that it makes it look like a living fossil.

While these police measures lead to exclusionary forms of social control very similar in kind to criminal punishment (*peine*), it is important to trace back these distinctions for two main reasons. First, it is important to clarify the differences between criminal law and administrative law logics of sanctioning. Second, it is worth remembering that the birth of the prison as a form of *punishment (peine)* in the nineteenth century (Foucault, 1995; Melossi & Pavarini, 1981) did not imply that police measures and administrative sanctions used at the time disappeared or stopped their own historical developments (see chapter 2).

As a matter of fact, imprisonment is only one of the possible forms of punishment in a complex network of exclusive forms of control working within, in addition to and beyond criminal law¹¹³. Moreover, incarceration may manifest itself differently in each normative

¹¹³ Pierrette Poncela theorizes sentencing (le *processus de détermination de la peine*) in a particularly interesting way. She argues that sentencing is not restricted to criminal law, but part of different sanctioning processes in various normative systems (criminal, civil, administrative, etc.) (Poncela & Casadamont, 2004, pp. 106 *et ss.*). This broader conception of the Penal is also present, at least in part, in the work of some elite deviance scholars (Shapiro, 1984, 1985; Lascoumes, 1997, 1999; Ruggiero, 1996, 2000, 2001), in Rusche & Kirchheimer (2003) and Foucault (1995) without the same nuances, and more recently in the work of more traditional criminal law scholars such as Antony Duff (2007, 2010a, 2010b).

system composing the Penal complex. For instance, immigration detention is not the same as military incarceration or imprisonment in the criminal justice system. The same thing can be said regarding banishment: penal transportation during British and French Colonialism, differs from deportation in immigration regimes or from zone restriction orders issued in the context of criminal justice and regulatory regimes. They all look the same and have similar effects, but I prefer to not presuppose that they are the same and structured in relation to criminal law (i.e. criminocentric dogmatism). My approach here is rather to identify and think about these forms of penalization in their own terms. In that sense, I follow Mariana Valverde who directs us to analyze legal effects by asking: ‘what a certain limited set of legal knowledges and legal practices *do*, how they work, rather than what they are (2003, 11; Bourdieu, 1990; Valverde, 2009). As we shall see below in the case of the Canadian immigration justice system and irrespective of the interests guiding legislative action and practices, the concrete effects are that non-criminalization, or even decriminalization, may be more punitive than traditional forms of criminalization (i.e. social reaction through the criminal justice system).

Stanley Cohen (1979; 1985), David Garland (1981, 1985), Philippe Robert (Robert & Faugeron, 1980), Pat O’Malley (2009; Freiberg & O’Malley, 1984), and many others, have convincingly shown that criminal imprisonment is not the main form of punishment used by state institutions, even in the criminal justice system. These scholars have focused on non-prison related sanctions (e.g. fines, surveillance). There is also an interesting and increasing scholarship on preventive or pre-trial detention¹¹⁴, referring to the types of measures

¹¹⁴ Ashworth & Zedner, 2010, 2011, 2012; Dubber, 2010, 2011, 2013; Dyzenhaus, 2013; Hannah-Moffat & Maurutto, 2012; Harcourt, 2013; Husak, 2011; Steiker, 1998, 2010, 2013; Zedner, 2007, 2010a, 2010b.

traditionally found in administrative law (e.g. immigration and military regimes) rather than in criminal law (see more particularly Doob & Webster, 2012; Duff, 2013; Webster et al., 2009; Zedner, 2007). In fact, prior to the nineteenth century, criminal law was perceived as only one of the various forms of social control. As I pointed in the *Overture*, one of the main penal strategies of the rising “modern” carceral system, the *1834 Poor Law* and its *workhouses*, was not criminal law, but rather related to administrative law (chapter 2, pp. 69-70). The contemporary use of punitive strategies in immigration law is surely not the result of a spreading out or a “widening of the carceral archipelago” (Cohen, 1985), as it is sometimes suggested by most of the literature on the “criminalization of immigration” (*Id.*), *crimmigration* (*Id.*) or double-punishment (*double-peine*) (more particularly: Mathieu, 2001, 2006 and Sayad, 1998, 1999). These forms of punishment were always available, at least since the Middle Ages as Rusche & Kirchheimer (2003), Walters (2002), Napoli (2003a) and many others have already indicated, or even in Ancient History under the form of ostracism.

It is not that criminal law is expanding or contaminating other legal realms. Instead, I suggested through my mobile-shaped Penal Complex model that there is a concurrency among different normative systems (criminal law, regulatory criminal law, administrative law, etc.), resulting in a variety of penal configurations that their interactions and non-interactions can eventually produce. The same applies to punitiveness generally speaking and to specific forms of punishment found in the different normative systems. In fact, if any “contamination argument” can be made, it is the other way around, with administrative law strategies and sanctions increasingly influencing the criminal justice system (e.g. bail orders, preventive detention, preventive orders, security perimeters). In the context of the U.S. war on crime, Jonathan Simon suggested the idea of “governing through crime” (2005) as a

technique of social reaction and social control. My observations of the immigration regime in Canada, as well as of the social reaction to recent political demonstrations such as the G20 in Toronto (2011) and the students' strike in Quebec (2012), rather suggest the penal configuration of a *governance through legal holes* – this will be discussed more specifically in chapter 7, section II. As we will see below, the uses of police measures in the immigration control are exclusionary on their own terms and may be imposed concurrently with other forms of punishment from totally different normative systems.

II) Exclusive forms of social control used in Immigration

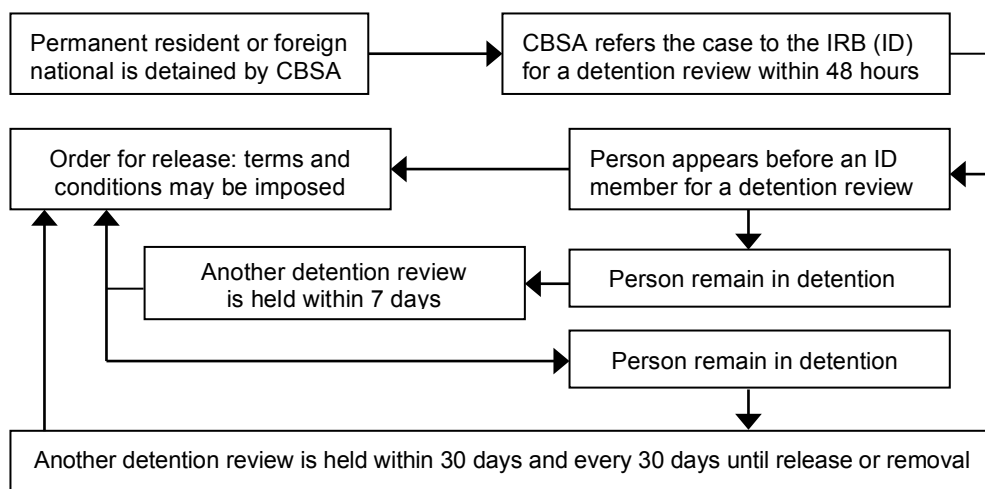
A) Detention

Foreign nationals are not incarcerated in immigration detention centres (or prevention centres) as the result of a sentencing process. They are not serving time or accessing carceral programs in order to be rehabilitated. Instead, they are simply there waiting for their release or for any other police measure to be executed (e.g. release under conditions or removal), which rarely takes more than two months¹¹⁵. Processually, detention review can be summarized as follows.. A permanent resident or a foreign national is detained by CBSA,

¹¹⁵ The recent *MV Sun Sea* case is a clear exception to this: 443 of the 492 Tamils smuggled in the *Sun Sea* were detained, costing over \$ 22 million in detention plus almost one million in ID procedures. (Nakache, 2011: 58-62).

which refers the case to the IRB – ID for a detention review within the next 48 hours. The person then appears before the ID member who can decide to keep that person in detention or to order his or her release under certain terms and conditions. When the person remains in detention, another detention review is held within 7 days and then every 30 days until his or her release or removal (see flowchart – figure 5).

Fig. 5 - Detention Review Process (flowchart)



Adapted from: IRB, 2005a, p. 4.

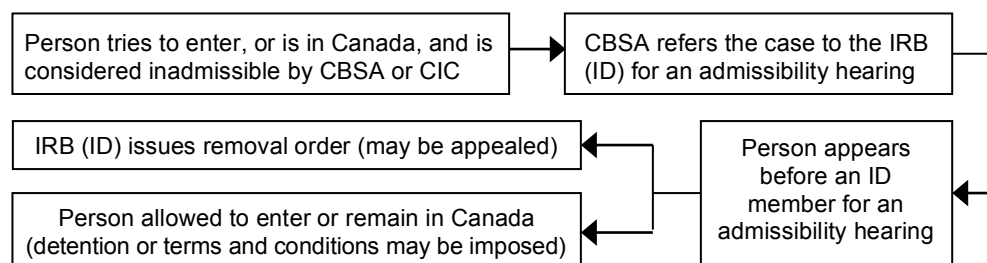
The initial social reaction by CBSA triggers the review process and technically a judicial response is given pretty quickly (“within 48 hours”), with an ID member reviewing the grounds for keeping a foreign national detained on a systematic and ongoing basis. In the books, social reaction and review procedures look similar to criminal justice, but as I discussed in *Act I*, the Immigration Division reviews the grounds for detention in accordance to the IRPA (see flowchart above), applying low standards of proof and strict liability criteria. In practice, the exclusionary results of such detention reviews are quite impressive: those who get in do not get out unpunished. The most recent statistics (from 2011-2012) show that out of almost 18.000

finalized detention reviews¹¹⁶, 81% remained in detention (the peak post-IRPA), 12% were released on terms and conditions, 1% had their conditions changed and only 6% were released without conditions (IRB, 2012). These numbers were similar in 2010-2011 (IRB, 2011: 17-19), but the ID was slightly more exclusionary in the previous years: only 4% were released without conditions in 2009-2010, 6% in 2008-2009, 5% in 2007-2008, 4% in 2005-2007, and only 3% in 2004-2005 (IRB, 2008b; 2010). Moreover, the terms and conditions imposed in the immigration regime are not necessarily the same as those imposed by the police, a criminal court or by the parole board. I will come back to this issue later in this section.

B) Removals

The Immigration Division also conducts (in)admissibility hearings to determine whether a foreign national should remain or not in Canada and its social reaction process can be summarized in Figure 6. :

Fig. 6 - Admissibility Hearing Process (flowchart)



Adapted from: IRB, 2006a, p.4.

¹¹⁶ Please note that the same person can pass through more than one detention review process as they are carried out after 2, 7 and every 30 days. Thus, the actual number of foreigners in detention is quite lower than the number of detention reviews may suggest.

Admissibility hearings are held when a person tries to enter, or is in Canada and is considered inadmissible by CBSA or CIC and CBSA refers the case to the IRB – ID. The person then appears before an ID member who can decide to issue a removal order (which can be appealed in certain cases) or to allow the person to enter or remain in Canada with or without certain terms and conditions. Similarly to detention reviews, the immigration bureaucracy triggers the social reaction process, but there are two differences here in comparison to detention review. First, while CBSA is the main player doing the policing (and “detective”) work and is responsible for prosecution at the ID, CIC may also act in the initial selection of events and/or offender. Secondly and more significantly, CBSA may issue a removal order directly without referring the case to the IRB (CBSA, 2004). As the population and the key issues raised before the division are more or less the same, the exclusionary outcomes of the cases that reach the Board are not that different from those of detention reviews. In 2011-2012, 71% of approximately 2900 admissibility hearings “resulted in a removal order being issued” (the person was declared inadmissible); “4% resulted in permission to enter or to remain in Canada; “7% were subject to the withdrawal of the inadmissibility allegation by the CBSA at the hearing”; and “16% were closed after the person failed to appear” (IRB, 2012). These numbers remained fairly stable since the IRPA came into force in 2002 (IRB, 2003; 2004; 2006; 2008b; 2010)

Three additional factors should be taken into account to understand better how these statistics translate into removals. First, the low number of hearings in comparison to detention reviews (proportionally less than one to five) can be explained by the fact that there are usually more than one detention review per person and that CBSA may directly issue removal orders if the person is not a permanent resident (i.e. temporary residents,

visitors and illegal immigrants) or for “less complicated breaches” (CBSA, 2004), such as falsified passport or misrepresentation. Secondly, when someone fails to appear, a removal order is issued: therefore, we should add that 16% to the removal numbers. Thirdly, withdrawals by the CBSA do not necessarily translate into a permission to enter or to remain in Canada; sometimes it means a voluntary departure. Finally, as a result, the removal outcome of “more complicated breaches” is not 71%, but something between 87% and 96% (which is statistically as exclusive as the detention review outcomes).

There are three types of removal orders in the immigration regime: departure orders, exclusion orders and deportation orders (s. 223 IRPA regulations). The main difference between them is the possibility of prohibiting (legal) re-entry for a certain period of time after the order was executed (ban) as an additional sanction. Departure orders simply require a foreign national to leave the country within 30 days. No other “sanction” is attached to him or her leaving the country and the foreign national may reapply for a visa or return to Canada if a visa is not required - for instance, a U.S. national under a departure order may leave Canada and try to re-enter right after as a visitor, which does not mean of course that the visa officer (CBSA) will allow his or her entry. However, if the person does not leave, the departure order will automatically become a deportation order after the 30-day period. An exclusion order removes a foreign national from Canada and determines that she or he cannot return for a period of one or two years (except if a written permission is obtained from a CBSA officer). Finally and more drastically, the deportation order banishes a foreign national indefinitely from the country. This person will only be allowed to return to Canada if she or he obtains a written permission from an officer and repays the costs of his or her deportation.

In some cases, removal orders can be appealed (at the Immigration Appeal Division of the IRB) or judicially reviewed by the Federal Court. Once appealed, the removal order will not be executed until the IAD or higher courts have made a final decision. This does not mean that the foreign national is “free” as detention and/or surveillance measures usually apply. Also, in very exceptional cases, a foreigner is found not deportable, that is, he or she cannot be forced to return to his or her country of origin due to certain reasons, such as: a risk of torture, the country do not exist anymore (e.g. Soviet Union, Yugoslavia), he or she is a stateless person (a situation similar to the previous one), etc. In these cases, either the Canadian government makes an agreement with a safe third country, which will accept the foreign national and offer guarantees that he or she will not be tortured or suffer unusual punishment, or the foreign national will remain in Canada under another immigration punishment, usually in detention, which may last several years or even indefinitely¹¹⁷.

¹¹⁷ Recently, the case of Michael Mvogo was drawn to the attention of the Canadian press due to a hunger strike launched in September 2013 at the Central East Correctional Centre, located in Lindsay, Ontario, and which holds criminal and immigration detainees. Mr. Mvogo had been detained for the last seven years, as he could not be deported (and still can't). First, the Ministry could not establish his country of origin and later, after he claimed he was from Cameroon, but the Republic of Cameroon had not issued a passport for him yet. Technically, he is currently a stateless person and under the current regime he can be detained forever with detention reviews every 30 days. Details can be found in Joe Friesen, Detained migrants continue hunger strike over Ontario jails, *The Globe and Mail* online, Oct. 1, 2013, retrieved from: www.theglobeandmail.com/news/national/detained-migrants-continue-hunger-strike-over-ontario-jails-conditions/article14647838/; CBC news, UN urged to aid man in limbo in Ontario immigration jail, October 24, 2013, retrieved from: www.cbc.ca/news/canada/toronto/un-urged-to-aid-man-in-limbo-in-ontario-immigration-jail-1.2200396, last accessed on Oct. 30, 2013.

C) Surveillance (terms and conditions, and stays)

I use the category surveillance in this thesis to refer to sanctions corresponding to forms of free-floating control (Deleuze, 1990, p. 240) set by the IRB. More specifically and in practice, surveillance means the possible judicial outcomes set by the Board as a punitive alternative to detention and to removals. I prefer using the term “surveillance” instead of “probation” because the conditions imposed are not exactly equivalent to those imposed in the context of a probation and they are also not necessarily crafted in accordance to the purposes and principles of criminal sentencing (for instance, deterrence, rehabilitation and so on). Moreover, immigration conditions are operationally and legally distinct from those eventually imposed by criminal courts or parole boards, even if in practice the administration of immigration-based carceral spaces is shared among legal actors associated to different normative systems, such as CBSA and Correctional Services of Canada (CSC) (Pratt, 2005; Larsen & Piché, 2007, 2009). As Pratt and Larsen & Piché (*ibid*) showed, immigration-holding facilities are usually jointly operated by CBSA and correction services, either provincial or federal, who technically manage the detainees under their respective jurisdiction. But this is not always the case in practice. Obviously, the fact that the CBSA, the RCMP, CSC and Parole Boards are under the same Public Safety portfolio contributes to blurring the institutional roles of these actors in performing their policing and carceral management tasks. However, the situation is fairly different regarding surveillance because these actors do not share immigration-related operations, and foreign nationals under immigration surveillance are reporting only to CBSA.

The use of the category surveillance also helps to better perceive and analyse how the penal strategies imposed by different normative systems combined, and to avoid the trap (and the oversimplification) of the notion of double-penalty (*double-peine*)¹¹⁸: see Sayad, 1998, 1999; Wacquant, 1999; Palidda, 1999; Mathieu, 2001, 2006. According to the literature on double-penalty, immigration sanctions constitute a double punishment for the same events – this literature is very criminocentric and does not nuance properly the social reaction processes and punitiveness logics of immigration regimes. In fact, immigration surveillance conditions may be experienced in four main different ways. First, totally new conditions can be imposed to foreign nationals who did not previously go through the criminal justice system. Secondly, immigration surveillance conditions can be imposed in addition to criminal and/or parole conditions. Thirdly, criminal and/or parole conditions can be extended in time through the immigration regime. And fourthly, criminal and/or parole conditions and immigration conditions can be created concomitant regimes of surveillance in the case of overlapping conditions effective at the same time. These last three arrangements may be present at different moments in any given case and they are the result of the combination of criminal penalties (*peine*) with other forms of legal punishment (i.e. parole and immigration), which follow logics that do not correspond necessarily to those of criminal sentencing. I should note that I am excluding from my analysis the bureaucratic forms of free-floating control conducted by CBSA (border control, customs etc.) and reinforce again

¹¹⁸ Sometimes Pratt's (2005) concept of immigration penalty is trapped in this notion of "double punishment", as she refers to it. However, and to be fair, she is not really engaged in this debate or operating with the same nuances I am interested in pushing forward here. She suggests that immigration penalty is a distinct penalty used to manage non-citizens. While I totally agree with this idea, I think the problem is that the term "penalty" in immigration penalty creates more confusion in a debate on punitiveness where terms such as penalty, administrative sanctions and police measures are present and need to be distinguished.

that my research is restricted to the juridical dimension of social reaction, although potentially, these forms of legal punishment might also co-exist and create additional combinations.

This being said, there are two main forms of surveillance ordered by the IRB: 1) *terms and conditions* associated with release from detention in the context of the ID; and 2) *stay orders*, which consists in suspending temporarily removal orders under strict conditions in the context of the IAD. In both cases, terms and conditions are actually imposed to a foreign national, but the conditions imposed upon release from detention are fairly lighter compared with those imposed in stay orders. In the first case (release from detention), conditions consist in measures to ensure that the person will appear in court, whether it is the IRB or a higher court, and will stay “clean” (that he or she will report to CBSA, keep the peace etc.). While there may be a security or a protection of society dimensions to the conditions issued, the main reasoning is related to the administration of justice in function of the internal political economy of sanctions in the immigration regime. The ultimate punitive objective is the removal, and other police measures are used where banishment is not yet imposed or cannot be imposed. Immigration detention is a provisory police measure; it is also a preventive act, aiming to continue the social reaction process in other terms through the bureaucracy of the Board. The logic differs from that of imprisonment as a criminal penalty: the idea is rather to keep someone in a holding facility until the bureaucracy decides to do something else with that person, ideally (from their perspective) to remove him or her from the country.

In contrast, conditions issued in stay orders can be very harsh because they are usually considered to be an alternative to deportation and they are imposed to guarantee public

safety. As discussed in the previous act, stay orders are generally granted based on humanitarian and compassionate grounds (H&C) at the IAD (see s. 68 IRPA). According to IRPA, the IAD can take one of the three following decisions: allow the appeal, stay the removal order or dismiss the appeal (s. 66 IRPA). Generally speaking, the IAD will not grant a stay order combined to detention. If the foreign national were that dangerous, he or she would not have been allowed the right to appeal or his or her appeal would have been rejected. In other words, if a stay order is issued, it is because the IRB found that there were H&C and that it decided to give “another chance” (as all legal actors say) to the foreign national to prove that he or she can remain in the country. Legally speaking, the IAD member can simply grant the appeal and release the foreign national without any condition, but the practice seems to be to issue a stay order with conditions first. In fact, I did not observe any appeal hearings which were granted (without conditions) except in the context of a review of a first stay order.

Almost everything can be imposed as a stay order condition, including “counselling with priests”, “learning to read” and other heterodox surveillance measures and welfare sanctions (Garland, 1981, 1985). I, of course, do not have anything against meeting priests or learning to read per se. However, including conditions like these can be really burdensome and problematic when included in a stay of a removal order, especially when there is a failure to comply with one of them. In a stay review hearing, one IAD member once declared: “I’m changing this condition [attendance at any educational institution]. In fact, the [first IAD] member set this condition because you were illiterate. She did it for your own benefit. But you work all day and you barely have time to follow the other conditions [following a therapy, attending Alcoholics Anonymous and/or Narcotics Anonymous meetings, etc.]. So,

I'm dropping it... It is not fair that such a condition, with which you will never be able to comply, ends up playing against you during the final reconsideration. Do you agree, [minister counsel]?" (Translated from French). Technically, these conditions require the consent of the appellant before being imposed, but let us keep in mind that someone, who is appealing from a removal order and trying to bargain a stay under humanitarian and compassionate grounds, is not in a position to challenge the Board conditions.

It is not really surprising that these very creative conditions appear among other security related conditions. As a matter of fact (and of law), IRB members are free to decide whatever they want as long as it is not "obviously irrational" or "patently unreasonable"¹¹⁹. In the case of stay orders conditions, there is even more discretion because there is no control from any higher court or no "landing zone"¹²⁰ for stay orders. The IRB explains this situation as follows:

"Because appellants tend not to seek judicial review of specific terms and conditions imposed as part of a stay order there is no judicial authority on terms and conditions within the immigration field. The purposes served by imposing terms and conditions are many, but the terms must be complied with for the appellant to have the removal order quashed and the appeal allowed. In this sense, they are imposed to ensure the safety of the Canadian public." (IRB, 2002a, p. 10-4)

¹¹⁹ *Thanaratnam v. Canada (2005) F.C.A. (Op. cit. Chapter 4)*

¹²⁰ Criminal law judges use the term "landing zone" (or range, or "*fourchette*" in Quebec) to situate the minimum and maximum length of punishment that may be imposed to an offender in comparison to other similar cases. Thus the landing zone is where a judge can "land" his or her decision without running the risk of being overturned by higher courts (also being in the land zone requires less justifications).

Basically, criminal sentencing principles, such as proportionality, uniformity, equality and predictability, do not apply. Similarly, while the context in which the alleged violation occurred is taken into consideration during removal order appeals based on H&C – for instance, the Board consider the plan of events (*lifeworld*), the discourses of the criminal justice actors (police, courts and corrections) and the legal translation made by CBSA at the bureaucratic and judicial level –, concretely and in terms of punishment, it does not matter what the original violation was, whether it was a criminal offence or not, or even whether the foreigner accessed directly the immigration justice system without appearing in the criminal justice system. Every foreigner who appears at the IRB for a removal order appeal is facing the same punitive fate (banishment). The bottom line is whether the Board will dismiss the appeal and execute the removal order, or whether it will grant the appeal or order a stay of the removal order with conditions.

When issuing a stay of the removal order, the IAD member can also choose the length of the stay, which will vary between one to five years. In doing so, he or she can take into consideration what was submitted by the parties in the case of joint submissions or consensual stays (whether this was done explicitly or off the record) or not. Remember that this is not a penalty (*peine*), but a police measure. The length of the stay does not necessarily mean more punishment from an immigration law point of view. On the contrary, the removal order (which means life banishment in the case of deportations) is stayed and thus, more surveillance time (or detention time) paradoxically means less or more lenient punishment, regardless of whether this may translate into more punishment globally speaking. In other words, a stay order is a “good” outcome for the appellant because, in a way, it represents the best deal a foreign national can practically get in a removal order appeal.

In a typical case where there is no agreement on the length of the stay, the minister counsel asks for a certain number of years or months and the appellant asks for a lesser time period. The member generally plays with these numbers and decides the length of the stay. My observations show that these negotiations play a larger role than the criteria established by the IRB Removal Order Appeals Guidelines (IRB, 2002a, 2009b)¹²¹. Further, the member may simply “copy and paste” the terms and conditions that are generally imposed (a list of six conditions prescribed in the law and/ or any of the nine most common non prescribed conditions)¹²² or choose specific ones that are more suitable to the circumstances of the case

¹²¹ Chapters 9 and 10 of the IRB Removal Order Appeals Guidelines (2002a and 2009a (updated)) establish certain criteria to help determine the length and the conditions of stay orders. However, during my fieldwork and the cases I observed, the negotiations between the parties played a much more important role. For instance, even if the length of the stay order and its conditions are part of the IAD member discretion, I never observed a single case in which the member did not consider somehow the submissions of both parties, playing with the numbers and the conditions that were on the table.

¹²² The term “copy and paste” is used in the courtroom in two different ways. First, and most obviously, it refers to the six conditions prescribed in the law (s. 68(2)(a) of IRPA, listed in IRPA Regulations, s. 251: “(a) to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address; (b) to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department; (c) to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department; (d) to not commit any criminal offences; (e) if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and (f) if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division”. Secondly, it refers to the most often used conditions, which include the six prescribed conditions mentioned above and other conditions that are considered necessary by the IAD in such a way that they become practically mandatory. The main “copy and paste” non prescribed conditions are: 1) and 2) “provide all information, notices and documents required by the conditions of the stay by hand; by regular or registered mail; by courier or priority post to” CBSA and the IAD respectively (as a rule they are listed as conditions 7 and 8 just after the prescribed ones); 3) report to CBSA (the variation is the method used to report (in person, writing, phone etc.) and how often the immigrant should report); 4) “respect all parole conditions and any court orders”; 5) “keep the peace and be of good

(e.g.: prohibiting someone with gambling problems to attend a casino or other related institution). As a result, someone who was imprisoned for six months in the criminal justice system because of a specific criminal offence can be imposed a stay of a removal order of two years in the immigration regime, whereas another person who committed the same offence and served the same time in the criminal justice system can end up being imposed a five-year stay. Moreover, most of the conditions imposed are the same regardless of the offence originally committed or of the offender's background. The legal realist adage according to which justice is "what the judge ate for breakfast" (attributed to Judge Jerome Frank) may be very true in the determination of stay conditions at the IRB¹²³.

The following case is a good example of how these dynamics are totally disconnected from the original crime or sentence. In that case, the appellant counsel (AC) proposed a five-year stay to the minister counsel (MC) to settle joint submissions as follows:

AC: Stay?

MC: How long? [MC was agreeing and was open to negotiations]

AC: Five years.

MC: Five years? [MC was very surprised; AC asked the maximum]

AC: Well, the youngest kid will be 18 [years old] by the end...

behaviour"; 6) "not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity"; 7) "make reasonable efforts to seek and maintain full time employment and immediately report any change in employment to the Agency" (CBSA); 8) "not own or possess offensive weapons or imitations of offensive weapons"; and 9) attend rehabilitation meetings / programs and/or obtain some kind of counselling (it changes from case to case, but usually the main variables/options are anger management, alcoholics and/or narcotics anonymous).

¹²³ Recently, certain scholars have perhaps shown another variation of that old adage by concluding that justice is best served on a full stomach after lunch (Danziger et al. 2011).

Since the key issue on appeal is humanitarian and compassionate grounds, in this case, the best interests of the children was the main aspect to be taken in consideration. Indeed, according to IRPA: “to stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.” (IRPA, s. 68(2)). In this case, the appellant’s youngest child was almost 14 at the time and he would have been 18 by the end of the stay. It was the age of his child that determined the length of the stay (surveillance) and not the offence itself or the offender’s individual characteristics, as it usually occurs in criminal sentencing and parole. Surprisingly, this appellant ended up with a five-year stay with sixteen conditions that were added to his probation conditions – we will return to this case in more details in the next subsection to visualize the proposed concept of *punitive surplus value*. It is interesting to note the dimension of time in punishment here. The length of the proposed punishment sounded odd (even to the minister counsel at first glance) because we usually interpret time in punishment within a modern carceral perspective (Foucault, 1995), that is, liberal criminal law; a social reaction regime in which time became a central aspect of punishment (i.e. measurement), if not the most important (Beccaria, 1769; Bentham, 1876a, 1876b; Ignatieff, 1978; Foucault, 1974, 1995; Melossi & Pavarini, 1981; Rusche & Kirkheimer, 2003). Actually, time does not make a lot of sense in the immigration regime. Again, we are talking about pre-liberal forms of rule and of social reaction, where legal sensibilities are positioned in deference to sovereign power (i.e. legal holes) and in which the logics of punishment (i.e. police measures) are structured much more in function of space (the territory of this country) than of time. It is not about *discipline and punish*, but punish and deterritorialise. It is not necessarily a post-disciplinary carceral dynamic, but rather a pre-disciplinary one. It is not

neoliberal punishment, it is pre-liberal or more precisely non liberal punishment. I prefer the expression “non liberal” rather than “pre-liberal” because contemporary social reaction regimes are part of a broader liberal legal regime either in terms of legal systems, legal tradition and/or rule of law (*Rechtsstaat*). As a matter of fact, and of historical common sense, such administrative law-based regimes (i.e. legal grey holes) cannot be “pre-liberal”. They are indeed “non liberal” (or only partially liberal) and sometimes even normatively, that is, by explicitly not following a liberal legal centralism in the statutes. However, as we will discuss in the following chapter (6), these forms of rule coexist in our Western legal tradition with the dominant liberal (and neoliberal) perspective and other legal perspectives. The law is plural, heterogeneous and fairly fluid, remarkably administrative law.

Finally, by the end of that punitive period of stay orders conditions, there is no guarantee that the appeal will be allowed. The IAD member may very well decide to dismiss the appeal (and the removal order will be executed) or even to extend the stay order, changing or not the previous conditions. Also, as briefly discussed above, there are some situations in which a removal order is issued and the appeal is not granted, but the person is not deportable (e.g.: risk of torture, stateless person, etc.). The result is a sort of juridical limbo with indefinite carceral conditions. The legal and practical reasoning is simple: if we cannot remove that person, we change this police measure by another such as detention or surveillance. This is exactly what happens in most security certificate cases, but these indefinite carceral conditions are not restricted to these exceptional cases¹²⁴. Foreign nationals under a security

¹²⁴ Again, my research does not focus on carceral conditions, but on judicial practices. This being said, I have no data (and it seems that there is no available secondary data) on what really happens during stays of removal orders and especially, after them. A more specific research about rehabilitation (or not) during stays of removal

certificate are considered inadmissible, but usually they cannot be deported (mostly due to risk of torture). As a consequence, they are kept in detention or under strict surveillance conditions forever or until they become deportable¹²⁵. Unfortunately, however, these indefinite carceral conditions are not restricted to these very exceptional cases. To paraphrase Mariana Valverde (2003, op. cit.), my role and the objectives of this thesis are not to establish what a certain limited set of immigration law knowledges and practices are, but how they work and what they *do*. And indeed, these police measures do exclude as much as criminal justice, or perhaps even more.

orders and extension of stays (and their justifications) and/or the surveillance practices of CBSA regarding “stays” should be done to better understand this issue.

¹²⁵ For example: Manickavasagam Suresh is a foreign national from Sri Lanka who was detained under a security certificate and is still under strict surveillance conditions. Suresh arrived in Canada in 1990 and had his refugee claim accepted in 1991. In September 1995, a security certificate was issued declaring him inadmissible for terrorism (he was an alleged supporter and fundraiser for the Liberation Tigers of Tamil Eelam). One month later, he was arrested and detained. In September 1997, a deportation order was issued against him, but in January 1998, the Ontario Superior Court withheld his removal (*Suresh v. R.* (1998) 38 OR (3d) 267). In March 1998, he was released from detention with very strict conditions (imposing that he report in person once a week, abide by geographic restrictions, ask court permission before changing his address, etc.). In 2001, the Supreme Court of Canada heard his case and in January 2002, the Court declared him as a non-deportable person (for risk of torture) (*Suresh v. Canada*, 2002 SCC 1). He tried to change his conditions after the SCC decision, but he was not very successful. Basically, the only condition that he had changed was his home address (he moved twice). As a result, more than nine years after his release, he is still reporting in person every week to CBSA in Toronto and Public Safety Canada is still trying by all legal means to remove him from Canada. His situation only changed recently when the federal government decided not to renew his security certificate when the new security certificate regime (including special advocates and other guarantees required by the Supreme Court in *Charkaoui v. Canada*, 2007 SCC 9) came into force in 2008. Of course, Suresh is an exceptional case, but it clearly shows how far the punitive practices of the immigration regime can go and the timeless dimension of immigration punishment. If someone is considered a danger to the public and cannot be removed, he or she will be neutralized in any way, either via detention or strict conditions.

III) On the Punitive Surplus Value:

Punishment Along, Beyond and in Addition to Criminal Law

Immigration sanctions can be imposed along, beyond and in addition to criminal law punishment. In this subsection, I introduce the notion of *punitive surplus value*, which derives from Marx's notion of surplus value developed in the context of the circulation of capital (Marx, 1973, 2008 [1887]), to discuss the combined effects and interactions between immigration sanctions and other forms of legal punishment, including criminal punishment. I also argue that lack of legal guarantees in the immigration regime, and in administrative regimes more broadly, intensify substantially such processes of circulation of punishment in the penal complex, and even anticipate them in relation to criminal social reaction.

Punitive surplus value consists in an excess or surplus of punishment created in a context in which such punishment was not necessarily available through a traditional social reaction process, typically but not exclusively, the criminal justice system. It is the result of the interaction between two or more normative systems, where punishment (or even the possibility of punishment) in a first normative system (say criminal law) is sufficient to trigger and justify the imposition of other forms of legal punishment in other normative systems (say immigration law). More specifically, in immigration law, punitive surplus value is produced in the context of events that are first managed by the criminal justice system and then complementarily by the immigration regime, or in the context of events which would typically be managed by criminal justice institutions (e.g. gang member), but end up being managed exclusively by the immigration justice system. This excess of punishment, or the

creation of a surplus of punishment which would not have been possible in the first normative system is the result of a combination of the preventive logics of administrative punishment (i.e. police measures which are imposed to guarantee public order) and an administrative style of penal translation (see *Act I*, mainly Chapter 4), which only requires low standards of proof and is subject to the highest deference on the part of higher courts.

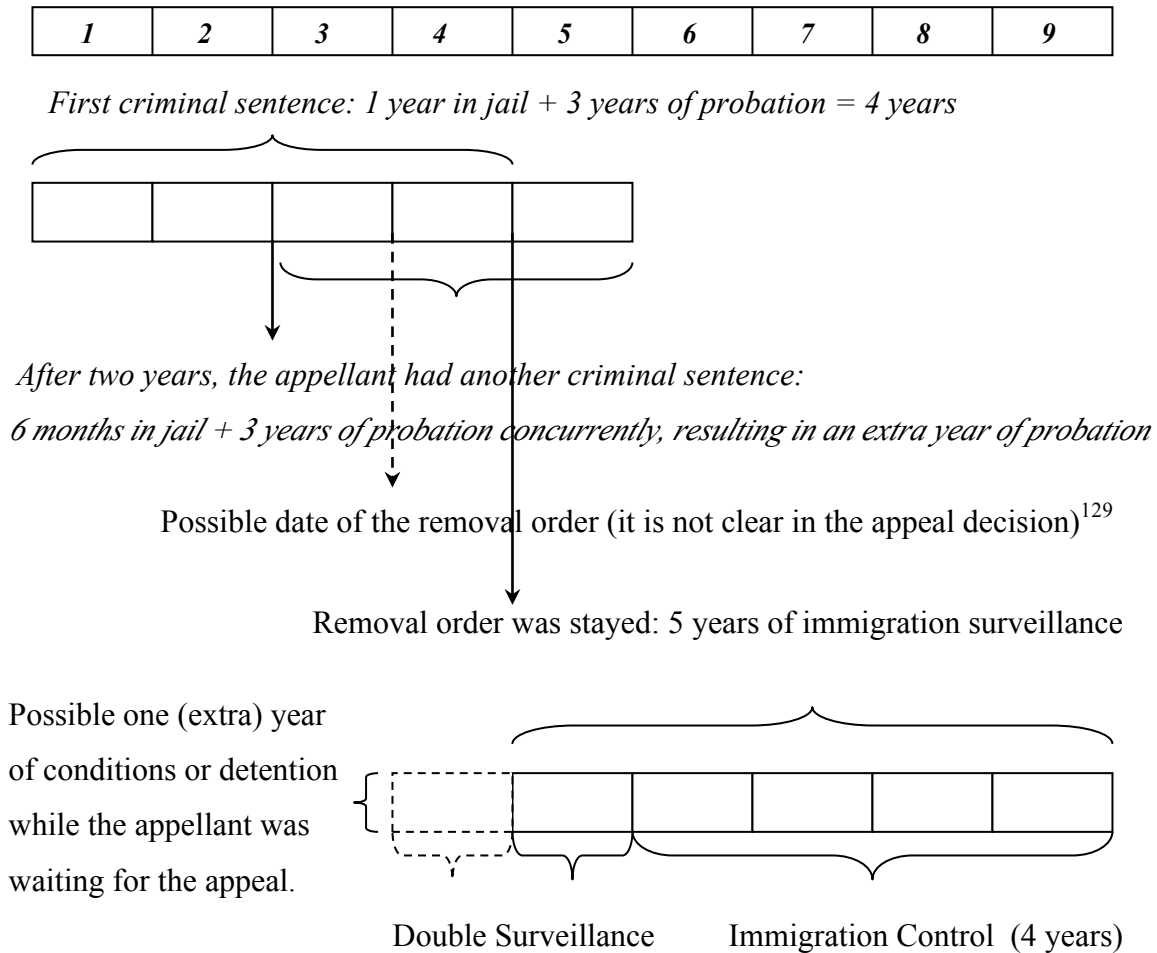
Let me illustrate the legal effects of punishment along, beyond and in addition to criminal law by going back to the case of the removal order appeal discussed at the end of the previous subsection. In that case, the appellant was not only imposed a five year stay of the execution of his removal order (based on the age of his youngest child), but also sixteen immigration-related conditions. These conditions were added on top of his criminal probation conditions issued in the context of two criminal offences. In fact, the appellant was initially convicted to one year in jail plus three years of probation for a first offence, and then to another year of probation as a result of his second offence. The new (immigration) conditions were supplementary and concomitant¹²⁶ for at least one year¹²⁷ during which the appellant was under the surveillance of both Corrections and CBSA, and then the foreign national became subjected to immigration control only. The total time of punishment was also extended, passing from five years (from his combined criminal sentences) to around

¹²⁶ I use the term “concomitant” to differentiate it from “concurrent” which is generally used in criminal sentences to indicate that sentences are being served at the same time. Here the situation is different because even if they are simultaneous, they are not being served together. As we are dealing with different normative systems and institutions, the penalties are being served separately, but at the same time.

¹²⁷ It is not clear when the first immigration penalties (detention, removal and/or other terms and conditions) started in this case. Considering the appeal timelines and delays, we can assume that there is at least one extra year of conditions to be added – the appeal should be filed within 30 days after a removal order is issued and the average processing time at the IAD is around 10 months, but these stats include ADRs conferences which are faster.

nine years, not considering the exponential effect of concomitant punishment. The overall quantum of punishment imposed to that individual can be better visualized in the following figure (7)¹²⁸:

FIGURE 7. Timeline of Legal Punishment (in years):



¹²⁸ Dates were omitted and details slightly altered in order to preserve the anonymity of this appellant, even if this case is public.

¹²⁹ It seems that the removal order was issued three years after the first criminal sentence when the appellant got out of jail for the second time, this was not very clear in the interactions during the appeal and even less in the IAD decision. The ID admissibility decision marks the appellant's entrance into the immigration justice system.

The situation described above exemplifies very well what I call *punitive surplus value*. The initial conflict resolution process, here the criminal justice system, where there is a certain amount of punishment (even if it is just a possibility), triggers different normative systems and/or social control institutions, and their combined punitive action through this amplified social reaction process produces more punishment than they would have initially. This example shows clearly the appearance of five to six years of surplus of punishment, not considering the exponential effect of one or two years of concomitant punishment (double surveillance). Building on Marx's theory of capital circulation (Marx, 1973, 2008 [1887]), we can create a theory of circulation and accumulation of punishment, which works as follows: $P \rightarrow C-L \rightarrow P'$, that is, initial punishment creates new possibilities of social reaction through counter-law¹³⁰ which in turn produces more punishment, or expanded punishment which was not available in the first social reaction context. This theory does in fact make a lot of sense to perceive and interpret the fluxes in an "extended" criminology

¹³⁰ I use the idea of counter-law in Ericson's sense (2007) as discussed in chapter 2 of this dissertation (pp. 91-93). Ericson takes the Foucauldian idea of counter-law (*contre-droit*: Foucault, 1995) and develops it in two complementary ways: *counter-law I* that "takes the form of laws against law" (which he associated to Agamben's *state of exception* (Agamben, 2005)); and *counter-law II* that "takes the form of surveillance assemblages" (2007, p. 24 ss.). He suggests that we are experiencing a "new wave of criminalization [...] enacted through counter-law" (p. 207). As I argued earlier, I reject this idea of criminalization and prefer to use the broader category of penalization to describe punitive social reaction, but to be fair, Ericson is quite explicit at pointing that he does not take criminalization as a social reaction process restricted to criminal law. Actually he argues that "counter-law I entails the creative development of laws that counter the traditional principles, standards, and procedures of criminal law" (p. 207), a process that seems to be very similar to the creation and reproduction of legal holes, pointing to the use of civil and administrative law and new forms of criminal law aiming to reduce due process guarantees. This is a position very similar from that of Duff (2007, 2010a, 2010b), who argues that the use of regulatory and administrative regimes seek to inflict punishment by avoiding criminal trials. Interestingly and to complete his development of the concept, Ericson argues that "counter-law II seeks to make legal process unnecessary"; again similarly to legal holes, it is a dynamic of fairly unconstrained sovereign power, but that is now framed much more in terms of *policing*.

scheme described in my theoretical chapter (“The Penal as a mobile”, pp. 76 *et ss.*). I consider the resulting P’ (i.e. expanded punishment in response to a given event) as surplus value¹³¹. In other words, there can be an initial P, but there is no requirement of an initial quantum of P for the production of new (expanded) punishment via counter-law, especially when the justice regime operates preventively such as is the case in immigration. The punitive surplus value begins where (and when) there are no concrete possibilities of criminal prosecution and criminal punishment.

The formula $P \rightarrow C-L \rightarrow P'$ can be considered as a short and general hypothetical description of the political economy of punishment in the penal complex (represented as a mobile-shaped dynamic structured). Institutional forms of punishment may be produced (primarily) through traditional social reaction (i.e. criminalization) and/or through non-traditional channels, and a surplus of punishment is (re) produced through counter law I and II on an amplified scale, that is, along, beyond and in addition to criminal law. Although my research was focused on judicial responses (i.e. counter-law I), I generally agree with Ericson that surveillance assemblages (i.e. counter-law II) also play a determinant role in the production of punitive surplus value in avoiding legal processes. I would add that, by surveillance assemblages, we are also talking about pre-trial punishment, referring to legal processes of any kind and not only to criminal processes. It is basically the same thing as social reaction through legal holes, but from a policing perspective. In this sense, the social reaction to recent political demonstrations, such as the G20 in Toronto and the student’s strike in Quebec where protesters were massively arrested and ticketed mostly through

¹³¹ This is different from Marx who considered surplus value as the result of the difference between C and C’: see Marx, 2008.

criminal law powers, but also increasingly through regulatory criminal law and municipal law, is a good example not only of the dynamics of legal holes, but also of counter-law and punitive surplus value. Actually most of the punishment inflicted to protesters in both situations was enacted as a result of counter-law II, that is, conditions imposed by the police in the context of detention release.¹³² I will come back to this example in my conclusion (chapter 7) when discussing governance through legal holes and penal policies at large.

Drawing again from the Marxian concept of surplus value, we can consider that there are also two facets of punitive surplus value: *absolute* (increasing the amount of punitive time) and *relative* (reducing the costs and increasing the intensity). According to Marx (and with the necessary adaptations): “the production of absolute surplus-value turns exclusively upon the length of the ~~working-day~~ [punitive time]; the production of relative surplus-value, revolutionises out and out the technical processes of ~~labour~~ [punishment], and the composition of society” (Marx, 2008 [1887]: 355). Moreover, as Marx observed, the relative surplus value is an indicator of the stage of development of the ~~productive~~ punitive forces (Marx, 1973, 2008 [1887]). A good example of the *relative* dimension is the use of less expensive or more expedient normative systems and their punitive facilities, the use of concomitant conditions imposed by legal actors working in different normative systems, and the extension of terms and conditions – either through conditions that would not be

¹³² See for instance the following reports on the G-20 in Toronto: Ombudsman of Ontario (2010), CCLA & NUPGE (2011), Toronto Police (2011) and OIPRD (2012); and the report of the *Ligue des droits et libertés et al.* (2013) on the social reaction to the student strike in Quebec. The recent newspaper article “Printemps érable – Victimes de pression judiciaire” by Karl Rettino-Parazelli from *Le Devoir* is also a good example to perceive how counter-law II “seeks to make legal processes unnecessary” (Ericson, *op. cit.*) and was fairly determinant in the production of punitive surplus value – retrieved from www.ledevoir.com/societe/justice/391413/victimes-de-pression-judiciaire, last accessed on 2013-11-01.

usually acceptable in criminal law (e.g. indefinite detention conditions) or in relation to jurisdictional issues (e.g. extending a prohibition to attend any gambling institution or casino in a particular province to the federal level).

The timeline used in my previous example is also helpful to visualise these two dimensions. As we can see, the foreign national had two different criminal sentences that were combined within the same normative system (criminal law) totalizing five years of imprisonment and probation altogether. After serving this criminal time, this person still has four more years of immigration supervision to do, during which the person may be detained, the stay conditions can be reviewed and the appeal can be allowed or refused. And again there is no guarantee that punishment will end after the period of the stay order, that is, the stay order may be renewed by the IAD or the IAD may not allow the appeal and in that case, the pending removal order would be likely executed.

The concept of punitive surplus value should not be understood as a static phenomenon, but as a process that can start, continue and end at different points in different normative systems at the same time. Actually, it depends where the social reaction was initiated in the penal complex (i.e. Penal as a mobile). This concept is a quite more robust concept than the notion of double-punishment (*double peine*: Sayad, 1998, 1999; Wacquant, 1999; Palidda, 1999; Mathieu, 2001, 2006), which refers to a person who is criminalized and then deported. It is not that this concept is useless, but it needs to be revised as an analytical operator when you are working at a more grounded level or doing thick description. Speaking of double punishment is a good first step, but it does not stand up to empirical data. First, it seems too stiff and superficial, being usually only associated to deportation. Second, it poses criminal law as a reference and simply adds immigration to it. This is not how immigration law

works. The force of immigration law is exactly the fact that it is not bounded by the criminal procedures, logics and practices. The immigration regime is distinct. It is not about crime or penalties (*peines*). It is a much more dynamic, effective and accessible normative system (at least for those representing the executive branch of the State) and it plays an important social reaction role, either by bureaucratically managing populations or through punitive legal responses.

The punitive surplus value is not restricted to immigration justice. It is a phenomenon that may be observed in different administrative law institutions, such as military tribunals, mental health courts, municipal courts, parole boards, etc.; in civil courts (e.g.: through the enforcement of punitive damages); and in mixed normative systems, such as regulatory criminal law. Similarly to the concept of the Penal as a mobile proposed in chapter 2, punitive surplus value is a concept that is open enough to incorporate every kind of legal punishment (criminal sentences, police measures, administrative sanctions, punitive damages and other, if any) and to navigate through different normative systems. It analyzes in terms of length and intensity how penal policies and social reaction manifest themselves in different normative systems and the exclusionary effects of such interventions in any of the normative and institutional components of the penal complex.

When I first presented the main ideas of this chapter in conferences almost four years ago, I was framing the punitive surplus value as a new form of penal policy. It was a great argument for a Ph.D. candidate enrolled in a program that has officially “a particular focus on the creation and reform of criminal justice policies in Canada”. Today, however, I realize that the idea of criminal or penal policy does not make a lot of sense in itself. When analyzing the emergency of penal policy in England during the nineteenth century and the

treatment given to what was then considered as “the reservoir of crime” (dangerous classes), Leon Radzinowicz concluded that “the history of this subject reminds us that, in the field of criminal justice, the final word belongs, more often than not, to social rather than penal policy” (Radzinowicz & Hood, 1986, p. 375). Also, as a young David Garland argued: “penalty is constructed around an eclectic series of disparate and contradictory forms and logics which may sometimes be strategically related, but are never singular or uniform” (Garland, 1985, p. 262).

Actually, this is not a dissertation on the creation or on the reform of criminal justice policies. More interestingly, it is a description of the effects of social policies in an immigration justice system, and how administrative forms of legal punishment play an increasing role in the penal system. The punitive surplus value is also one example of a broader critique of criminocentric perspectives that are still dominant in our field of studies. Instead of dogmatically restricting my gaze to criminal policies, I moved beyond by incorporating other forms of State punitive intervention. Of course, it does not mean that it is not important to study, analyze, propose or reform criminal policies, but my objective here is different. In part, it was a deliberated move aiming to question the notion of criminal policy itself and its determinant role in the penal complex. As Radzinowicz suggested, “the final word belongs to social rather than penal policy”. I totally agree with him and as critical criminologists we should at least be aware of that. It is never too late to review our own biases and limitations, bringing politics back to the discussion (see chapter 7).

Finally, I was not and I am still not really interested in thinking criminal justice policies, immigration policies, social policies or any kind of public policy that may be related to social control in an isolated way. This is about what a given policy is and not necessarily

what it does and how it works. The broader conception of social reaction put forward in the proposed model of the Penal complex as a mobile and the idea of punitive surplus value allows me to think that any policy involving any element of the Penal mobile may produce effects on other elements of the mobile. For instance, a change in citizenship policy (e.g. workforce adjustment (i.e. jobs cut) in CIC¹³³ and / or additional scrutiny in citizenship applications¹³⁴) may produce effects in the criminal justice system. Such policies impact more directly the processing time of citizenship applications and their outcomes. Less permanent residents becoming citizens or taking longer to become citizens means that there are necessarily more people under the jurisdiction of the immigration regime who may be punished somehow. This punishment may produce more punishment (punitive surplus value), and we can reasonably presume that some of those foreign nationals will be subjected to criminal justice forms of social reaction either in terms of policing, courts or corrections.

In concluding as I do, I am not necessarily including the labelling effects of such social reaction processes, that is, the imputation of deviant roles and the realization of a self-fulfilling prophecy. If we were to include this as well as Foucauldian (e.g. the Carceral shapes the offender) and other contributions, things would be even more complex. The same argument can be made for housing, mental health, labour and other social policies in general.

¹³³ More than 400 full time equivalent positions were cut in CIC since the beginning of the third mandate of Stephen Harper (June, 2011) and the number of cuts may be much higher (up to 600 or more). Retrieved from: Laura Payton, Almost 11 000 federal jobs cut so far Tony Clement says, CBS News online, November 16, 2012 : www.cbc.ca/news/politics/almost-11-000-federal-jobs-cut-so-far-tony-clement-says-1.1288838 and <http://psacunion.ca/workforce-adjustment-notice-issued-september-16-2013>, last accessed on 2013-08-10.

¹³⁴ See for instance “Immigration backlog: Anti-fraud measures add years to citizenship process”, retrieved from: www.thestar.com/news/canada/2013/01/24/immigration_backlog_antifraud_measures_add_years_to_citizenship_process.html, last accessed on 2013-08-10.

In short, public polices are directly and/ or indirectly interconnected and may have unforeseen effects, including in terms of punishment or even decarceration (Webster & Doob, 2014), in any specific social reaction regime and in the (re) production of deviant behaviours, including criminalizable ones.

To conclude this section, I would like to make some remarks on the case of the brothers Fredy and Dany Villanueva, a tragic story widely reported throughout the Québec media. In the evening of August 9, 2008, two police officers showed up in the parking lot of the Henri-Bourassa arena adjacent to the park in the north of Montreal (Montreal-Nord district), where they questioned a group of youth who gathered there, some of them playing dice. Thereafter, there was an altercation between the police and the youth, and one of the police officers fired four times, killing young Fredy Villanueva, and injuring two other young people. The coroner's report was released on December 19, 2013 blaming the police officer's judgment and intervention, as well as the Montreal police for their mishandling of the case (Perreault, 2013), but no charge have been laid so far. However, my interest here rather lays in the case of his brother Dany and the intersections between crime and migration. Dany had a past criminal record. At the time of the events, he was under bail conditions and a probation order to keep the peace (which includes obeying to municipal by-laws) following a criminal conviction in 2006 and charges for two distinct events that had occurred in June 2008 (robbery, using an imitation firearm, breach of probation, and shoplifting, breaches of ordinance and of a commitment made a week earlier)¹³⁵. On that fateful day, Villanueva was found in the presence of individuals who were playing dice (according to the coroner's report, he had stopped playing dice himself a few minutes before the officers arrived at the parking lot) and

¹³⁵ *R. v. Villanueva Madrid*, 2011 QCCM 23266; *Villanueva Madrid v. R.*, 2011 QCCS 4851.

as such, he could have been found in violation of his bail conditions or probation order or he could have received a ticket for a minor municipal offense (participating in gambling)¹³⁶, breaching his previous ordinance, probation order and commitments. It is not clear when he started dealing with the immigration system, but just days before his brother was killed on August 9, 2008, his lawyer sent a letter to CBSA in response to their declaration of inadmissibility for serious criminality. In April 2010, the ID issued a removal order against him and later in 2011 his appeal at the IAD was dismissed and the Federal Court refused to hear his request for judicial review. Dany Villanueva was once criminalized, but in 2008 he was immersed in a myriad of normative systems, most of them administratively based (pre-trial ordinances (bail), probation, regulatory offences and immigration).

The concept of criminalization is not adequate to explain the penalization of migrants, and also cases such as Dany Villanueva's. Criminocentric approaches do not fully account for the nuances and the complexity of the punitive social reactions, both in terms of policing or judicialization, which we are increasingly facing in the twenty-first century. Decriminalizing criminology is not a new or a radical proposal, but almost the natural development of the social reaction paradigm, as I previously argued in chapter 2. Clifford Shearing (1989) and others already suggested this regarding policing studies more than twenty years ago. We can reasonably argue that policing has changed a lot since then and today, policing is not limited to State institutions or to the idea of reaction (e.g.: prevention, risk management, etc.). However, justice studies in criminology remain fairly criminocentric, even when approaching topics that barely touch upon criminal justice or that are not administrated by it (immigration,

¹³⁶ *Règlement sur les parcs*, R.R.V.M., c. P-3, art. 6 : «Il est interdit à quiconque visite ou fréquente un parc: [...] 10° de conduire des jeux de hasard ou d'y participer».

elite deviance, homelessness, etc.). The notions of crime (or criminalization) and penalty (*peine*) are not sufficient to describe this phenomenon in terms of social reaction. The most important contribution of my description of the IRB in the last three chapters consists in proposing categories that refine the debate (Geertz, 1973) around social reaction and punitiveness. Obviously this is not restricted to the immigration field, but it is also applicable to criminal justice, regulatory, civil and administrative regimes and to criminology and penology more broadly. The ultimate goal of any comparative approach is indeed to “widening our own” perspectives (Malinowski, 1922).

IV) Lightning Legal Grey Holes

The important limitations or encroachments to the rule of law at stake here are not the results of a process of criminalisation of immigration. Instead, it is precisely the non-criminalisation process through the punitive use of administrative law that partially exempts the federal government from the requirements of the rule of law (*legal grey hole*). The immigration justice system not only accepts to deal with events that would not lead to charges in the criminal justice system, but it also rules against the accused whenever there is a doubt. Moreover, the police measures inflicted by the immigration justice system are at least as exclusive as the criminal law forms of punishment and they are often imposed in addition to criminal sentences (i.e. punitive surplus value). The combination of such social reaction

processes result in very harsh exclusive forms of social control due to the complementary and concomitant character of the punishment imposed, that is, the person spends more time under punishment and he or she is more punished at the same time. Thus, the immigration justice system presents a certain degree of exceptionality that is flagrant, not only regarding exceptional cases such as security certificates, but also on an everyday basis, as discussed throughout *Act I*.

The most common option to “lighten” legal grey holes without major law reform is through applications for judicial review. However, paradoxically, the higher courts ended up authorizing and legitimizing the “exceptionality” of such a system, darkening it even more. As the Federal Court of Appeal suggested in *Thanaratnam v. Canada (2005)*, their purpose is not to ensure fair trials, but to guarantee that what happens at the Immigration and Refugee Board is not “obviously irrational” or “patently unreasonable”.

In this chapter, I want to suggest that many of these immigration forms of punishment, if not all of them, only exist in fact because there are fewer legal guarantees in this normative system and because of the preventive character of punitive practices in the immigration regime (i.e. police measures). It is in this sense that I consider the immigration justice system as a legal gray hole, possibly the largest in Canada, as it is the main administrative law-based regime in the country. This is not because of its inherent punitiveness, “what it is”, but because of how conflicts are judicially administrated at the Immigration and Refugee Board, a tribunal that is highly discretionary, operating at the limit of suspicion and based on borderline reasonability, and which is too deferential to the executive most of the time.

Luckily, the IRB is an independent tribunal; otherwise, I could not even imagine how

immigration and refugee conflicts would be administrated in Canada; maybe as *realpolitik* in the most pejorative sense of the term. I do say luckily as well because the fact of being formally an independent tribunal makes the IRB a much more suitable place to settle disputes fairly, either through trials or alternative forms of dispute resolution. Also, to be honest, during my fieldwork I met different legal actors who were generally interested in fairness, even if the way the tribunal is structured sometimes makes their job more difficult. More importantly, as argued in *Act I*, these beliefs and legal sensibilities shared by legal actors, especially IRB members, produce concrete effects in the field and this surely cannot be neglected.

Nevertheless, the existence of this legal grey hole means that it is possible to preventively punish a significant part of the Canadian population while avoiding criminal trials or other criminal justice strategies. Addressing this issue is not as simple as it appears. In order to offer immigrants a fair trial or to provide more legal guarantees, we cannot simply abolish the immigration justice system, increase the standards of proof, or even transfer immigration conflicts to the criminal justice system. Actually, criminal law-based regimes are not necessarily a guarantee of fairness as many critical criminologists and critical legal scholars have already convincingly argued¹³⁷. Moreover, trials (whether they are fair or not) are simply not the norm in the criminal justice system¹³⁸. The idea of imposing

¹³⁷ Among other criticisms raised against the criminal justice system, let us mention its formalism, its excess of professionals and the issue of the appropriation of conflicts (e.g.: Christie, 1977), its punitive solutions as a major form of settling disputes (if not the only form) (e.g.: Hulsman & De Celis, 1982), its costs, how it individualizes (social) problems (and their causes), and its lack of effectiveness compared to the gains that might be achieved through other forms of intervention (e.g.: crime prevention, social polices, etc.).

¹³⁸ Around 90% of all criminal cases in Canada are settled through non-trial procedures (Kong, 2005, p. 46),

criminal law criteria of evidence at the IRB is very tempting, but the effects, would probably be devastating for refugee claimants and appellants in refugee determination processes or sponsorship appeals. While lower standards of proof and the fact that the decision maker is not bounded by the rules of evidence are part of the problem, they are also sometimes part of the solution (see chapter 6). Indeed, the lack of formality, the accessibility, speed, economy and fairness of administrative tribunals is in some cases desirable and should not be neglected.

The European Court of Human Rights has offered a possible solution. In interpreting Article 6 of the *European Convention of Human Rights* (which provides the right to a fair trial), the Court developed the idea of the “‘autonomy’ of the concept of ‘criminal’” in order to ensure certain legal guarantees in criminal-like contexts (*Engel and Others v. Netherlands* [1976], §§80-83)¹³⁹. In that case, the European Court of Human Rights (ECHR) established three criteria to determine what is “criminal”¹⁴⁰ under Art. 6 of the Convention: a) the classification of the offence in domestic law; b) the nature of the offence; and c) the severity of the penalty that might be imposed. The first principle is just a starting point, which means that it does not really matter if the offence is not actually labelled as criminal in domestic

mainly plea-bargaining. By definition, plea-bargaining presents serious drawbacks in terms of legal guarantees, pushing alleged offenders to withdraw some of their constitutional rights (Langbein, 1979; Feeley, 1997).

¹³⁹ More details at: ECHR, 2009, pp. 63-70; and ECHR, 2011, pp. 52-57.

¹⁴⁰ Civil cases are protected by art. 6 §1 of the Convention, which provides for civil rights and obligations including a fair hearing, an independent tribunal, etc. In addition to this basic level of civil rights, cases defined as criminal are also covered by §2 (right to the presumption of innocence) and § 3 (a set of five other minimum legal guarantees which are basically those granted to alleged criminal offenders, including for instance the right to be informed of the offence, the right to a full defence including the possibility to cross-examine witnesses, the right to legal assistance and the right to the assistance of an interpreter).

law. The second and the third criteria are considered as alternatives and they are not necessarily cumulative. The Court held that: “The very nature of the offence is a factor of great import”, but it would be illusory if the Court “did not also take into consideration the degree of severity of the penalty” (§82). In other words, “the right to a fair trial favours a ‘substantive’, rather than a ‘formal’, conception of the ‘charge’ referred to by Article 6” (*Adolf v. Austria* [1982], §30). The sanction that might be inflicted really matters, even if originally the case was not labelled as criminal. The *Engel and Others* was a military case, but other areas of administrative law or mixed regimes such as regulatory offences¹⁴¹ can be considered as “criminal” under Art. 6. Therefore, the decision to prosecute a person under an administrative-based normative system in order to avoid a criminal trial might not work in Europe the way it works in North America. Institutional actors who play the role of a public prosecutor cannot shop among different normative systems simply because it would be easier, cheaper and faster to have a legal response in civil, administrative and/ or mixed regimes than it would be in criminal law¹⁴².

¹⁴¹ See for instance *Adolf v. Austria* [1982], *Öztürk v. Germany* [1984] and *Lauko v. Slovakia* [2001], among others cases. Anthony Duff (2007) points that sometimes this is a prosecutorial decision made in order to avoid trials.

¹⁴² It is very interesting to note what happened in the case of the juridical social reaction to the Norbourg scandal, as brilliantly discussed by Boisvert (2008) and Boisvert *et al.* (2009). The Norbourg case was an accounting scandal of up to C\$ 155 million that took place in 2005, involving the Montreal based trust-fund company Norbourg Financial Group, founded by Vincent Lacroix. In short, Mr. Lacroix was first prosecuted under the *Quebec Securities Act*, a regulatory regime (*Autorité des marchés financiers c. Lacroix*, 2008 QCCQ 234). He was found guilty of 51 counts for violations of the Act and was sentenced to imprisonment of 15 years less one day. Mr. Lacroix was imposed such a high penalty because Mr. Justice Leblond interpreted that the sanctions under the Act (i.e. a maximum of 5 years of imprisonment less a day) should be served consecutively, and not concurrently, which ended up resulting in a harsher sanction than he would have received if he had

The ECHR understanding of “criminal” is promising. However, at the time being and perhaps not surprisingly, Art. 6 of the Convention does not cover immigration and asylum proceedings. First, immigration cases are not considered “criminal” (*Maaouia v. France* [2000] §39), but civil cases. Moreover, the proceedings related to the expulsion of foreign nationals are not protected by Art. 6 §1 of the Convention because the understanding of the Court is that its procedural safeguards fall under Art. 1 of the *Protocol no. 07* (*Maaouia v. France* [2000] §§37-38), which coincidentally [*sic*] offers less legal guarantees than Art. 6 §1 of the Convention¹⁴³. As Christos Rozakis, a former judge and former vice-president of the ECHR, reminds us: “the only categories of cases, bearing a public law element, which resist the control of the Court – because the Court so decides – are mainly immigration and asylum proceedings as well as tax proceedings” (Rozakis, 2004, p. 97). This being said, I still consider that the broader concept of “criminal” could be a creative solution to achieve fairer trials and proceedings at the IRB. Despite being considered as a legal hole in practice, the IRB is, at least in the books, an independent administrative tribunal committed to “resolving

been accused of fraud under the *Criminal Code*. Actually, Mr. Justice Leblond acted as if he were in a criminal law regime for the matters of sentencing after the Crown had been favoured by the lower procedural guarantees of the regulatory regime. Justice Leblond held that: “The fact that the defendant was convicted of regulatory offences rather than criminal offences alters nothing if there is a high degree of moral blameworthiness, as in the present case. Therefore, there is no existing rule to prevent imposing a harsh prison sentence within the limits of the law and the case law” (*op. cit.*, § 55). The Court of Appeal of Quebec did not agree with the trial judge’s position. The appellate court reduced the imposed sanction to a maximum of 5 years less a day (see: *Autorité des Marchés financiers c. Lacroix*, 2009 QCCA 1559). Mr. Lacroix ended up being prosecuted in criminal law as well, where he “pleaded guilty to 200 counts of conspiracy to commit fraud, fraud, use of the proceeds of crime, conspiracy to make false documents, and the making of false documents” (*R. c. Lacroix*, 2009 QCCS 4519, § 1) and was imposed a sentence of incarceration of thirteen years.

¹⁴³ For instance, foreign nationals facing expulsion have the right to have their cases reviewed, but there are no explicit requirement of “fair and public hearing” or “independent and impartial tribunal” (Art. 6 §1).

immigration and refugee cases efficiently, fairly and in accordance with the law”¹⁴⁴.

The legal basis for shedding light on legal grey holes can be found in *Engel and Others v. Netherlands* [1976] as well as in the doctrine of the “‘autonomy’ of the concept of ‘criminal’” that emerged in European Law in its aftermath. It is “only” a matter of transposing such reasoning in Canadian law by somehow recognizing the severity of the punishment present in administrative law as an element to determine what level of legal and procedural guarantees should be taken into consideration. In two legal decisions released at the end of the 1980s, the Supreme Court of Canada considered the meaning of “penal consequences” to determine whether someone who had been found in violation of disciplinary provisions under administrative law could in turn be charged of a criminal offence in criminal law (*R. v. Wigglesworth* [1987] 2 SCR 541; *R. v. Shubley* [1990] 1 SCR 3). In both cases, the Court found that there was no violation of the protection against double jeopardy because the proceedings in administrative law did not lead to ‘penal consequences’, arguably because the violations were not considered “public offences.” More specifically, in *R. v. Wigglesworth* [1987], the Supreme Court held that:

The rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. The section is intended to provide procedural safeguards in proceedings, which may attract penal consequences even if not criminal in the strict sense. (*op. cit.*)

Although the defendants in these cases were not successful, I think that the Court has left it

¹⁴⁴ www.irb.gc.ca/eng/brdcom/abau/Pages/Index.aspx, last accessed 2010-11-09.

open to argue along the same lines as in *Engel and Others v. Netherlands* [1976], that there might be cases where there are “penal consequences even if not criminal in the strict sense” and that they should consider them as a relevant factor to provide criminal like procedural safeguards.¹⁴⁵ This is even more so considering that these decisions were made in the early years of the Canadian Charter and only in the specific context of double jeopardy. This strategy, if successful, would increase the standards of proof of certain cases only in the immigration regime, not affecting the “civil” cases, refugee cases or the overall accessibility of the IRB. In other words, this would provide a case-by-case solution to the question of whether criminal procedural guarantees should apply in order to be as fair as possible regardless of the status of the claimant or the accused when “penal consequences” are an issue. The specialized authority would remain the same; the IRB would keep its jurisdiction over immigration and refugee conflicts, but the cases in which severe sanctions could be imposed would have to follow stricter proceedings. It is not necessarily a matter of depenalizing administrative law (which is actually not realistic), but to provide the available guarantees traditionally restricted to criminal law for those who are being more penalized than criminals through administrative-based normative systems.

¹⁴⁵ During my fieldwork, I observed some IRB members who refused to consider police charges as criminal, despite the rules of evidence, arguing that in fact there had been no criminal convictions. However, these situations were exceptions that confirmed the rule. The members did not ground their decision in this fair trial argument, but their main point and the sensibilities of justice and fairness they displayed were basically the same.

CHAPTER VI:

BACK DOOR FOR LEGAL INNOVATION: ESTABLISHING MARITAL STATUS IN SPONSORSHIPS APPEALS

The academic and common sense imaginaries of immigration or asylum tribunals (i.e. in UK) are those of a tough and exclusionary place: a justice system restricted to foreign nationals operating with lower levels of legal guarantees and greater possibilities of punishment (detention, deportation and strict surveillance) when compared to other institutionalized regimes of administration of conflicts, such as criminal justice and regulatory criminal law. These characteristics are not far from the reality of immigration regimes in most contemporary western democracies. This vision of immigration control is certainly the most prominent side of immigration and refugee justice systems, or at least the most visible aspect for the general public and socio-legal and criminological literature. The Canadian example is not that different. As I have argued in this thesis so far, the Immigration and Refugee Board of Canada (IRB) can be perceived as a legal grey hole, operating with legal logics that do not necessarily correspond to liberal forms of rule or to what is expected in the everyday life of a tribunal working under the rule of law.

However, reducing the administration of immigration conflicts at the IRB to its punitive and exclusionary aspects or to the “guess game” of refugee determination is simply naïve

and offers an incomplete (and ultimately wrong) description of its regulatory and conflict resolution practices, in particular in its treatment of transcultural cases. The IRB is a very particular kind of tribunal as its clients come from a multitude of cultural backgrounds, bringing various legal perspectives into play. And, interestingly, the low legal standards in place and the fairly high level of discretion in the hands of the IRB members also create an environment where different legal logics can be taken into consideration in a legal pluralistic sense. In other words, and to be fair, the legal grey hole context that allows the resurgence of “pre-liberal forms of rule” [of immigration control] (Walters, 2002), also permits a dialogue (Bakhtin, 1981; Bakhtin/ Volosinov¹⁴⁶, 1986) with other legal cultures within State law.

At the IRB, the most appropriate context in which we can observe such a melting pot are sponsorship appeals due to the inherent characteristics of these cases (i.e. mostly cross cultural marriages) and those of the immigration appeal division itself (e.g. the humanitarian and compassionate grounds opening new venues for disputes).

Sponsorship appeals are appeals made by Canadian citizens or well-established permanent residents from a decision made by a visa officer (immigration bureaucracy). This is one of the rare cases at the Immigration Appeal Division (IAD) in which it is possible to dispute

¹⁴⁶ There is a controversy among sociolinguists on who is the author of *Marxism and the Philosophy of Language*. It is not clear whether Volosinov wrote the manuscript about Bakhtin’s methods with the help of Medvedev (and Bakhtin) or whether Bakhtin himself wrote it alone and published it under the authorship of his close friends. Interestingly, the impossibility to determine who is the main (or only) author of this book is very coherent with Bakhtin’s discursive approach and his ideas of *dialogism* and *polyphony*. According to Bakhtin, all discourse, language and ultimately, thought are essentially dialogical and the result of a diversity of points of view and voices. This being said, for convenience reasons, I decided to refer only to Bakhtin when using his ideas without mentioning necessarily his friends.

questions of law and facts (e.g.: errors made by visa officers), in addition to raising issues based on humanitarian and compassionate grounds (H&C). Moreover, there is also the possibility of referring the case to alternative dispute resolution hearings, which are technically and practically more informal and add more complexity to sponsorship appeals. These proceedings-related elements are a first structural explanation for the richness of these disputes, but the idea of sponsorship itself adds most of the time an intercultural component to such appeals.

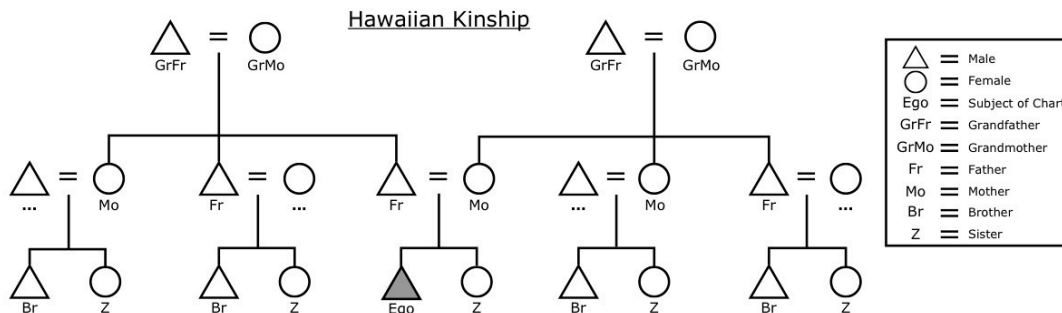
Sponsorship is a process in which a Canadian citizen or permanent resident may sponsor certain family members (mainly spouses and dependent children) to come to Canada. It is a bureaucratic process in which the visa officer (from CIC) will determine whether the citizen or permanent resident complies with the minimal requirements for being a sponsor for one or more foreigners, whether their family relationship is valid under immigration law and whether the foreigner(s) being sponsored are themselves admissible (criminal record, health conditions, etc.). The tricky issue is the recognition of the family relationship and its legal ramifications because kinship, as Claude Lévi-Strauss (1952, 1969) and many others argued, is something as diverse as humanity. In other words, the visa officer is usually receiving applications from different legal cultures and evaluating if they fit within State law categories. Thus, for instance, a Canadian or a permanent resident who builds his or her family in an ambilineal context (groups using the Hawaiian kinship system¹⁴⁷) would probably not be able to sponsor the entire generational group below him

¹⁴⁷ The Hawaiian system is a quite simple kinship system based only on distinctions in terms of gender and generation. Thus, in such system all women of the same generation (i.e. sisters and female cousins) are considered sisters and all women of the above generation, mothers. Similarly, all men are considered sons,

or her by claiming that all children under 18 are his or her dependent sons or daughters, because such family relationships would not be considered valid in Canada. Actually, this would be probably a very interesting sponsorship appeal case, but the chances of this actually happening are pretty slim.

However, it is not rare to observe sponsorship appeals reaching the tribunal exactly because there was some kind of cross-cultural confusion in the translation of something valid under a different legal regime into Canadian immigration law categories, especially regarding the marital status of the applicants. I say “immigration law” because immigration marital categories are actually broader than civil categories (i.e. family law) present across Canada. There are three marital categories in immigration law: marriage, common-law partner and conjugal partner. The main difference between immigration law and civil regimes is the third category, conjugal partner, which is something that simply does not exist in Canadian law outside of the immigration system. The conjugal relationship is a variation of the common-law relationship that is more realistic in a transnational context. It has fairly the same level of marital commitment as in common-law partnerships, but without the cohabitation requirements of living together “for at least one year” due to immigration barriers, such as the limited length of temporary visas or visa

brothers, fathers, etc. The Hawaiian kinship system can be summarized in the following figure (Figure 8):



refusals, and/or due to legal barriers such as those of countries where divorce or same-sex relationships are prohibit. Therefore, this marital category recognizes ongoing relationships of at least one year between individuals living in different countries but who are able to justify why they could not live together. This category makes a lot of sense when one considers that the objectives of the Immigration Act concern directly family reunification (IRPA, 3(d)).

There are good reasons why I chose to focus this chapter on the “establishment of marital status in sponsorship appeals”. The cross-cultural cases, which easily fit or which patently do not fit in the interpretation of State law categories, are dealt with at the bureaucratic level and do not usually reach the tribunal. If a relationship is easily translated as valid, the sponsorship application will be granted. And if the marital relationship is not valid at all or not well-translated under Canadian immigration law, or even in the original foreign country State law categories, for instance in the case of informal marriages or conflicts between customary law and State law, the applicants will most likely decide to address these issues, whether they are related to the lack of evidence in support of the relationship or to documentation issues, and reapply. In other words, the bureaucratic process acts as a filter for the easiest and extreme cases (those which are valid or clearly invalid). Therefore, the cases in which the IAD is asked to decide on marital status are the most complex and borderline cases. I was not planning on studying this cross-cultural dimension when I started my fieldwork. This was more like an interesting discovery while in the field. After observing a couple of sponsorship appeal cases, I realized that they offered a very special context to observe pluralistic legal perspectives at play in a State law bounded tribunal. These cases were also by far the funniest, the most challenging and the most mind-

boggling part of my fieldwork. Observing sponsorship appeals was like being on a lake fishing this particular kind of fish called legal pluralism in the best conditions: the lake (IAD procedures and jurisdictions), the fish (cross-cultural cases) and even the barriers, the locks and the rapids (the visa officer/ immigration bureaucracy) controlling the fish that are able to swim in the lake by accepting or by refusing sponsorship applications.

More specifically, in this chapter, I will discuss three particular and disturbing sponsorship appeal cases, which helped me think about the possibilities and the limitations of legal pluralism at the IAD, and consequently in the immigration justice system more broadly speaking. These cases were chosen among many others because they ideally reflect how extended legal pluralistic dialogues are possible. These are three real cases that I observed directly or indirectly in the field, but I “transcribed” them as ideal cases for two reasons. First, for argumentative reasons, I use these cases as analytical tools (i.e. similarly to Max Weber’s notion of ideal types) to think about the IAD and to better nuance the idea of legal holes in pluralistic terms. Secondly, I transcribed them into ideal cases in order to protect the confidentiality and the anonymity of the persons involved in these conflicts, despite the public character of these three cases and the fact that the IAD has published written reasons for two of them. I decided to name these *real-ideal* cases as follows: I) the “Triple Talaq” case, II) the “Snowbirds” case, and III) “The sponsor who married his wife twice” case. All three cases are appeals of the decision made by a visa officer to refuse the permanent resident’s visa application of his or her partner in accordance to subsection 63(1) of the IRPA (visa refusal of family class). They should not be necessarily taken as a description of sponsorship appeals in general or even or appeals under ss. 63(1), but as analytical tools useful to think about the field, its nuances and its constraints. After

presenting these cases, I will analyze them in IV) “From Interculturality to Internormativity”, discussing some of the possibilities of legal pluralism within State law and counterpointing the IRB as a legal grey hole with Arthurs’ notion of legal pluralism via deference (Arthurs, 1985).

I) Triple Talaq

The first case is an appeal from the refusal of the visa application of the appellant’s wife under s. 39 of the *Act*¹⁴⁸ because their family relationship was considered invalid under subparagraph 117(9)(c)(i) of the *Immigration and Refugee Protection Regulations* (IRPR)¹⁴⁹. In short, the visa officer concluded that the sponsor had not enough resources to sponsor his new wife and more importantly, that he was in a polygamous relationship at the time of the application because he was still formally married, or not officially divorced, to his previous wife in Canada. The sponsor had separated from his previous wife in March

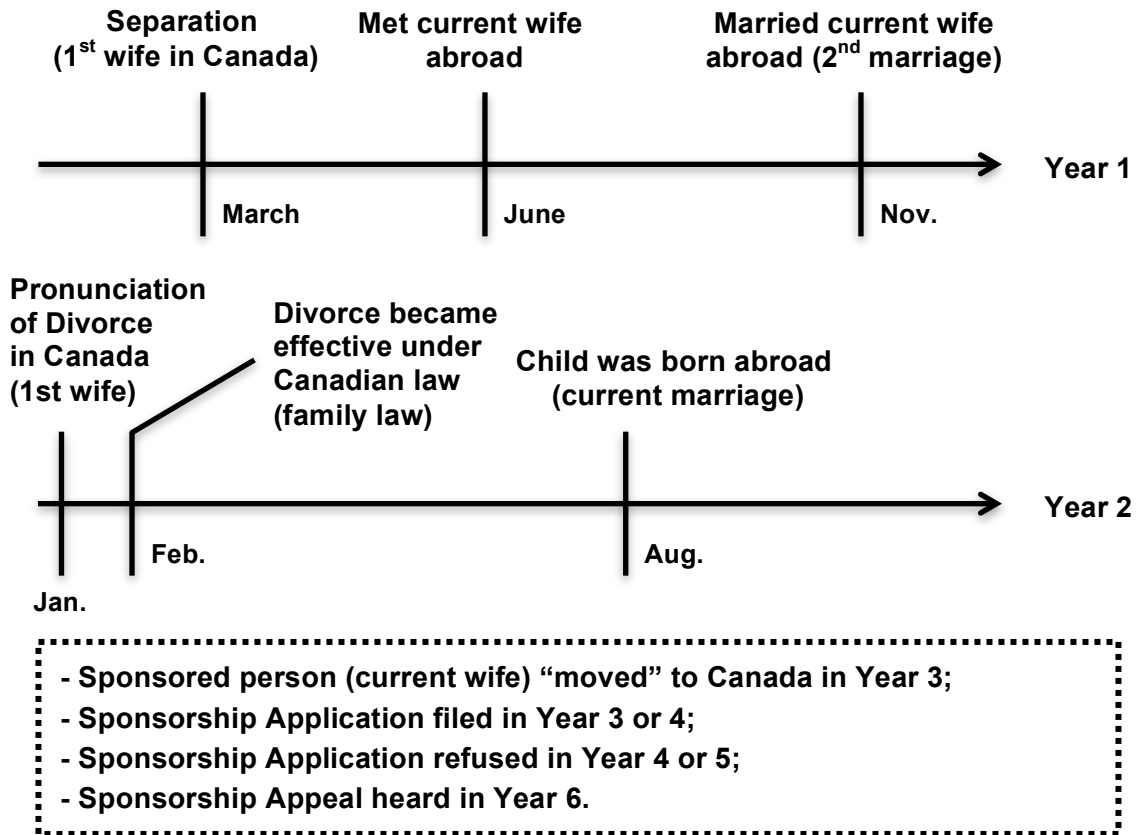
¹⁴⁸ “39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.”, in: IRPA, S.C. (2001), c. 27.

¹⁴⁹ “117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if (...) (c) the foreign national is the sponsor’s spouse and (i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or (...)”, in: IRPR, SOR/2002-227, June 11, 2002, as amended.

of a given year¹⁵⁰. Three months later, in June, he went to the Middle East to visit family members and he eventually met his current wife. They married in November of that same year under local Islamic law, but his divorce was only technically pronounced in Canada in January of the following year, becoming effective under Canadian State law a month later. Six months later, in August of year 2 in our timeline (see figure 9 below), the sponsor and his wife had a child who was born abroad and who was already a Canadian citizen at the time of the sponsorship application. The application was filed two years later, roughly four years after the appellant's separation with his first wife, three and a half years after his second marriage and three years after the formal divorce under Canadian law. The child was born with a disability and he eventually moved to Canada to receive better health care. The wife, the child's mother and the sponsor's partner, "moved" along with her child under a temporary visa, but she had to leave the country and request visa extensions from time to time while she was awaiting the results of her permanent residency application. The case can be summarized in the following timeline (figure 9):

¹⁵⁰ Details and dates were altered (keeping the same timeframe) in order to preserve the anonymity.

FIGURE 9: TIMELINE OF THE *TRIPLE TALAQ* CASE



Technically, the sponsor was married with two women at the same time during three months, and consequently, the visa officer decided that the second marriage certificate was invalid in Canadian State law according to s. 117(9)(c)(i) of the IRPR. Incredibly however, this whole marital *quiproquo* was even more complex than that. In fact, the sponsor’s first marriage was also celebrated under Islamic law prior to his arrival in Canada with his first wife a long time ago. It was not clear how, when or even if this first marriage was formally translated as a marriage under provincial law in Canada. However, the sponsor argued during the oral proceedings that he was never in a polygamous relationship because he had actually divorced from his previous wife through a triple *Talaq* at the time of his second marriage with his current wife, something that he had already explained to the visa officer

during the sponsorship application interview. In fact, he added, according to Islamic law, he would not have been allowed to practice polygyny by marrying his actual wife because he did not have the resources to support both of them. He explained that he divorced his first wife under Islamic law before getting married with his new wife because of the requirements of Islamic law, but also because he was aware that his current marriage would not be recognized here without divorcing from his first wife. According to the sponsor, he started the *Talaq* procedure when he separated with his first wife and he concluded the procedure by following all the requirements just in time to marry again under local Islamic law abroad. In other words, his argument was that the fact that he was able to marry his current wife under Islamic law was the proof that he had divorced from his first wife, and therefore he could not have been in a polygamous relationship.

Obviously, none of these legal pluralistic dimensions are written in the IAD decision. The IAD member, who knew some Islamic law, addressed all these *Talaq* related things during the oral proceedings. The member considered that the sponsor was not in a polygamous relationship at the time of the application and that the couple had a “genuine” relationship. The member finally concluded orally that the visa officer refusal under subparagraph 117(c)(i) of the IRPR was “not valid in law”. Actually, this last part is written in the decision, but of course, the member does not mention whether by “law”, he meant Islamic law, customary law, civil law, Canadian family law or a mix of all of them. In writing, the member states that he changed the appellant’s marital category from “married” to “conjugal partner” and that the Minister’s counsel accepted the authenticity of the conjugal relationship. Moreover, in order to allow the appeal and to cancel the visa officer’s decision, which was also based on the fact that the sponsor had insufficient resources, the

IAD member granted a special relief based on H&C in the best interests of the child who was already living in Canada.

Not a word is left in the decision about *Talaq*, polygyny or legal pluralism. In fact, I was lucky enough to be present at the hearing; otherwise, most of the pluralistic elements of this case, if not all of them, would not have been accessible. For instance, the decision does not mention the *Talaq* at all or any form of religious divorce, occluding the main criteria used to solve the puzzle of the excluded relationship under 117(c)(i) of the IRPR. At the hearing, the main issue was whether the relationship was considered polygamous under Islamic and customary law despite being “formally” excluded under Canadian State law (both immigration and family law) because the Canadian divorce occurred after the second marriage. Only later, after disclosing that the “consensus [was] that the appeal [would] be allowed”, did the IAD members write down the reasoning from a legal monist perspective by re-interpreting the marriage as a genuine conjugal relationship. In this case, as well as in other similar cases, changing the marital category was the legal operation that formally transformed an excluded marital status into something valid under immigration law at the time of the application. This is not a very common practice. It requires a certain level of consent from the Minister’s counsel and from the IAD member, but I observed this technique being used in some sponsorship appeals, and it is even supported by case law¹⁵¹ and by the sponsorship appeals guidelines¹⁵².

¹⁵¹ See especially *Tabesh v. M.C.I. [2004]* (IAD VA3-00941) and *Ur-Rahman, Mohammed Ishtiaq v. M.C.I. [2005]* (IAD TA3-04308), among other more recent decisions usually referred to in the field.

¹⁵² “In some cases, where an application for permanent residence was based on marriage and the IAD has found that marriage not to be valid, they have examined whether or not the appeal could be allowed based upon a

II) Snowbirds

I did not observe the second ideal case directly in the courtroom. Instead, an IAD member (Z) told me about this case in one of our conversations after we had observed a case that was very similar to the *Triple Talaq* case. In the observed case, the main dispute was slightly different because the application had not been refused because the appellant was in two marriages at the same time, but because the sponsor got married after the date of the application. The technique used was equivalent: the IAD member changed the marital category from marriage to conjugal relationship in order to dispute the case under new bases. In that particular case, the minister was convinced of the genuineness of the relationship and consented to the appeal, removing any traces of the debate in the decision. After both parties left the hearing room, the member (Z) asked me what I had learned that day. I told the member that I found very interesting the fact that there was some negotiation around marital categories during the hearings to revalidate excluded relationships, and I told him that I had observed this before in the *Triple Talaq* case and in some other cases. The member commented that these things happened, but that X [who is also an IAD member and a friend of Z] was the only one “crazy enough” to recognize bigamy in writing, referring to the snowbirds case, adding that: “it makes sense, but it is wrong in law”. My interlocutor provided additional details of the snowbirds case (more than I have eventually found in writing) and I was able to track back this decision.

common-law or conjugal partnership” (IAD, 2008, Ch. 5, p. 33).

The *Snowbirds* case is very unique, “untraditional” in the words of member X’s written reasons. Despite the publicity surrounding the case, I decided not to disclose its reference and to preserve the anonymity of those originally involved in the case in order to avoid any possible legal and social repercussions. My description will not mirror exactly the written decision for these reasons, but also because I have included some elements of the narrative of my interlocutor (member Z) based on the discussion that he had with member X and other IRB colleagues. In that sense, the *Snowbirds* case is explicitly polyphonic and heteroglossic (Bakhtin), not only because of the multiples voices of the case, but because of the various speeches of narrators (member X’s written decision and oral narrative, member Z’s translation and my own interpretation of the written decision and of member Z’s narrative). This ideal case is therefore, and more than the others, a mix of written and non-written elements from different sources. This case allows us to think about the possibilities, but also about the limits of the legal sensibilities at play at the IAD (Geertz, 1983; Ewick & Silbey, 1998), given that this case was both supported by an IAD member (member X) and criticized by another (member Z).

The name *Snowbirds* was chosen because it is a story about snowbirds, Canadians and Americans from the New England region who fly in the south, whether it is in Arizona, California, Texas, Florida, or in the Caribbean, during wintertime seeking warm weather. The main character of this case is Mr. A, a retired Canadian who tried to sponsor his new partner whom he met in the south of the United States. The visa officer refused his sponsorship application because their relationship did not observe the exclusivity requirements of common law and conjugal relationships at the time of the application. The visa officer argued that Mr. A was still legally married in Canada and supporting his

lifetime wife not only financially, but familiarly. She (his lifetime wife) was sick and she lived in a special care facility. She was still his beneficiary and dependent. He was paying all her bills, visiting her regularly and taking care of her and of her needs, but they did not live together nor share a companionship, something which was restricted to his new partner. The application was refused and the sponsor appealed. We already know the appeal was granted, that it “makes sense” and also that the written decision recognized the validity of both marital relationships at the time of the application. The main question is how this happened, how it “makes sense” and especially how to make sense of this more broadly?

This case is really unique and it is partially explained by the fact that Mr. A’s lifetime wife suffered from a degenerative disease and that she had not been able to recognize him for years before he met his new partner. Mr. A was doing everything he could for her because they had spent their lives together and she was the mother of his children. He had been her caregiver until the day she reached a vegetative state and was finally transferred to a special care facility. Obviously, filing a divorce because you may need to sponsor someone with whom you fell in love and with whom you want to spend the rest of your life is the last thing someone in these conditions and considering their advanced ages would think about and would do. Thus, Mr. A. continued living his life and meeting other people, but at some point he actually fell in love abroad and tried to be happy with his new partner (the applicant). The problem was that he was still married! Consequently, the conjugal relationship was not technically valid under Canadian State law. The solution was to do a “humanitarian divorce”, as member Z suggested. But member X considered (orally and in writing) that the visa officer was “wrong” and that, in his opinion, the sponsor had

an exclusive and genuine relationship with the applicant and not with his wife. The Board (member X) argued that Mr. A was *de facto* separated from his (legal) wife due to the advanced state of her illness and suggested that the appeal should be allowed and the visa officer should reconsider the application without questioning the validity of their conjugal relationship. Mr. A never divorced his lifetime wife, who eventually passed away one month after the sponsorship application was refused by the visa officer. It was member X who “divorced” them at the IAD to render lawful, at least, in the immigration regime, the new conjugal relationship between Mr. A and the applicant at the date of application (when Mr. A’s wife was still alive and his dependent). There are a lot of unique things about this case, but the most interesting one is the creative solution given by the IAD member to encompass the complexities of the *lifeworld (lebenswelt)* into a legal order which is clearly, and by definition, much more limited.

III) The sponsor who married his wife twice OR

The Mullah, State Law, The Sponsor & His Wife

The third ideal case is one of the most complex cases, if not the most complex case, I observed during my whole fieldwork in all three divisions of the IRB. Paradoxically, it was a fairly quick case. The sponsorship appeal was basically a two hour-long back and forth pre-hearing conference with the appellant counsel leaving the courtroom to discuss with the appellant in private a couple of times. It ended up with the appellant deciding not

to continue with the appeal, opting to resubmit his sponsorship application all over again. In other words, there are no written or oral traces¹⁵³ of this case and of its outcome in the tribunal and the only registry of what happened that day is my field journal and the participants' memories. The fact that the appellant withdrew his appeal and that it is fairly impossible to identify any of the individuals involved in this case (e.g. tracking back decision and case files), puts me in a more comfortable position in terms of authorship (Clifford, 1988; Geertz, 1988; Marcus & Clifford, 1986) to describe it and also to provide details, something that I could not do in the two previous ideal cases. Therefore, I am not altering anything from my field notes and I will also transcribe some courtroom dynamics in more details because they are especially relevant to understand this ideal case.

In this case, the visa officer refused the sponsorship application because the marriage was not considered officially valid in the country of origin, Afghanistan, due to a technicality. The details of this technicality were obscure and they were not really discussed during the pre-hearing conference. The appellant and sponsor, a man, and the applicant and sponsored person, a woman, were married in a traditional Afghan wedding ceremony. However then, they could not legally translate that marriage in formal Afghan State law and consequently, get the official marriage document ("marriage record book") required by the Canadian immigration authorities because the *mullah*, a local elder playing also a clergy role, was

¹⁵³ Oral proceedings are usually recorded, but not necessarily accessible to the general public. The main objective of these recordings is to have some evidence of what happened in the courtroom when filing a judicial review of procedures and/or reviewing a case in upper tribunals. However, and obviously, not everything is said on record and as a rule all the discussions during pre-hearing conferences are off record.

not present during all the negotiations of the *Nikah*¹⁵⁴. In part this happened, they briefly explained, because the sponsor lived in Canada and the marriage was pre-arranged by Afghan family members of the couple somehow under the supervision of the local *mullah*. Everybody was already aware of the terms of the marriage in advance, and when the appellant arrived in the small village in the middle of Afghanistan, the parties involved probably did not strictly follow the *Nikah* ritual. Most importantly for the purposes of this case, the *mullah* was not caught on videotape or in any pictures with them. When the couple showed the video and the pictures as part of the marriage record book application, the Afghan authorities argued that there was no *mullah* and they invalidated the marriage that was still valid under customary law. They decided to file the sponsorship application without the official marriage document and tried to regularize their bureaucratic situation in Afghanistan afterwards. However, and more dramatically, in order to regularize their situation in Afghanistan, they had to first divorce in customary law and repeat the whole traditional ceremony while making sure that the *mullah* was there during the *Nikah*, or at least that he appeared on the videotape. During the sponsorship application interview, the visa officer did not consider the second marriage because, although valid in Afghanistan, it

¹⁵⁴ Incredibly, the Wikipedia entry for “Afghan wedding” summarizes pretty well the essential ritual dynamics of the *Nikah*. In short, the *Nikah* “is a religious Islamic marriage ceremony in which a marriage contract is agreed upon. It is traditionally held in private with the gathering of the couple's immediate family and is led by an Islamic clergy, the *mullah*. The bride and groom are traditionally kept in separate rooms.” The bride is usually represented by her father or by a close male relative that is assuming such familial role in the absence of the first. The *Nikah* is negotiated in the presence of the *mullah* between the groom and the bride's representative, mostly everything is arranged in advance, but repeated before the *mullah* as a constitutive aspect of the ritual. “Once the groom has accepted the terms of the marriage, the *mullah* then comes before the bride [in a separated room] and asks three times if she accepts the marriage. Once the bride accepts, they are pronounced husband and wife.” Excerpts retrieved from: http://en.wikipedia.org/wiki/Afghan_wedding#Nikah, last accessed on 2013-08-08.

had occurred after the date of the application, and he refused the application because the first marriage was not valid under Afghan State law.

At the beginning of the pre-hearing conference, both parties had an intensive discussion about the case law regarding the validity of the marriages and the dates of application. Essentially, the appellant counsel was trying to include the second marriage in the appeal, but the minister counsel was complaining because it had occurred after the application and could not be considered as evidence. This discussion took about ten to fifteen minutes, which is quite long for this kind of rite because usually the parties settle on these issues in less than five minutes. The appellant counsel asked to talk with his client in private and they left the room, leaving the minister counsel and the IAD member (and me) in the courtroom. After fifteen minutes, the IAD member asked the minister counsel to “go there inquire” and he left and came back saying: “He is having problems with his client”. Shortly later, the appellant counsel entered alone and clarified that his client “[was] extremely upset and [that he] still [didn’t] have any clear instruction from him”. The IAD member, who also knew some Islamic law, asked him to bring his client in the courtroom so that he could talk to him and understand what was the issue regarding his case.

Until this point, everything was off the record. When the appellant entered the room, the IAD member started discussing with him going on records as follows: “Mr. AF, your case presents a legal problem and I cannot go beyond that (...) I have to assess the legality of the marriage and to accept the document, the marriage needs to be legal in the other country. The first document was not valid. I look at it from a legal point of view”. Then he mentioned he understood what the appellant had to go through, marrying twice, etc., and he started to explain the three categories of matrimonial status valid in the tribunal in order to show how

his marriage could be interpreted as a different relationship for immigration purposes, while recognizing that these categories differed from the Islamic and customary laws that ruled his marriage. They had the following exchange:

IAD member: *You cannot prove to the visa officer that you are married [referring to the fact that the second marriage cannot be considered in the appeal as it was done after the application]. The only option you have is to continue as a conjugal relationship.*

Appellant: *But you understand my point of view?*

IAD member: *[move her head affirmatively] Do you want to continue as a conjugal partner or reapply?*

Appellant: *I don't know... She's my wife! I don't know. I cannot call her...*

Minister counsel: *[intervened] You can say that she is your wife. No problem, but [IAD member] will accept that as a conjugal relationship...*

Appellant: *My culture doesn't allow me to do that. She's my wife! I cannot call her other (...). I don't want to divorce her... She's my wife.*

The appellant's counsel asked "a little bit of time to discuss" with his client again or even to "reschedule" the hearing, and the IAD member suggested a fifteen minutes break before taking any further decision. The appellant's counsel asked whether they could bring the interpreter with them and whether his client could call his wife to discuss the issue. The IAD member agreed and left the courtroom. The appellant was completely confused and disoriented: he was really worried about the risk of involuntarily divorcing his wife in the courtroom or on the phone. It had been already more than three years since they first married

and the last thing he wanted was to end up in a situation in which he would need to marry her again. It was at the same time a Kafkaesque and a surrealistic situation that reminded me of Peter Greenaway's marital drama *The Cook, The Thief, His Wife & Her Lover*, which inspired me the second nickname of this case (see above). The main difference between this case and Greenaway's movie was that there was no lover in this courtroom drama. Otherwise, the strange subaltern character supervising the love relationship is the *mullah*, and not the cooker as in Greenaway's drama, and finally State law played the role of the person who repressively tried to end the extra-official relationship of the loving couple.

After fifteen minutes, and this short cinematographic digression, all legal characters were back to the courtroom and the appellant's counsel asked for extra time because his client was still on the phone with his wife. It was a very awkward situation: it was clear that the couple had a genuine relationship and that both the minister's counsel and the IAD member were open to concede the change of marital status from married to conjugal partners in order to decide the appeal on these terms. They were just waiting for the appellant's agreement in which case they probably would have asked the couple some questions to follow the procedure, and eventually the member would have granted the appeal orally. Around ten minutes later, the appellant's counsel came back, expressed his sincere thanks to the Minister's counsel and to the member for all their efforts, but announced that his client decided to reapply. He then asked whether he could use the remaining minutes on record to submit a new application and inquire into whether it was possible for the visa officer to consider the new procedure as "an expedited application". The minister told him he would communicate this request to the visa officer, but that ultimately, this was not under his control: "it is a visa office decision", he said.

The case ended abruptly: the appeal was simply withdrawn. Despite the efforts made by the minister and the member to accommodate this unusual situation, the appellant preferred to reapply and wait at least one more year than “calling his wife something else than his wife”. Reassessing marital status through conjugal relationships gives some room to accommodate diversity, but not everything can be accommodated in sponsorship appeals and this is true on both sides. It is rare that the barrier is on the appellant’s side, as it is usually considered as the other and the most vulnerable part of the dispute, but this was clearly a case in which the appellant created a barrier and said “enough! I cannot go that far to win my case”, isolating himself in a sort of legal ghetto despite the invitation to communicate with (and within) the dominant legal culture in place.

IV) From Interculturality To Internormativity:

Symbolic Proximity and Recognition of the Self and of the Other

These three cases exemplify how intercultural dynamics can lead to internormativity (Carbonnier, 1977, 1988; Belley, 1996), or even become a matter of legal pluralism (Falk Moore, 1973; Fitzpatrick, 1984; Griffiths, 1986; Merry, 1988) in formal *legal institutions* (Bohannan, 1965). They show how exotic double-normative systems and conflicting values can be translated in State law-based legal spaces, producing formal legal effects in Canada. The concept of internormativity refers to the relationship between (State) law and other

normative systems, whether they are formal or not, or legal or not. This notion is easily confused with that of legal pluralism because sometimes “law” is simply understood as referring to State law, and “other normative systems” are understood as referring to other legal regimes or orders whether they are State law-based or not. But the notion of internormativity is broader than the idea of legal pluralism, as it may include normativity, which cannot necessarily be associated to or constitute legal orders. It is mostly an operational concept. From a constructivist point of view, we can argue that internormativity is everywhere in a society as any interaction with the law is permeated through other normative systems and sets of references. However, as Sally E. Merry put it: “Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all these forms of ordering law?” (1988: 876). The same critique can be made against some post-modern legal pluralist approaches, which consider that legal orders can be thought in individual terms such as in Boaventura de Sousa Santos (1977, 1987, 1996) and Roderick Macdonald’s (1993, 2002, 2011; Macdonald & Kleinmans, 1997) conceptions of legal pluralism. I do not go that far in my legal anthropologist and Bourdieusian structural constructivist conception of law. This is the reason why I take the notion of internormativity as something mostly operational. It is useful to perceive more than one normative system at play at the IRB. However, when internormativity refers to the fact that intercultural cases make explicit references to different legal systems and cultures unrelated to Canadian State law, I prefer using the notion of legal pluralism in a thick sense. This conception of legal pluralism is anchored in legal anthropology and contrasts with the legal version of legal pluralism present in Western law since the invention and the rise of modern law in the Late

Middle Ages (Berman, 1977, 1983, 1984).¹⁵⁵ H. J. Berman is right in saying that State law in the West is intrinsically and inexorably plural, but this is not the kind of legal pluralism that we are talking about in the three ideal cases explored in this chapter, especially in the first and the third cases.

Higher courts, through deference, tolerate internormativity and a certain level of legal pluralism, such as that present at the IRB, because the IRB is a specialized administrative tribunal. In these cases, higher courts follow the *pragmatic and functional approach* doctrine and show a high level of deference towards administrative decision-makers deciding matters over which they have exclusive jurisdiction. As a result, the IRB members have enough discretion to proceed as previously described in the three ideal cases because the IRB has an ample interpretative independence to apply the statutes under its exclusive jurisdiction. Higher courts usually defer to these kinds of tribunals, letting them rule the law on their terms, even if a given decision seems to be conflicting with the rule of law more broadly and

¹⁵⁵ The legal version of legal pluralism is reflected in this excerpt from Berman, 1984: “(...) perhaps the most distinctive characteristic of the Western legal tradition is that diverse jurisdictions and diverse legal systems co-exist and compete within the same community. This characteristic originated in the late eleventh century with the church's establishment of an ‘external forum,’ a hierarchy of ecclesiastical courts, with exclusive jurisdiction in some matters and concurrent jurisdiction in others. Laymen, though governed generally by secular law, were also subject to ecclesiastical law, and to the jurisdiction of ecclesiastical courts, in matters of marriage and family relations, inheritance, spiritual crimes, contract relations where faith was pledged, and a number of other important matters. Conversely, the clergy, though governed generally by canon law, were also subject to secular law, and to the jurisdiction of secular courts, with respect to certain crimes, certain property disputes, and related matters. Secular law consisted of various competing types, including royal law, feudal (lord-vassal) law, manorial (lord-peasant) law, urban law, and mercantile law, each with its own jurisdiction. Throughout Europe, the same person might be subject to the ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, and a merchant's court in a sixth. The pluralism of Western law was a source of legal sophistication and of legal growth.” (p. 515)

substantively speaking. Also, as it has been clearly demonstrated in the literature on legal pluralism, especially in legal and political anthropology (e. g. Kuper & Smith, 1969; Pospisil, 1971; Griffiths, 1986; Merry, 1988), State law tolerates and sometimes even encourages legal pluralism in a cross-cultural and thick sense in order to reduce the tensions between the official (and dominant) legal regime and the practices of law in a given territory. This is basically done to improve governance in a context of colonialism. In this sense, what happens at the IRB regarding marital status and family reunification is not that different from the relative acceptance of the law of the oppressed during colonial times, or even in relation to indigenous groups. The difference is that the colonized are not engaged in a legal institution in their ancestral territory, but in the metropolis.

The *pragmatic and functional approach*, more recently referred to as the “standard of review analysis”, is used by higher courts in Canada when a great measure of deference is appropriate towards administrative decision-makers deciding matters that relate to their special role, function and expertise. According to the Court, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, par. 25). This is so despite the fact that administrative tribunals or commissions occupy a lower position in the hierarchy of formal legal institutions. This doctrine was established in Canadian administrative law in the last thirty years and it ended up in practice promoting a legal pluralist approach in judicial reviews as opposed to the typical legal centralism that ideally organizes State law and the hegemonic conception of the rule of law in the modern legal

imaginary (i.e. normativism or legal formalism). In other words, specialized administrative legal spaces are relatively autonomous to interpret and apply the statutes under their jurisdiction regardless of constitutional fairness and values, unless their decision is “unreasonable”, going too far for better or for worse.

Before the Supreme Court decision in *Dunsmuir v. New Brunswick* [2008], the standard of deference to review IRB decisions was “patent unreasonableness”, a standard developed in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999]. Unless the IRB decision was found patently irrational or unreasonable, it was okay to defer to whatever the decision maker had decided. Again, this should be read in combination with the low standards of proof that apply at the IRB. *Dunsmuir v. New Brunswick* did away with the distinction between patent unreasonableness and reasonableness simpliciter. The Court suggested referring to this standard of review as “reasonableness *simpliciter*”, but insisted that in doing so, it did not “pave the way for a more intrusive review by courts” (par. 48). One year later, fairly immediately after I left the field, in *Canada (Citizenship and Immigration) v. Khosa* [2009], the Supreme Court ruled that this standard of “reasonableness *simpliciter*” applied to immigrations matters. However, it seems clear that the reasonableness criterion is fairly less reasonable when applied in the immigration context than in labour issues, such as in *Dunsmuir v. New Brunswick*. Justice Fish’s dissenting opinion (paragraphs 139 to 157) in *Canada v. Khosa* is very interesting and revealing in this regard. Justice Fish agrees that the standard of review is indeed the reasonableness criterion, but he argues that the IAD decision was unreasonable¹⁵⁶. As a result, it is not only fairly reasonable, but also correct to infer that

¹⁵⁶ As Fish argues in paragraphs 147 and 148: “Despite all of this evidence indicating that Mr. Khosa was extremely unlikely to reoffend and had taken responsibility for his actions, the majority at the IAD seized

whether one follow the pragmatic and functional approach (from *Baker*) or the standard of review analysis (from *Dunsmuir* and *Khosa*), the result is similar: patently unreasonable decisions made by the IRB are in fact still given a lot of deference by higher courts.

This form of legal pluralism in administrative law via deference, and its opposite¹⁵⁷, an ideal and almost transcendent conception of the rule of law, is not something new. Harry W. Arthurs (1979, 1983, 1985, and 2005) showed how administrative tribunals have consistently displayed these characteristics throughout history. Arthurs (1985) looked into these tribunals more extensively in the nineteenth century in the UK, and showed how these characteristics persisted in contemporary common law traditions. The problem with this approach, and with the standard of review analysis doctrine itself, is that their origins are intrinsically linked to labour cases. We can directly refer to Arthurs' work as a theoretical support for the doctrine and see how the pragmatic and functional approach evolved into the current standard review analysis doctrine primarily in the labour context.

upon one consideration: Mr. Khosa's denial that he was "street-racing" at the time the accident occurred. Apart from a brief mention of Mr. Khosa's "show of relative remorse at [the] hearing" ([2004] I.A.D.D. No. 1268 (QL), at para. 15), and a passing allusion to the judgments of the criminal courts to his culpability (para. 14), Mr. Khosa's denial was the *only* consideration that the IAD majority considered with respect to these issues. Manifestly, this solitary fact was the decisive element — if not the sole basis — upon which the majority of the IAD denied Mr. Khosa's basis for all humanitarian and compassionate relief. So much cannot reasonably be made out of so little". Justice Fish goes on to say that "there was ample evidence suggesting that he posed no risk" and that the IAD "simply disregarded virtually all of that evidence" (paragraphs 154 to 156), concluding at par. 157 that: "With respect, I thus feel bound to conclude that the IAD was unreasonable in its evaluation of Mr. Khosa's rehabilitation, remorse and likelihood of reoffence." (*Canada v. Khosa* [2009]).

¹⁵⁷ See for instance the celebrated and controversial *The New Despotism* of Lord Gordon Hewart (1929). Arthurs refers to him as well when he observes that: "Between the 'Rule of Law' and what is called 'administrative law' (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other." (Arthurs, 1979, p. 1 / Hewart, 1929, p. 37).

In 1979, the Supreme Court of Canada issued two important decisions: *C.U.P.E. v. N.B. Liquor Corporation* and *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*. *C.U.P.E. v. N.B.* was the very first case to set the “patent unreasonableness” standard of review in Canadian administrative law and *Nicholson v. Haldimand-Norfolk*, in line with the British landmark case of *Ridge v. Baldwin* [1963], extended the duty of procedural fairness from tribunals to boards and commissions as well. Much development occurred in labour law cases and scholarship during the 1980’s and 1990’s before the Supreme Court issued its decisions in immigration cases in the late 1990’s: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998], and especially *Baker v. Canada* [1999]. The last decision, *Baker*, was the main support for the pragmatic and functional approach doctrine during the early years of this century. The same argument can be made with respect to the most recent developments in *Dunsmuir v. New Brunswick* [2008] and *Canada v. Khosa* [2009], respectively a labour case and a removal order appeal. It is one thing to defer to local boards and commissions in labour cases, letting them rule pluralistically, but when the same is done in immigration cases involving punishment, it may be problematic, not to say alarming. David Dyzenhaus is of the same opinion. In an article, he criticized Arthurs’ legal pluralism as follows:

“[Arthurs] takes the concern about coherence much more seriously, and it is a concern about coherence however and by whomever it is imposed, since he thinks that coherence undermines pluralism. However, it is not exactly clear what he means by pluralism. It is clear that he [Arthurs, 1979, and I would add 1983 and 1985] means at least the descriptive claim that if the officials of different administrative regimes are left to pretty much to their own devices, they will

develop their administrative regimes as they see fit rather than as some central body sees fit. But he must mean more than that, since no one will deny that the substantive policy of the immigration law regime will differ from that of labour boards, and so on. (Dyzenhaus, 2005, pp. 709-710)

To be fair, and reasonable, and to finally come back to my three ideal cases, the pluralistic approach present in the standard review analysis doctrine makes sense in relation to labour cases, but it may be problematic when this excess of deference is the core characteristic of “legal holes” (Dyzenhaus, 2006; Steyn; 2004 and Vermeule, 2009). Let me clarify this: legal pluralism by deference makes sense when punishment is not involved in conflict resolution. When there is any possibility of punishment, detention, removal or surveillance, a more legal centralist approach should be considered, and correctness should be the applicable standard of review, no matter how ideal, ‘transcendental’ (Arthurs, 1979) or even hypocrite (Bourdieu, 1991a) such legal centralist values are. The hole in the rule of law that permits a back door for legal innovation in pluralistic terms is exactly the same hole that allows intermittent and a surplus of punishment along and in addition to criminal law without the legal guarantees associated with the criminal due process¹⁵⁸. Thus, on the one hand, it is not necessarily a good idea to close all legal holes as it was suggested by Dyzenhaus because in doing so, we would not leave enough room for local knowledge innovations (legal sensibilities; Geertz, 1983). Arthurs’ administrative legal pluralism is indeed a very important counterpoint to Dyzenhaus’ solution. On the other hand, it is not desirable to allow

¹⁵⁸ This argument is not necessarily new. Galanter and Luban (1993) made a similar suggestion in the context of punitive damages in civil regimes, although it was not presented with the same nuances as those observed in administrative law with respect to deference.

lower courts or administrative tribunals to follow the kind of legal pluralism that operates through pre-liberal forms of rule (Walters, 2002) regarding punishment. It is one thing to let local instances deal with strictly civil conflicts more informally and on their own terms, a thicker legal pluralistic position that Arthurs clearly refuses by the way¹⁵⁹, and another to allow a local legal institution (formal or not) to handle rape by compensation, as it happened in early Germanic law, and still may occur in Africa and Oceania through customary law. The same can be said for gender issues in the context of labour disputes. In that case, local institutions may not be the more appropriate legal spaces to rule the issues in a reasonable manner. For instance, when equal pay for women has been achieved in some western countries, it was done mainly through legal centralist approaches or even through the adoption of new legislation, either at the federal or at the State/provincial level, and not through deference to entry-level boards and commissions.

Our three ideal cases regarding marital determination at the IAD should be first understood in the context of legal pluralism via deference. They are helpful to think about the possibilities of legal innovation in terms of communications with other legal cultures and other references, but also to think about the limits of this kind of pluralism. For instance, how far can the IAD go when it is dialoguing with the law of the other, and regarding internormativity and legal pluralism? What “makes sense, but is wrong in law” (to borrow

¹⁵⁹ As Dyzenhaus mentions, and I agree: “A second, much thicker, sense of pluralism is that, in so far as different regimes should be governed by norms of procedural fairness and should stay within the limits of their mandates, they are the best judges of how those norms should apply and what the limits are. But Arthurs [1979] does not want this thicker sense of pluralism, clearly because it allows officials to determine the content of precisely the sorts of values he deems transcendent. Rather, it seems, he wants something in between, as is illustrated by his disagreement with Peter Hogg [1974].” (Dyzenhaus, 2005, p. 710) [“Referencing” to Arthurs, 1979, pp. 32-33]. [Hogg, Peter (1974)]

the expression used by my interlocutor in the field)? Or to use the terms of the standard of review doctrine: what is not reasonable, patently unreasonable and therefore what goes beyond the limits of higher courts deference? Moreover, as member Z told me at a different occasion: “We have a lot of room to decide, but no one wants to have a JR [judicial review] saying you don’t know how to do your job; this is not good!” And finally, how far can the other go when entering in a dialogue with State law? These three ideal cases cannot cover all the dimensions of these questions, nor do they convey all the richness of marital determination in the immigration domain. But they can provide some answers about how the legal sensibilities at play at the IAD (re)create law by dealing both with the temptations of legal pluralistic fairness via deference and the pressure of higher courts. It is always good to remember that the IRB is official law and higher courts can ultimately review IAD decisions, requiring a new hearing in which the law, explicitly in legal centralist terms, would have to be taken in consideration.

In the first case, the *Triple Talaq*, the IAD member clearly addressed the validity of the second marriage through Islamic law. He wanted to know whether the appellant had divorced first and was not practicing polygyny at the time of the application. It seems that the member needed to know this for his own conviction before suggesting that both parties should continue by considering the case as one of conjugal relationship. This was a reasonable decision, and it was also a correct decision in Islamic law. The IAD member was very competent in that sense because he was trilingual and “trilegal”, being fluent in English, French and Arabic, and at least very functional in common law, civil law and Islamic law. In this particular case, for instance, he corrected the translator because he was not using the appropriate legal category in Islamic law, and he was able to perceive some of the nuances in

the testimony of the appellant and of the applicant, the appellant's wife, which were determinant in his assessment of the validity of their marital relationship. None of this is in the decision! The IAD member used his discretion to make the necessary connections at the hearing as well as to make his decision orally, but ultimately he followed the legal centralist rules by changing the marital category from marriage to conjugal relationship with the Minister's consent. It would have been a complete different thing to put all of this in writing in these terms. If he were to do so, his decision could have been considered patently unreasonable and revisable by higher courts.

In the second case (the *Snowbirds case*), on the other hand, the appellant's polygyny was put in writing. It was not explicit or written in uppercase in the decision, but if you read it carefully, you will perceive that the appellant was married and sponsoring someone as his conjugal partner at the same time. This is the reason why member Z expressed his disagreement with member X by saying that he was "crazy" and adding that "it makes sense, but it is wrong in law". In member Z's opinion, the reasoning of member X was clearly going too far, crossing the line of discretion and of the tolerated deference. It was something potentially unreasonable. However, and to be fair with member X, this case is very different from the first case because it was not dealing with an "exotic" non native legal system, but with very unusual and real-life circumstances. He put this in writing because the "humanitarian divorce" was somehow acceptable in law. It "makes sense", it is reasonable; borderline, but factually reasonable. Also, this was the kind of situation with which a middle-aged upper class person who usually occupies the honourable position of judge in higher courts in Canada, could possibly identifies with. In the *Triple Talaq* case, while there was a certain proximity and recognition between the IAD member and the

context of the case because of the member's knowledge of Islamic law this would not necessarily have been the case in higher courts. But every potential decision-maker, from the IAD member to the judge of the Supreme Court was likely to identify with the appellant in the *Snowbirds* case. It is reasonable, it "makes sense" to consider that you are in fact in a conjugal relationship with your new partner, even if you are still married to someone who suffers from a degenerative disease and has not been really able to recognize you for years before you actually met the new partner that you are trying to sponsor. At the end of the day, the appellant and his new partner were at relatively advanced ages; they had a true relationship; the appellant's lifelong wife had already passed away and they actually did not have a lot of time to lose in a new application. Thus, why not let them enjoy the rest of their life together? It would have been very unreasonable not to do so. The legal problem was to put that in writing.

Finally, the third case reflects a limitation created partly by the other, that is, the applicant, his wife and their legal references. *The sponsor who married his wife twice* simply chose to reapply to keep the marriage legal label on his relationship instead of continuing the appeal as a conjugal relationship. He and his wife (apparently) were not symbolically ready to concede and to dialogue with Canadian State law on their terms. The IAD could not go further than changing their marital status from "marriage" to "conjugal relationship", and the couple could not give away the "marriage" marital category because they were running the risk of divorcing each other once again and potentially to lose their own marital relationship. There was a cultural and normative impasse despite the genuineness of the relationship. And when there are such impasses, formal legal institutions such as the IRB cannot and will not concede more than what higher courts and legislation allow them to

do. Legal pluralism in State law is not as thick as it is in small-scale societies or in less formal legal spaces where a given authority or decision-maker can more freely chose how and what norms he or she should apply. It is the price of institutionalization; it comes necessarily with constraints, on both sides.

A few lessons can be learned from these three cases. First, legal pluralism via deference present in Canadian administrative law can be very innovative as it may allow a better dialogue with other legal cultures. However, these dialogues are limited to recognition processes by key authoritative actors in the field – for instance, you need a very good translator at the right place and time, preferably one who is trilingual and “trilegal” such as the IAD member from the first case. These dialogues are also limited to what legal centralism defines as correct or reasonable depending on the deferential criteria in place. Eighteen months of ethnographic observation and cross-documentary analysis suggest that pre-liberal forms of rule regarding punishment seem to be considered more correct and reasonable than any non-Western legal reference regarding family reunification. Secondly, the immigration law concept of “conjugal relationship” works as a “magical category”. When this category is combined with “humanitarian and compassionate grounds”, it may change the marital classification of the original sponsorship application, creating possibilities for disputing the validity of the relationship in a more fluid manner, and for accommodating different factual and legal realities. Thirdly, and finally, there are different levels of inscription regarding legal pluralism. When legal pluralism operates beyond State law legal formalism, that is beyond the level of authorized deference, and when it involves other legal cultures, its manifestation will depend heavily on the context of the observation. In this sense, legal pluralism appears depending on where and how one tries

to observe these dynamics, on the kind of legal space or institution being observed (lower tribunals and boards or higher courts), whether the legal ritual is on or off the records, what kind of ritual is being observed or analysed (pre-hearing conferences, oral proceedings, written decisions), and so on.

There is no doubt that some level of legal pluralism exists in State law, as many scholars argued throughout the 1980s and 1990s¹⁶⁰. But it is a matter of where, when and to what extent legal pluralism is present in formal legal institutions. I am not necessarily interested in the nuances of the contemporary legal pluralistic debate. Instead, I want to use Arthurs' conception of pluralism via deference to nuance the idea of legal hole and to show how it is possible to produce legal innovation in thick legal pluralist terms by incorporating exotic legal cultures into State law in a creative manner. Consequently, I also argue that there are different levels of inscription in State law. Immigration tribunals are in a better position to bridge the plurality of jurisdictions in the Western legal tradition (Berman, 1986), and the

¹⁶⁰ See for instance the seminal piece of Marc Galanter (1981) in the early 1980s and the work of Jeremy Webber and Jean Guy Belley since the 1990s, and more particularly *Le droit soluble* (Belley, 1996) for the Quebec and Canadian contexts. See also the vast work of H. W. Arthurs on administrative law, mainly labour law regimes, and legal pluralism (*op. cit.*, among others) and especially his masterpiece *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1976). They all provide more than enough evidence of legal pluralistic manifestations in State law and in the routines of formal legal institutions. Possibly one of the first to make such a claim was Richard J. Wicksteed (1886) in his short piece *The inferior magistrates, or, Legal pluralism in Ontario*, even if his conception of pluralism was not very clear such as in the legal institutionalism of Santi Romano (1917) and Maurice Hauriou (1933) or in line with the more contemporary sense of legal pluralism (see Falk Moore, 1969, 1973, 1978; Griffiths, 1986; Merry, 1988; or even Sousa Santos, 1987, 1995; MacDonald, 1994; MacDonald & Kleinhans, 1997; Teubner, 1992, 1997 and Tamanaha, 1993, 2000). Actually, the existence of legal pluralism in State law is a fairly pacified statement, the disagreement is on exactly what this means (e.g. plurality of jurisdictions, plurality of legal orders, plurality of legal culture, the individual as a legal order, etc.), to what extent and so on. This progressive dissent in the literature is much more a matter of "a refinement of debate" as C. Geertz (1976) would put it.

legal pluralism via deference of administrative law regimes into thick legal pluralism dynamics. In this sense, immigration tribunals are able to create a very particular context of relative tolerance for legal orders, which are also anchored in other legal cultures, within State law.

To conclude this chapter on a theoretical and methodological note, let me also add the following. The different degrees of pluralistic logics and of legal sensibilities to which observers will be exposed will vary depending on the research methods they used and on the particular contexts that are being analysed. For instance, researchers who focus only on Supreme Court decisions will probably conclude that law is basically State law in a very formalistic, hermetic, monist and autonomous way. This kind of observation and analysis of legal pluralism is pointless legally, sociologically and anthropologically. It is like trying to fish at a dried-up riverbed. Unless you are the mysterious Dr. Lao from the movie *7 Faces of Dr. Lao* (1964), your chances of fishing something are very limited. Drawing on Bourdieu, it merely shows how certain kinds of jurists are the guardians of the collective hypocrisy (Bourdieu, 1991a). However, it does not mean that this formalistic conception of the legal realm is silly. On the contrary and argued by Bourdieu (1991a, pp. 98-99, it produces real effects and it shapes considerably the way we experience law in State law-based legal institutions. The legal institutional actors believe so much in the (magical) rules of the game that they act differently depending on the context. Certain things are allowed in oral proceedings or off the records, but not in written decisions. Member Z was truly and deeply shocked by the fact that Member X put “bigamy” in writing, even if this was not explicit in the reasons of the *Snowbirds* case and that it actually “made sense” in the circumstances of the case. Going that far is a taboo, it

is “wrong in law” and being formalistically protective is part of the rules of the game, even in legal pluralistic-friendly contexts.

The picture and the sense of legal pluralism will vary enormously from place to place. What can be observed at the IAD is very different from what is visible in higher courts. What is openly discussed in pre-hearing conferences and/or oral proceedings is not necessarily written in the reasons for judgment. The higher you go in the hierarchy, the more legally centralist the decision is likely to be. It does not mean that one cannot find legal pluralism in the federal courts or in the Supreme Court decisions. It is surely possible, but it will be disguised in formalistic terms such as “royal prerogative” or “deference”. Pluralism exists, mostly via deference, but it does exist. However, it should be reasonable, and sometimes even correct¹⁶¹. Moreover, reasonableness varies greatly among legal orders, among jurisdictions, among specialized tribunals and even among the kinds of case in the same tribunal and in the same division. For instance, what is reasonable in removal order appeals may be different from what is reasonable in refugee determination cases. Moreover, at the IAD, reasonableness may vary between removal order appeals and sponsorships appeals. A researcher needs the right glasses to observe what she or he is looking for. He or she also needs to look at the right place and at a very precise time. It is like fishing: you need a good spot, specific equipment to fish different fishes and principally, you need time and a lot of patience because you never know when pluralism will bite!

¹⁶¹ For instance, in *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002], the Supreme Court held that the standard of review should be “correctness” (at least tacitly) because the risk of deportation to face torture based on another deference standard violated Suresh’s rights under section 7 of the Canadian *Charter*.

ACT III:

SEEING THE REAL YOU AT LAST

*Well, I sailed through the storm
Strapped to the mast,
But the time has come
And I'm seeing the real you at last.*

- Bob Dylan: *Seeing the real you at last*

CHAPTER VII:

BRINGING POLITICS BACK INTO THE DISCUSSION

The title of this chapter and the epigraph of Act III are clear references to Ian Taylor, Paul Walton and Jock Young's seminal book written in 1973 (*The new criminology: for a social theory of deviance*). Like them, my objective is to bring politics back into the discussion, although not necessarily in the same terms. My interlocutors in this dissertation are not the same as theirs. At the time, Taylor, Walton and Young reacted to applied criminology, aetiological perspectives, and early social reaction criminology, including labelling, ethnomethodology and conflict theories. My point is not to bring politics back in the discussion about crime and social control, two concepts that were not necessarily addressed through power relations before the 1970s. These new criminologists already did that, and brilliantly so, opening new venues for our discipline. As I already suggested in chapter 2, the New Criminology consolidated a first ontological turn in criminology, moving away from aetiological studies and making a definitive shift to a social reaction perspective that is also and especially mediated by power. There is no way back: power is now part of the contemporary criminological agenda.

The debate here is very different. My interlocutors are anchored in this now not so new paradigm: they are critical criminologists, from different political streams and theoretical approaches. The notion of power is also different. Power, as it is understood in criminology and social sciences today, includes posterior contributions nuancing power relations beyond a fairly structural conception of repressive power linked to the State, as proposed by early new criminologists (left idealists and realists included), to a conception of constitutive power-knowledge relations anchored mainly in the work of Foucault (1970, 1971, 1972, 1980, 1988, 1995, 1999, 2003a, 2003b, 2007, 2008), but also others, such as Norbert Elias (1982) and Pierre Bourdieu (1977, 1991b) in terms of micro-physics, institutional or governmental power.

My proposal to bring politics back into the discussion is in fact related to another aspect pointed by new criminologists: the “need to deal with society as a totality” (Taylor et al., 1973: 278). Despite this assertion however, new criminologists ended up proposing something fairly distant from thinking social reaction and punitiveness as a totality, given that their “*political economy of crime*” (*id.*: 270), and of “criminal action” (*id.*: 279) were built on criminocentric terms. Moreover, their capacity of moving “criminology out of its own imprisonment in artificially segregated specifics” (*id.*: 279) only went that far and ended up creating and reinforcing new segregated specifics through a certain reification of criminal justice, State and law. The “*political economy of social reaction*” (*id.*: 274) proposed by the new criminology in the 1970s and sustained by critical criminology is still and mostly a criminocentric agenda. Even penal abolitionism is still generally thought in function of crime-related categories, such as criminalization and decriminalization, and I do say “generally thought” because Louk Hulsman and many others after him also pointed to

the presence of penal logics in non-criminal regimes and other carceral spaces¹⁶². In that sense, forty years after *The New Criminology* and despite the efforts of nodal governance and elite deviance studies to decriminalize criminology, we are still lacking a political economy of social reaction or at least one that focuses on how different legal institutions administrate conflicts and justify punishment. The challenge of developing a political economy of social reaction consists in dealing with social reaction as a totality and in figuring how a mobile structure composed of different normative systems adapts to different contexts and situations.

After sailing through the immigration storm, strapped to the mast, I was not only able to see that “to live outside the law you must be honest”¹⁶³, but also, something more nuanced, that there are a multitude of legal regimes that are not organized in function of crime and penalties. The ethnographic part of this thesis (*Acts I and II*) documents well the distinct aspects of social reaction in immigration justice when compared to criminal justice. More particularly, in chapter 4, I described how the process of legal translation in the immigration regime differs substantially from criminal justice. The immigration regime operates with less legal guarantees, and transforms into legal facts events that would not necessarily have been translated into criminal law categories because of the lack of evidence. Before my fieldwork at the IRB, I knew to a certain extent that the kind of social reaction observed in the immigration regime was not about crime or criminalization. But I was not aware of the

¹⁶² See for instance Piché & Larsen (2010) discussion on the broadening of the penal abolitionist enterprise since the 1980s and how the contemporary abolitionist perception of the penal is much more in line with the broader conception of punitiveness that is being discussed in this dissertation.

¹⁶³ Excerpts from the song ‘Absolutely Sweet Marie’, from Bob Dylan, which was used as the main epigraph to the book *The new criminology*.

richness of such processes and I was surprised to learn that the punitive logics in place were also very different. As discussed in chapter 5, immigration punitiveness is not about penalties (*peine* or *poena*), but about police measures. The logic of intervention is essentially preventive and the punitive response can be triggered by a virtual act, something that exists as a *potentiality* and not as an *actuality* to put it in Aristotelian terms. Generally speaking, in the criminal justice system, the Crown has to prove an actual *actus reus* and the *mens rea* of criminal offences beyond any reasonable doubt¹⁶⁴. This is not the case in the immigration justice system as the Minister's counsel only has to prove that there are reasonable grounds to believe that an act potentially exists and the foreign national is then presumed negligent (strict liability) for this virtual act.

After reading *Acts I* and *II*, it should be clear that the notions of *crimmigration*, criminalization of immigration or any related category are simply not sufficient to describe social reaction in immigration regimes, and more specifically at the IRB. I also provided throughout this dissertation some elements suggesting that the widely used category of criminalization may also be problematic in many other contexts. Actually, this whole drama was deliberately set up like this. In the Overture, I opened new possibilities and gazes to observe social reaction and punitiveness. This was followed by detailed ethnographic material, which strongly questioned the idea of criminalization of immigration, but also aimed at raising doubts about the accuracy and reliability of the idea of criminalization itself. In fact, you never know in advance whether a social reaction process will only be about criminalization. This is perhaps one of the greatest lessons of elite deviance studies, which I

¹⁶⁴ There are of course exceptions, most notably in the case of negligence-based crimes, and regulatory offenses for which strict liability applies.

brought with me in the field. Social reaction may very well be about criminalization, but it can also be about administrative or civil adjudication, or even a mix of all of these and of legal pluralistic dynamics completely outside State law. There are numerous possibilities of social reaction and you will only know their shape after the fact, that is, after legal responses occur. Immigration matters contrast with elite deviance studies however in that immigrants are not elites and the fact that we use different normative systems against them has nothing to do with promoting impunity. Quite on the contrary...

At the IRB, I observed various cases in which foreign nationals were managed by different normative systems, mostly a combination and juxtaposition of immigration, criminal and regulatory regimes. While it was clear to me that immigration social reaction was not about criminalization, the existence of a plurality of social reaction processes pointed to additional conclusions. First, the process of criminalization is occasionally a part of broader social reaction processes. Secondly, the concept of criminalization is not precise enough to describe what is going on *even* when there is some form of criminalization because other forms of social reaction are also at play at the same time. For instance, a foreign national considered inadmissible on grounds of organized criminality (IRPA, s. 37(1)) does not need to be formally accused or convicted in the criminal justice system to trigger the immigration social reaction. However, he or she may very well face both social reaction processes (criminal and immigration justices). The idea of criminalization oversimplifies complex forms of social reaction by framing them in terms of crime and penalties. This is true in the case of immigration-related illegalities, but, and this is an important conclusion of this dissertation, it is theoretically also valid for any kind of illegality.

Finally, bringing politics back into the debate is also moving new criminology and critical

criminology out of “artificially segregated specifics”: those of criminocentric dogmatism. What I am proposing here is not merely making new nuances or refining the debate, to use Clifford Geertz’s words. Instead, I suggest looking at distinct social reaction processes and punitive regimes with their own specifics and legal sensibilities, nuancing what most criminologists traditionally frame as criminalization. This is the kind of nuances, which necessarily come with some theoretical implications. I am seeking alternatives for criminology from and within criminology and proposing a refinement that changes substantially the debate on social reaction and punishment.

Actually, this is why I began this thesis about the Immigration and Refugee Board of Canada with an *Overture*, much more in the sense of an opening or an aperture than of a beginning. In the first chapter, I characterized my research interests as being intrinsically related to elite deviance studies and to social reaction through non-criminal normative systems. This was a first movement in order to unlearn criminology, an empirical and methodological move. In the second chapter, I set out the theoretical bases of this thesis developed mostly in and from the field. While I chose to place these theoretical developments at the beginning of this thesis, they should be understood as conclusions or statements built from fieldwork and through analysis that helped me observing and nuancing certain practices of the IRB on the regulation of immigration in Canada. I had a hard time deciding whether I should place these findings before or after the ethnographic part of my thesis. But, they were a part of my gaze, of the way in which I made sense of the field, and consequently, these findings were necessary for the reader to fully understand the nuances and contributions of the empirical chapters. Chapter 2 indicates where I am going theoretically, what one needs to know to follow me into the field of immigration law. It also provides the necessary tools to relearn

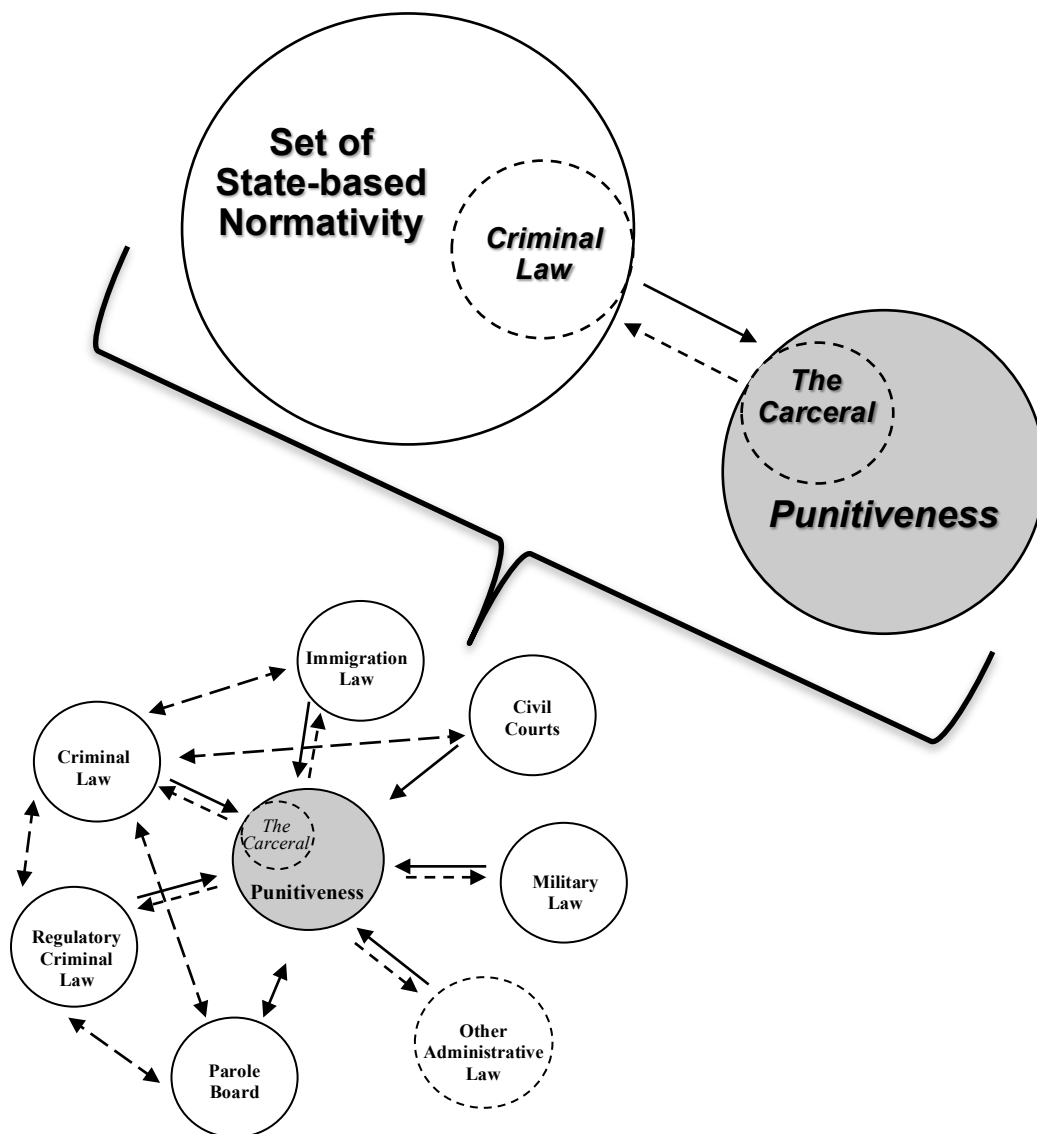
criminology, or at least to perceive the nuances in order to refine the debate on the criminalization of immigration, but also more broadly. Refining the debate in such a manner has two implications that will be addressed in this last chapter: first, revising the new criminology and the idea of selectivity of justice; and secondly, discussing penal policies at large and nuancing a regime of governance that does not necessarily focus on crimes, but on legal holes. This brings us back to the notion of the penal complex as a mobile-shaped model discussed in the *Overture* and as a totality.

I) New Criminology and Selectivity of Justice Revisited

In chapter 2, I followed Clifford Shearing's enterprise of decriminalizing criminology (1989), but I focused on justice studies rather than on policing. The first step towards the proposal of a mobile-shaped penal complex model was to question the hegemonic binary system composed by criminal law and the carceral used to think legal responses in both aetiological and social reaction perspectives, despite the deontologizing of crime promoted by the later. I did so by decentering criminal law and thinking social reaction through a multitude of normative systems (criminal, regulatory, civil and mixed regimes). This also implied decentering the realm of punitiveness from criminal law and criminal punishment. In other words, the mobile-shaped model is a combination of two mobiles composed of State-based normativity and punitiveness (see figure 10 below). It is not a matter of only

making crime (Ericson, 1981) or translating events into criminal law categories (Acosta, 1987), but of making illegalities (Acosta, 1988; Foucault, 1995) in a broader sense. This is not a new proposal in the sense that some of these ideas are already present in the elite deviance and nodal governance literature, and arguably in the work of Michel Foucault.

**FIGURE 10: DECENTERING CRIMINAL LAW IN TWO WAYS:
SET OF STATE-BASED NORMATIVITY AND PUNITIVENESS MOBILES**



Fernando Acosta (1988), for instance, suggested long ago that certain events are actually legally polysemic¹⁶⁵ and as such, they may be interpreted and transformed into legal facts in various normative contexts. Acosta draws a distinction between two types of illegalities: privileged illegalities (*illégalismes privilégiés*) and typical illegalities (*illégalismes typiques*). Privileged illegalities refer to illegalities, which can be legally translated through different normative systems, whereas typical illegalities are dealt with exclusively through one particular normative system, generally the criminal justice system. As discussed in *Heterogeneities (Act II)* and more particularly in chapter 5, immigration deviance, like elite deviance, is not only legally polysemic, but this polysemy can actually be cumulative in the sense that the illegality in question can trigger multiple institutional social reactions at the same time. Thus, building on elite deviance and nodal governance, I make two important contributions or nuances in this dissertation. First, privileged illegalities (*illégalismes privilégiés*) are not only restricted to the kind of deviance most traditionally associated with the elites and the powerful¹⁶⁶. They may also extend to the kind of deviance more generally associated to the regular clientele of punitive institutions, namely the poor, vulnerable populations, dangerous classes, populations at risk, or any other trendy category trying to make it sound more politically correct. To be sure, many nodal governance scholars have already showed that these populations were also and mostly managed by regulations. Here, I

¹⁶⁵ This statement builds on the contributions of ethnomethodology in the 1960s (e.g. Garfinkel, 1967) or, I suggest, can be even traced back to the first half of the twentieth century in Charles Peirce's theory of signs and the work of Bakhtin (1981, 1986), especially his ideas of dialogism, polyphony and heteroglossia.

¹⁶⁶ To be sure, Acosta did not mean to say that privileged illegalities were privileged because they exclusively referred to elite deviance or to crimes of the powerful. The privileged aspect of these illegalities refers to their polysemic character, that is the fact that they can be translated in different normative systems (Acosta, 1988, p. 13).

emphasize the judicialization aspects of social reaction and not necessarily the governance or political economy in a broader sense.

Secondly and perhaps more importantly, I suggest that at a theoretical level, all illegalities are privileged illegalities. Whether an illegality should be considered privileged or typical depends on the shape of the penal complex mobile as a result of the social reaction process. In other words, all events are legally polysemic, and illegalities that are considered typical because they are exclusively dealt with by one single justice system are actually privileged illegalities that were not (yet) translated through other available normative contexts. For instance, certain events involving gang affiliation are typically considered criminal matters or criminalizable, but they can also be translated in immigration and regulatory regimes through their own legal categories and sensibilities. The distinction between “privileged” and “typical” is not so much related to a kind of illegality, but to how the mobile adapts and reacts to a particular situation. By penal complex however, I am not talking about a penal system (Foucault, 1995) that pre-exists in a more or less demarcated way and which reacts to a given deviance, making crime. The penal complex, as I see it, does not really pre-exist; it is malleable and takes form as social reaction processes unfold. This is why it is very hard to predict the exact shape of the penal complex mobile in advance. Traditional criminology suggested that the penal system existed because there are crimes and social reaction criminology suggested that crimes existed because there is a penal system. I suggest that there are illegalities because there is a penal complex and that social reaction processes may produce different things, including crimes.

At this point of my thesis it should be clear already that this analytical penal complex model does not only apply to immigration issues. It is a general and open model that helps

understanding social reaction as a totality and accommodating different manifestations of legal punishment in our society. In the second chapter, I briefly discussed some historical and contemporary examples of such manifestations: the Poor Law and its work-houses, elite deviance (slavery in Brazil; Velloso, 2005, 2006), *Guantanamo Bay* (military law) and the use of ordinances or by-laws to control urban disorder which is currently one of the most common forms of punitive regulation in our cities¹⁶⁷. Regulatory criminal law is also an amazing nodal element in the penal complex and it is frequently used as a judicial alternative to criminal justice when problematic situations are not criminalized or even decriminalized. This is common sense in elite deviance studies and nodal governance. Criminal regimes are not well adapted to deal with such illegalities and the fluxes of social reaction flow mostly to regulatory regimes. Assuming that decriminalization represents depenalization is simply naïve. It ignores other forms of social reaction and punitiveness that do exist and have their own specifics, practices and historical developments. Institutional and/ or social changes do not happen in a sociological vacuum and once a problematic situation is not criminalized, usually it is conducted to alternative social reaction paths where the State ideological obligation to punish will be eventually achieved.

This was one of the major flaws of the new criminology. While Ian Taylor, Paul Walton and Jock Young called for “wider origins of deviant reaction” and suggested that “we [lacked] a *political economy of social reaction*” (*id.*: 273-274), they understood the selectivity of justice as the selectivity of criminal justice. As a rule, new criminologists and critical criminologists alike have been operating mostly within this framework for the last forty years. New criminology did not move beyond criminal justice to develop a political

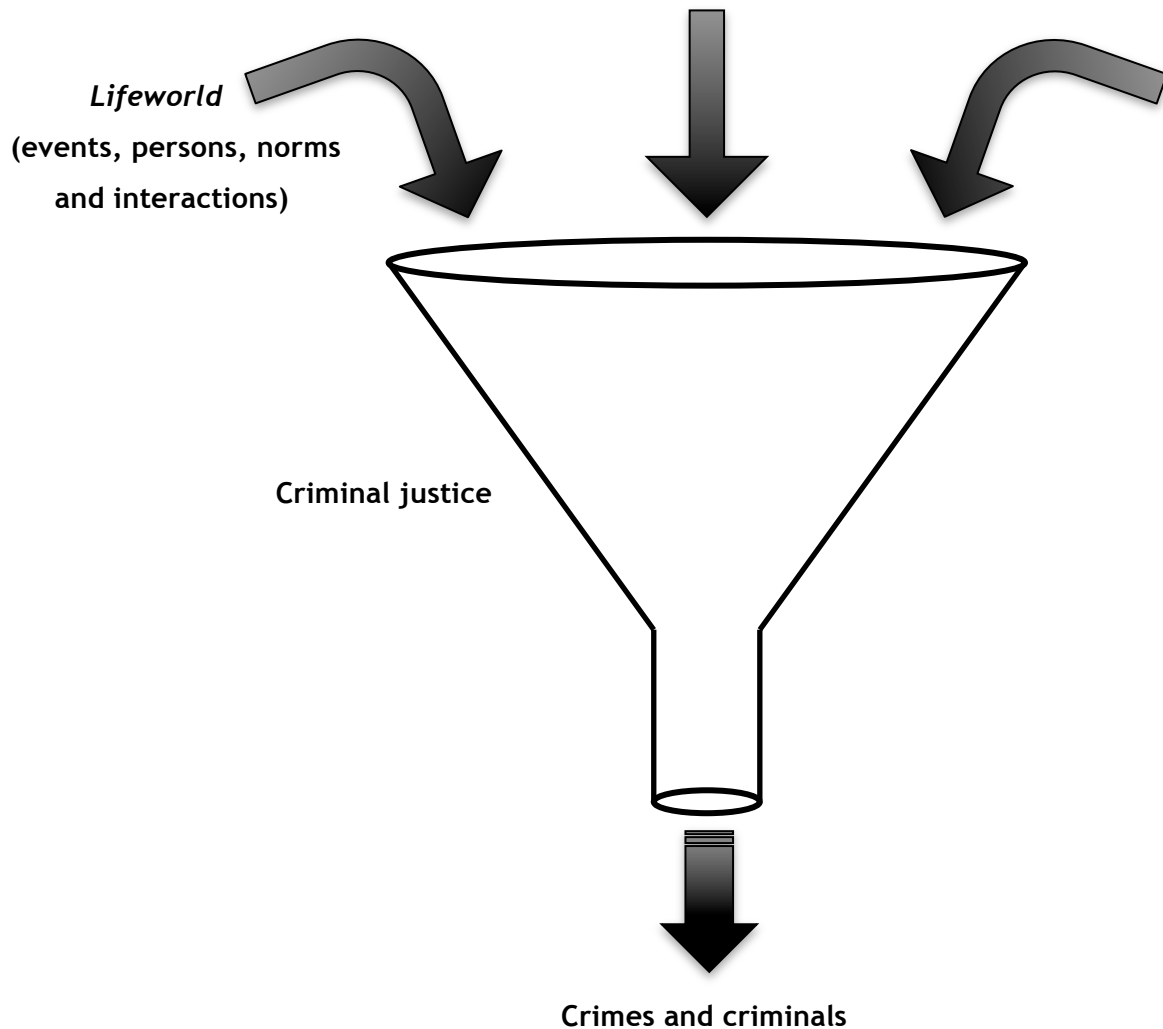
¹⁶⁷ Among many others: Beckett & Herbert, 2008, 2010; Blomley, 1994; Sylvestre, 2007, 2010; Ranasinghe & Valverde, 2006; Valverde, 2005, 2009;

economy of social reaction. Instead, they made two important contributions. First, they stressed that criminalizable behaviour was not restricted to a specific part of the population, as it was suggested by traditional criminology. Alternatively, they suggested that crime and criminality were universal. And secondly, they argued that criminal justice was in fact being selective mostly because of power relationships and macro-sociological determinants. As Young put it years later:

“The revisionism of the early 1970s period pointed to the endemic nature of crime (*universality*), and emphasized the systemic class bias in the focus of the criminal justice system (*selectivity*). And if universality made conventional positivist notions of causation unlikely, selectivity pointed to fundamental problems in neo-classist ideas of equality before the law.” (Young, 1999: 42).

As a result, the political economy of social reaction to deviance of the new criminology is at most a political economy of criminal justice, or a political economy of criminal social reaction. But in fact, this is contradictory. The idea of a political economy of social reaction to deviance does not fit with a model of selectivity restricted to criminal justice. Scholars working within a criminocentric perspective understand the idea of selectivity as referring to one, and only one selectivity funnel (see figure 11 below). This criminal justice funnel filters events (and persons) successively and produces crimes and criminals as outputs.

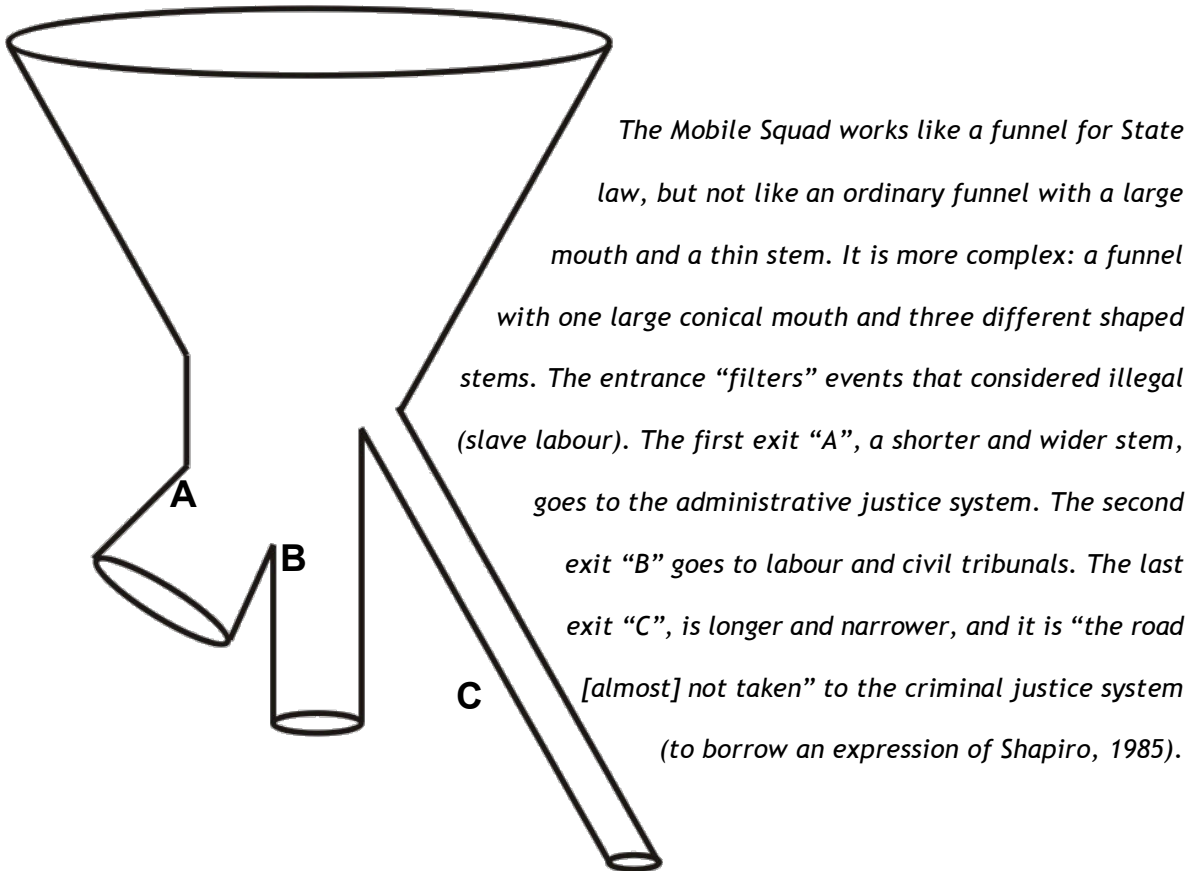
FIGURE 11: THE CRIMINAL JUSTICE FUNNEL



The use of the funnel metaphor to represent the selectivity of justice gained in popularity with the rise of social reaction criminology in the 1960s and 1970s, and it became fairly hegemonic since then (Robert, 1984, 1985; Robert & Faugeron, 1980). However, this is not the only existing funnel in the criminological field. Elite deviance scholars developed a variation of this selectivity funnel, a model with one wide mouth at the top and multiple narrower stems. Let me illustrate this second kind of funnel with the following example taken from my M.A. thesis. In this context, I built one of those funnels in order to visually

represent the legal responses given to contemporary slavery in Brazil by the Executive Group for Repression Against Forced Labour (GERTRAF – *Grupo Executivo de Repressão ao Trabalho Forçado*), most commonly known as the “Mobile Squad” (*Grupo Móvel de Fiscalização*). The Mobile Squad is a multi-institutional group responsible of “combating” contemporary slave labour in Brazil. Its members are public servants who work in different departments, agencies and other public institutions responsible of regulating slave labour. They include the Federal Police, federal prosecutors, labour prosecutors, the Labour Inspection Division of the Department of Labour and Employment (federal level), and eventually other State actors and agencies aiming to support the Squad’s main staff in their incursions into rather inhospitable areas (e.g. the Army). In short, the institutional social reaction to contemporary slavery starts in the context of the Mobile Squad inspections, which trigger different legal responses, mainly administrative and civil responses (civil law also includes labour law regimes in Brazil), and more rarely or almost never criminal responses. To draw an analogy with the selective funnel of the criminal justice system, the Mobile Squad plays the role of the police at the top of the funnel, “filtering” the events that are considered legal or illegal (slavery) under any of the normative regimes administered by the members of this multi-institutional group. The fact that the Squad works explicitly beyond criminal normativity already makes this funnel slightly distinct. But the big difference between the regular funnel and this one is the fact that there are at least three stems at the bottom of the funnel and not only one leading to the criminal justice system (see figure 12 below). The Mobile Squad’s funnel is not a funnel about the selectivity of justice, but about the selectivity of justices in the plural.

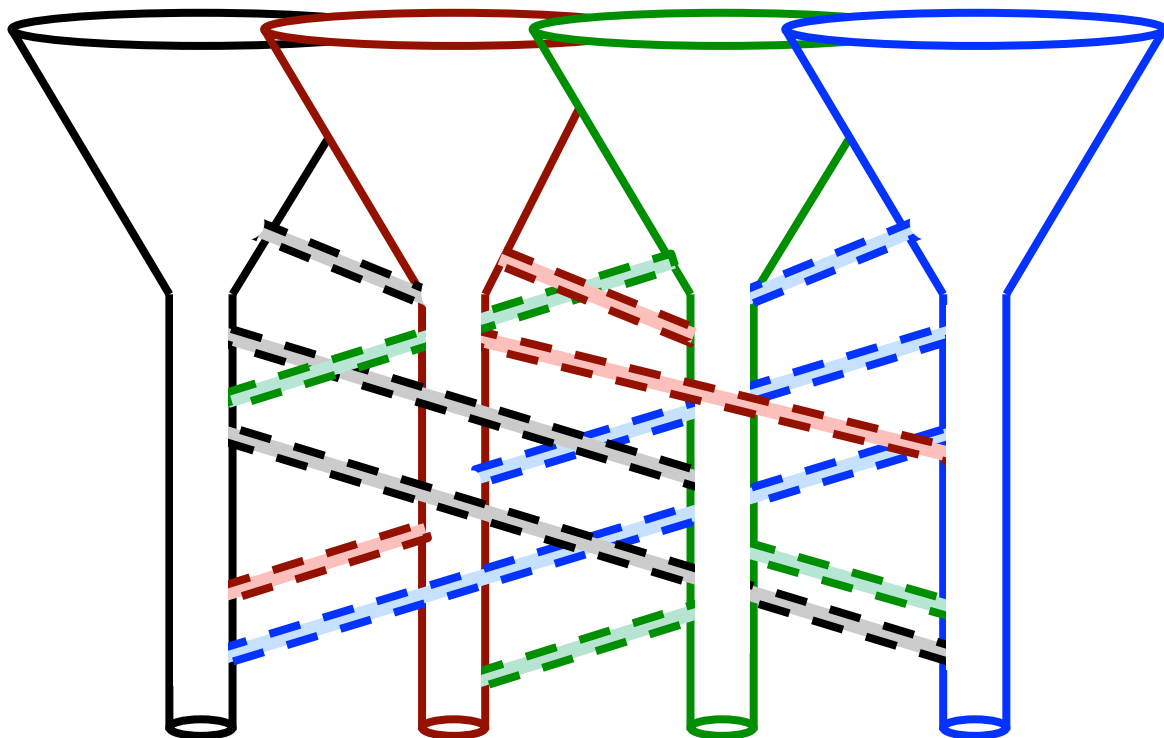
FIGURE 12: THE MOBILE SQUAD'S FUNNEL



Yet the conception of selectivity of justice that is implicit in the Penal as a mobile model is even more sophisticated. Like elite deviance studies, it operates through a conception of selectivity of justice that encompasses a plurality of normative regimes. However, and this was very clear during my fieldwork, it is not limited to one entrance or even to one selectivity of justice funnel. There are multiple entrances, a multitude of interrelated funnels in which each one of them corresponds to a different normative system at play during social reaction processes. This is so even if in some contexts a given institutional actor may operate more than one normative system, and consequently act in more than one funnel at the same time – for instance, the public police who enforce both criminal statutes and by-laws during their everyday routines. In this sense, social reaction may start in different funnels at the same time, or occur

successively as the output of one given funnel triggers the reaction of a different funnel. This is the classical example referred to in chapter 5 of the foreign national who is being criminalized first and then sent to the immigration justice system as a result of the initial reactive process. Moreover, these distinct selective funnels may communicate among each other throughout their respective selectivity processes. Thus, the social reaction to deviance may start in one funnel, continue in another and then even come back to the same initial funnel (see figure 13 below illustrating their interactions).

FIGURE 13: THE SELECTIVITY OF JUSTICES FUNNELS



During my fieldwork, I observed several cases that illustrate very well these processes, in particular in the context of removal order appeals. In a typical case, a foreign national is being managed through different normative systems, and he or she has to comply with multiple surveillance conditions imposed in two or three justice regimes, sometimes overlapping. But it

is not only that there are various normative systems or funnels operating at the same time. These normative systems and funnels also interact with one another. At the IAD, when immigration counsels contextualize the trajectories of their clients in different justice systems, an attentive observer realizes that what was so far only considered as a “crime” was in fact the result of different layers of legal translation. Sometimes a foreign national is found guilty for having breached a regulatory condition that ends up becoming a criminal offence; at others, it is a new regulatory offence which also constitutes a breach of probation sending the foreigner back to prison. And when the immigration regime interferes as well, it just adds another layer of complexity to an already multifaceted social reaction process. At the end of the day, the immigrant’s long deviant record is much more about an odd Kafkaesque Ping-Pong from one selective funnel to another, from which it seems almost impossible to escape. And here, I am only talking about the fluxes of administration of conflicts that flow from one normative system to the other in the mobile-shaped model. If I were to add to this picture some of the contributions of labeling theory such as the notion of deviant “role engulfment” proposed by Edwin Schur (1971) or even the more general idea of self-fulfilling prophecy, we could argue that the plurality of social reactions combined with the imputation of deviant identities may produce even more crimes. This would not only be the result of the different fluxes or interactions among the funnels, as a sort of re-translation or short-circuit, but also because of the creation of new behaviours that may be considered illegal or even criminalizable – for instance, the imposition of probation or bail conditions creates new opportunities for breaches which in turn creates more crimes.

The case of Dany Gilberto Villanueva Madrid discussed at the end of chapter 5 is a very good example of these Kafkaesque normative imbroglios. The coroner’s report on the causes

and circumstances of the death of his brother Fredy Villanueva (Perreault, 2013) shows these social reaction processes at work and is revealing of the kind of shapes that the mobile can take in everyday life. Dany Villanueva first got involved with the Montréal police (SPVM) and with justice institutions in 2003, roughly five years before the fatal incident. His first contact was however not related to crime or criminal justice. He was rather subject to the social reaction process of regulatory criminal law. More specifically, he was convicted by default for refusing to leave a park after being ordered to do so by a peace officer. The offence report contextualized the problematic situation as a confrontation “Latino vs. Haitian”. In 2004, he was found guilty of being in a park after hours, a regulatory offence contrary to Montreal by-laws, and in February 2006, he was convicted again by default for playing dice (gambling), another violation to the municipal by-law regarding parks. A month later, he was arrested with four gang members and he formally made his entry in the criminal justice funnel. In April 2006, he was convicted to one year in prison and two years of probation for a robbery, to six months in prison for possession of a prohibited or restricted firearm, and to thirty and seven days in jail for breaches of an undertaking to be served concurrently. He is eventually sent back into the same criminal justice funnel for breaching his probation conditions while at the same time being processed by regulatory criminal law for a parking offence in 2007. In 2008, he is once again sent back to criminal justice for being accused of theft. Meanwhile, in July 2008, Dany Villanueva is first notified by CBSA requiring him written submissions for an eventual inadmissibility application on the grounds of serious criminality, possibly due to the 2006 gang-related robbery case. His counsel writes back to CBSA at the beginning of August. Four days later, on August 9, 2008, Dany Villanueva is playing dice in the Henri-Bourassa Park with a group of friends, knowing that he is still under probation, which includes the condition of keeping the peace and the

condition not to be in the presence of at least two people in the group, and knowing that he has to appear before the Municipal Court of Montreal later that month and at the Montréal courthouse in Mid-September to respond to new criminal charges.

While according to the report, Dany Villanueva had stopped playing dice ten minutes before the police arrived on the scene, he, and possibly his brother, knew that he is in big trouble. The fact that he was playing dice, a municipal regulatory offence, would almost certainly produce effects in the criminal and the immigration justice systems. In other words, the act of playing dice in a park is technically not criminalizable or does not constitute a violation of the IRPA, but the process of legal translation in a regulatory regime produces legal facts that may flow to other selectivity funnels, contributing or even being determinant to the creation of crimes and immigration offences. This scenario is fairly different from the scenario contemplated by the first two selectivity funnels presented above because the fluxes do not necessarily come only from the *Lifeworld* into the funnels. Actors operating in one funnel can contribute directly or indirectly to the selectivity process of other funnels and the social reaction process may continue in the same funnel and/or in other funnels in a concurrent and complementary manner. In the particular case of Dany Villanueva, the social reaction mobile-shaped model was composed of three normative systems (regulatory criminal law, criminal law and immigration law) and the regulatory translation of playing dice in one funnel created fluxes, via short-circuits, to other selective funnels (criminal and immigration regimes), producing new possibilities of punitiveness that cannot not be directly associated to the original behaviour or act or to the first legal translation of the event. This is exactly the same illustration of *punitive surplus value*, to use the concept developed in chapter 5, but presented via a selectivity of justice perspective.

The reasoning of the recent Supreme Court decision in *R. v. Pham* (2013 SCC 15) is another way to perceive the fluxes between normative systems and the changes in the mobile also in terms of punitiveness. In this case, a unanimous Supreme Court held that “collateral immigration consequences may be just as relevant in sentencing as the collateral consequences of other legislation or of circumstances specific to the offender” (*id.*: §22). Thus, the current criminal sentencing doctrine suggests that the possibility of immigration consequences, that is, the possibility of fluxes to another selective funnel, produces changes in sentencing. According to the Supreme Court, the issue of immigration consequences can be properly brought to the sentencing judge who can decide whether he will impose a two-year or a two-year less a day sentence in order not to prevent the offender from his right to appeal from a removal order at the IAD. Where the trial judge considered immigration consequences and decided nonetheless to impose a two-year sentence, then the appellate courts should defer to that decision:

“Where the issue of immigration consequences is brought to the trial judge’s attention and the trial judge applies the proper sentencing principles but nonetheless decides on a two-year sentence, then, absent fresh evidence, deference is owed to that decision. Where this issue has not been raised before the trial judge and the Crown does not give its consent, an affidavit or some other type of evidence should then be adduced for consideration by the Court of Appeal.

An appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue. (...). As I explained above, however, the aim of such an intervention is to determine the appropriate

sentence in light of the facts of the particular case while taking all the relevant factors into account. Although there will be cases in which it is appropriate to reduce the sentence to ensure that it does not have adverse consequences for the offender's immigration status, there will be other cases in which it is not appropriate to do so." (*id.*: para. 23-24)

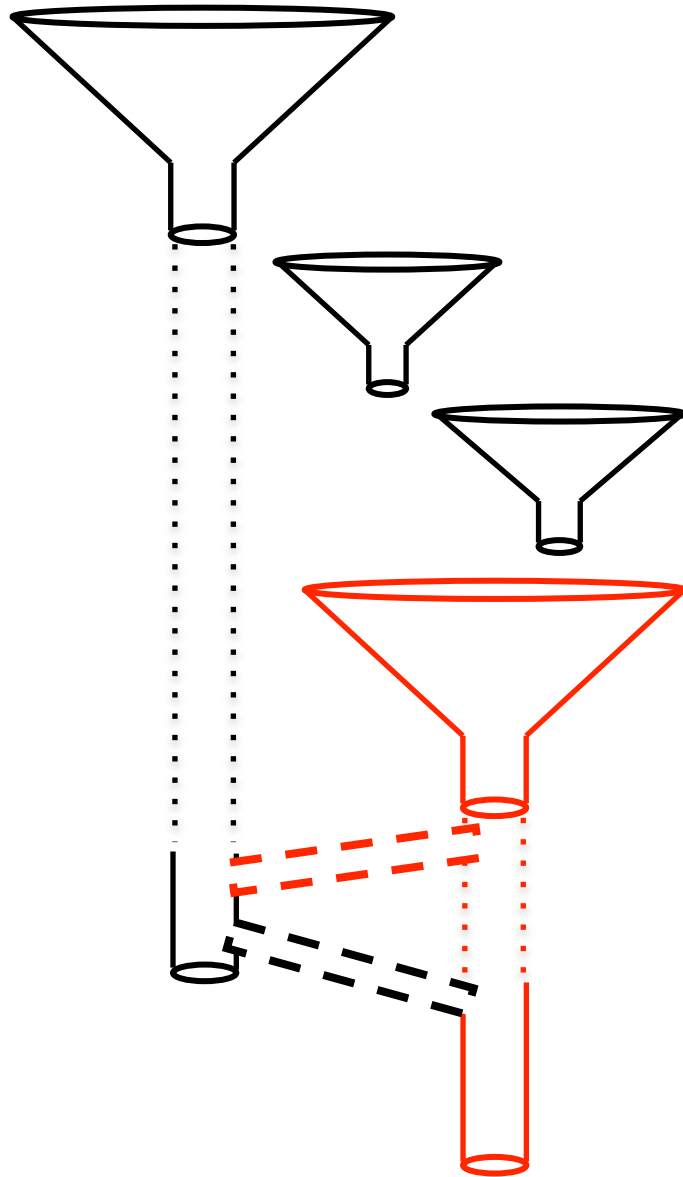
Two years before *R. v. Pham*, the Court of Appeal of Manitoba was asked to decide the case of *R. v. Arganda*, 2011 MBCA 54 and pushed a similar reasoning to its limits. In *R. v. Arganda*, the Court of Appeal wrote that "[a]s will be apparent, the circumstances giving rise to this appeal are highly unusual" (*id.*: para. 2). *R. v. Arganda* was an appeal to revise the criminal sentence after it had been served in order to obtain a right of appeal from a removal order at the IAD in the immigration regime. In 2006-2007, Joselito Arganda was involved "in a fraudulent cheque-writing/cashing scheme" (*id.*: para. 4) and in October 2007, he "pled guilty in Provincial Court to various charges and received an effective two-year jail sentence, followed by 18 months' supervised probation" (*R. v. Arganda*, 2011 MBCA 24, para. 1). Mr. Arganda served his sentence, but reoffended in at least two different occasions. First, in May 2009, he was convicted of possession of stolen property, personation with intent and failure to comply with his probation order and a summons, and sentenced to 75 days in jail. In April 2010, he was sent back again to the criminal justice system and convicted of possession of a weapon for a dangerous purpose and sentenced to a \$500 fine and to one-year unsupervised probation with conditions (par. 8-9). These cases stimulated the immigration regime to react as well and in December 2010, he received a removal order with no right of appeal because he had received a sentence of two-year imprisonment in 2007, whereas a sentence of less than two years would have given him the right to appeal (s.

64(2) *IRPA*, at that time¹⁶⁸). After receiving this notice, Mr. Arganda filed an appeal before the Court of Appeal to have his sentence reduced to two years less a day based on the fact that the sentencing judge had not considered his immigration status at the time. The Manitoba Court of Appeal allowed the appeal and this changed the social reaction in the immigration funnel.

I can make the following observations by using the mobile-shaped model to analyze the social reaction to the Arganda case. First, the social reaction mobile is composed by at least two active normative systems: criminal justice and immigration justice. I say “at least” because the original case was related to fraud and regulatory regimes could have been involved as well. It may be however that the entry in the criminal justice system and the guilty-plea ended up obstructing the access to the regulatory regime. In other words, regulatory criminal law could have been included in this particular mobile with a less active role. Secondly, the conflict resolution fluxes are very complex. The first case passed through the criminal selective funnel and it was already out of this funnel when Mr. Arganda passed again and again through criminal justice due to different events. But then, when the combination of these three fluxes triggered an entry in the immigration selective funnel, the first criminal flux was sent back in the criminal justice funnel in the context of an appeal to create the possibility of an immigration appeal, which was not available originally. As shown in figure 14 (below), there are discontinuities in both criminal and immigration funnels and, curiously, it was the fluxes between them that created new possibilities of legal responses, but also of resistance to punitiveness.

¹⁶⁸ The Parliament changed this section of the *IRPA* recently and I will discuss it in the following pages.

FIGURE 14:
SELECTIVITY OF JUSTICE
IN ARGANDA'S CASE



And this brings politics back again into the discussion. But before I turn to the possibilities of resistance to punitiveness embedded in this model, I will go back to the State and more particularly, to the possibility of implementing penal policies through a multitude of normative regimes. As we shall see and as Louk Hulsman once warned me, we cannot trust the State (see *supra* epigraph to *Act II*).

II) Governing through Legal Holes: Penal Policies at large

In the previous section, we saw that social reaction to behaviour may involve different selectivity funnels, and more particularly, that the non-criminalization or even the decriminalization of problematic situations does not necessarily result in a lack of social reaction and of punitiveness. As I showed in *Acts I* and *II*, the use of administrative or mixed regimes may be as punitive as the criminal justice system, or even worse if we consider the fact that administrative justice systems include lower levels of legal guarantees and may react to events which would not have been processed in the criminal justice system because of a lack of evidence. In this subsection, I want to show that government is in turn not limited to one normative system or funnel when it develops strategies of governance and penal policies. As Ericson (2007) has argued, these initiatives are enacted through counter-law dynamics that antagonize “the traditional principles, standards, and procedures of criminal law” (Ericson, 2007: 207).

Contemporary social reaction, and this is arguably true of other historical periods as well, is not only a matter of *governing through crime* (Simons, 2007), but of governing through different legal regimes. The war on crime and neoliberal penalty did indeed transform American (and Canadian) democracy by imposing harsher criminal penalties, but also by activating other normative systems. In fact, the war on crime or the tough on crime agenda was never focused on crime per se. Crime is not a particularity of events or of people, but part of social reaction processes. Moreover, as I argued earlier, the penal complex as a mobile implies that all illegalities are privileged illegalities and the social construction of

crime may be the result of multiple dialogues and voices from different normative systems. The war on crime was always a war on nuisance, immorality, abnormality, illness, race, poverty, gender, etc. Crime has always been an ancillary and unessential aspect of this war.

Thus, contrary to what Simon argues in his new penology articles (Feeley & Simon, 1992; 2003) and in his book *Governing through crime* (2007), the new form of governance is not new and it is often not related to crime. The war has not changed much since the rise and the consolidation of capitalism, deploying similar legal and political tools and targeting more or less the same populations. It is not a matter of novelty, but of scalability. What is increasingly explicit today is the existence of integrated penal polices that operate along, beyond and in addition to criminal justice. David Garland made a similar argument when he introduced the notion of welfare sanction and of the welfare/control complex (1981, 1985). He suggested that: “social regulation (...) is produced through a whole complex of agencies of social investigation and scrutiny in which the penal option is the last of many, the coercive end of a much broader continuum” (Garland, 1981:29). Garland was absolutely right: social control is not restricted to criminal justice or criminal policies, but rather about social regulation, governance and policies at large.

One of the great lessons from the social reaction processes displayed at the IRB is how legal translation and punitiveness follow different logics, practices and legal sensibilities. As I argued throughout *Acts I and II*, especially in chapters 4 and 5, immigration social reaction is not about crime or penalty (*poena*). The immigration regime fits perfectly in the concept of legal holes (Steyn, 2004, Dyzenhaus, 2006; Vermeule & Posner, 2007; Vermeule, 2009), which are a form of legal pluralism via deference (Arthurs, 1979, 1983, 1985), as discussed in chapter 6; or as Jedi master *Yoda* would put it: legal holes a dark

side of legal pluralism are, a pluralism that leads to fear, anger, hate, suffering. Accordingly, it is fair to argue that most of the time immigrants are governed through legal holes and not necessarily through crime, as making crime is not a technical requirement to trigger immigration social reaction. It is in this sense that I problematize and push the concepts of *governmentality* (Foucault, 2007, 2008; Burchill et al., 1991; Rose et al., 2006; O'Malley, 2010) and of *governing through crime* (Simon, 2007) to its limits in order to explore more freely the different configurations of the penal complex and the specific forms of social reaction at play. Alternatively and complementarily, I propose the idea of governing through *legal holes* to nuance and cover aspects that are not explicit in Simon's work and in other criminological appropriations of Foucault's work. In short, governing through legal holes shifts away from crime and focuses on administrative provisions and instruments used as alternative to punishment. These forms of social reaction avoid criminalization and normalize exception through a mix of questionable legislation and judicial deference to executive action (e.g. the *standard of review analysis* in Canadian administrative law). Governing through legal holes should not be taken as a substitute to governing through crime, but as a refinement of that debate.

Actually, these categories become relative and situational when one considers the penal complex as a totality. The frontiers between governing through crime and governing through legal holes are increasingly blurred, especially when considering broader penal policies such as the "war on crime" or the "tough on crime" agenda. The Canadian government systematically takes consideration the immigration justice system while making and enforcing penal policies or adopting "tough on crime" law reforms. For instance, the *Safe Streets and Communities Act*, most commonly known as the *Omnibus*

Crime Bill, amended the Criminal Code and a whole bunch of other statutes, including the IRPA. Every normative system has its own specifics, practices and legal sensibilities, but they should not be reified into artificially segregated specifics; they are also part of a whole (the penal complex mobile), either in terms of normativity or punitiveness. Law enforcement actors and prosecutors use different normative regimes in their everyday routines in order to enforce penal and security policies. Those representing the State do not want to abdicate any of the normative systems in their toolbox. On the contrary, State actors use anything available in terms of social reaction even if that means that they must give away the due process of law or even the rule of law in order to do so. The case of Dany Villanueva is a good example of this. Finally, we live in a society with less and less criminal trials. Around 90% of all criminal cases in Canada are settled through non-trial procedures (Kong, 2005, p. 46), and these convictions produce all kinds of effects in the penal complex mobile.

Let us come back to the case of Joselito Arganda (*R. v. Arganda*) to illustrate this further. First, this case clearly blurs criminal policies and immigration policies. The removal order policy executed by the CBSA prioritizes the removal of dangerous criminals from Canada. Does this make this policy a criminal or an immigration policy? The answer is far from being simple, especially when considering the consequences of such policies and the Department behind it (Public Safety Canada). It is perhaps more accurate to describe in totalizing terms as a penal policy, operating and producing effects in different regimes. Secondly, and this is perhaps the most interesting aspect of the Arganda case, both the appellant and the State have considered the penal complex in its totality in their respective strategies. Remember that after State actors mobilized the immigration regime, Mr. Arganda

countered the counter-law strategy by appealing to the criminal justice system to create a new possibility of defense in the immigration regime. In doing so, he fought back using the dialogism and heteroglossia of the penal complex mobile, that is, he relied on the coexistence, the interactions and the contradictions of a variety of speeches in the juridical field. Mr. Arganda won that battle, although it is unclear whether he will ultimately win the war at the IRB, and two years later, the Supreme Court in *R. v. Pham* confirmed that collateral immigration consequences should be taken in consideration in criminal sentencing.

But the penal complex mobile is always moving, or, as Captain Nemo said aboard *The Nautilus*¹⁶⁹, it's moving within the moving element (*mobilis in mobile*). The government also stroke back, taking the quickest, the easiest, and the more seductive path of the dark side of legal pluralism via deference by turning the immigration legal grey hole in almost a legal black hole. In June 2012, Jason Kenney, the minister of Citizenship and Immigration at the time, announced the tabling of Bill C-43: *Faster Removal of Foreign Criminals Act*. It is interesting to note that the Minister of Public Safety and Emergency Preparedness did not table the Bill despite the agencies under Public Safety Canada portfolio. Bill C-43 proposed to deny access to the IAD to those sentenced to six months imprisonment or more in the context of appeals from removal orders on grounds of serious criminality. It also proposed to reduce the access to humanitarian and compassionate considerations (H&C) in these appeals. Not surprisingly, Minister Kenney referred to the Arganda's case as one of the main antagonists in his discourse to announce the tabling of Bill C-43¹⁷⁰. The Supreme Court's decision in *R. v. Pham* was released in March 2013 and the *Faster Removal of Foreign*

¹⁶⁹ Referring to the motto of the Nautilus, in Jules Verne, *Twenty Thousands Leagues Under the Sea* (1870)

¹⁷⁰ <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-06-20.asp>, last accessed on 2013-12-12.

Criminals Act was assented in June 2013. As a result, sentencing judges still have to consider immigration consequences in imposing their sentences, but they have much less discretion. Any sentence imposing more than six months in jail is likely to produce one of the worst immigration consequences: a removal order without the possibility of appeal. The motto of this new legislation is to grant even more discretionary power to the executive branch of the State than it already has in the immigration justice system – it is to darken even more the immigration legal grey hole. The objective is not only the removal of foreign criminals, but to remove them faster, ideally without any legal means of defense. As discussed in *Act I*, structurally-speaking, there are barely any possibility of disputes in the Immigration Division of the IRB. The outputs of admissibility hearings are very exclusive: more than 90% of the cases result somehow in a removal order. The only possibility of dispute on the immigration side of the IRB is at the Immigration Appeal Division and the only effective mean of defense is humanitarian and compassionate grounds (H&C). I did not observe the IRB in action under this particular statute and other “tough on crime” legislation, but it is not necessary to be a witchdoctor to predict that IAD will receive less removal order appeals and that the IRB outcomes will be even more exclusive when considering the ID-IAD social reaction dynamics.

In the last decades, Canadians have been experiencing a traditional “tough on crime” agenda, one that focuses mainly on the *Criminal Code* and harsher criminal sentences, but also a more sophisticated conservative agenda focusing on the administration of justice and on regulatory and administrative regimes and apparatuses. The federal government’s political reaction to the case of *R. v. Arganda*, and arguably *R. v. Pham*, should not be taken in isolation. Since 2006, Stephen Harper’s government implemented penal policies

and enacted new legislation that increased the use of administrative dispositifs, administrative law-based normative systems and resulted in a certain shrinking of criminal adjudication. This does not necessarily mean less social reaction to deviance, but less criminal processes and less constraint to executive action by granting more discretionary power to actors representing the executive branch of the State (the police and the crown) and undermining the judiciary. The “war on deviance” operating through legal holes is not the result of a *law and order* agenda, but of an *order and order* agenda, which imposes more sanctions while providing less legal processes.

The adoption of the *Truth in Sentencing Act* is one of the first explicit moves made by the conservative government along these lines. The Act limited considerably the amount of credit that can be taken into account by the sentencing judge for pre-trial custody. Before this Act, judges had the discretion to take into account any time spent in custody as a result of the offence, and as a rule, judges were granting credit on a 2:1 basis, two days for every day served. While trial judges who departed from the 2:1 basis had to provide justifications, in very exceptional cases, judges went as far as granting credit on a 3:1 basis. As a result, an offender who had spent six months in pre-trial detention and received a two-year imprisonment sentence typically served one year of imprisonment according to the 2:1 rule. The *Truth in Sentencing Act* changed this practice by limiting any credit for the time spent in custody to a maximum of one day (1:1). In exceptional cases, “if the circumstances justify it”, the Court may give a credit on a 1.5:1 basis (s. 719(3) (3.1) *Criminal Code*). Not only does the new legislation introduce important policy changes, but it also explicitly suggests that the time spent in preventive detention (a police measure) is the equivalent of the time spent in imprisonment (a penalty/ *poena*). I think the message is clear: if the time spent in pre-trial custody when an accused is presumed innocent can be equally compared to the time

spent in custody after a trial before an independent tribunal, then due process of law is a detail, if not a nuisance. The new legislation goes directly against “the traditional principles, standards, and procedures of criminal law” (Ericson, 2007: 207). It is also, and more importantly, about making the criminal justice system more deferential to executive action; that is, hybridizing criminal law by creating administrative dispositifs and legal holes. Curiously, the war on crime is also, and increasingly so, a war on making non-crime.

The *Truth in Sentencing Act* was however only the first of a series of proposals intentionally designed to make substantive changes in the shape of the penal complex mobile. Bill C-10, the *Safe Streets and Communities Act*, followed the same trends. This Act reduced the constraints on executive action by increasing the scope of pre-trial detention and by creating new mandatory minimal sentences. It also proposed changes to the *Corrections and Conditional Release Act* and creates additional barriers to obtain a pardon from the Parole Board of Canada. In doing so, the Act increases the possibilities of keeping offenders in penal institutions and of recidivism through minor breaches of conditions or even minor offences that are not necessarily criminalizable (e.g. Dany Villanueva playing dice in a park). Bill C-31 or *Protecting Canada’s Immigration System Act* was designed in the same way. This legislation granted more discretionary powers to CBSA, in particular with respect to the power to designate certain people or groups of people as “designated foreign nationals” and to detain them or considerably limit their ability to apply for temporary permits and permanence residence, including in the case of refugees¹⁷¹. The Bill also limited detention reviews by the Immigration Division: while detention reviews at the ID were held within the first 48 hours, then within 7 days and then, every 30 days

¹⁷¹ See the interesting analysis of Delphine Nakache (2013) on the impacts of Bill C-31 on refugee claimants, especially regarding detention.

afterwards, the new Statute provides that the initial review should be held within 14 days and then every six months in the case of designated foreign nationals. Actually, the federal government had originally proposed mandatory detention without review before one year for refugee claimants who arrived as part of designated irregular arrivals and become designated foreign nationals. The opposition suggested amendments and the conservatives ended up proposing a compromise of a first detention review within 14 days and subsequent reviews every six months for these cases.

Governance through legal holes however is not restricted to the conservative federal government. The liberal provincial governments of Ontario and Quebec also created legal holes to respectively manage the G20 summit in Toronto (on June 26-27, 2010) and to provide additional tools to the punitive social reaction of students' strikes and political protests in 2012. In the case of the G20, the Ontario government quietly passed *Regulation 233/10*¹⁷² on June 2, 2010, pursuant to the Ontario's *Public Works Protection Act*¹⁷³, designating a good part of downtown Toronto situated within the G20 security fence as a "public works" area. This regulation was so nebulous that the *Toronto Star* remarked a week before the G20 that while the regulation "appeared without notice on the province's e-Laws online database last week [June 16], it won't be officially published in The Ontario Gazette until July 3 – one week after the regulation expires"¹⁷⁴. To understand the scope and effects

¹⁷² http://www.e-laws.gov.on.ca/html/source/regs/english/2010/elaws_src_regs_r10233_e.htm

¹⁷³ http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p55_e.htm

¹⁷⁴ Jennifer Yang, The G20 gives police sweeping powers to arrest people, *Toronto Star* online, June 25, 2010, retrieved from: http://www.thestar.com/news/gta/g20/2010/06/25/g20_law_gives_police_sweeping_powers_to_arrest_people.html, last accessed on 13-01-2014

of this regulation, we should know that the *Public Works Protection Act* is a piece of legislation originally enacted in 1939 as an emergency statute in the context of World War II and which aimed to protect infrastructures, public buildings and any place defined as “public works” from wartime enemies (McMurtry, 2011). This legislation granted super police powers to “guards”, including the possibility to fine or to imprison any person who neglected or refused to comply with the Act, even the “guards” themselves through a breach of duty of guard provision. Thus, the Toronto police not only had super-police powers in terms of search and seizure, use of the force and arrests (Ombudsman, 2010; CCLA & NUPGE, 2011; McMurtry, 2011; Toronto Police, 2011; OIPRD, 2012), but they also had the mandate to enforce these dispositions under the threat of being punished themselves. In these circumstances, it came as no surprise, at least for me, that one of the largest mass arrests in Canadian history (1,105 people were arrested in two days according to the police) occurred in the context of the G20 summit in Toronto. The provincial government created a legal black hole. But while this legal hole was valid for about a week at a very specific location, it has had effects in the penal mobile on a longer period of time. The G20 legal hole was regulatory-based and it produced effects in this specific regime through the imposition of fines. But more importantly, many people were released under conditions and, as we have seen, breaches of these conditions may trigger the reaction of different selective funnels. Moreover, the very fact that someone has once been policed and appears in the police’s records may increase substantially the possibilities for that person to enter regulatory, criminal and immigration regimes in the future.

The Quebec government followed a similar, yet distinct strategy in its governance of the 2012 students’ strike and political protests. In this case, the governance through legal holes

strategy was not implemented in the same dramatic conditions as the G20 in Toronto and it arguably backfired. After three months of students' strikes and of daily protests, especially in Montréal, the provincial government proposed *Bill 78* (*Projet de loi 78*; LQ, 2012, c.12¹⁷⁵), an emergency law adopted on 18 May 2012 after twenty hours of debate during an extraordinary session of the National Assembly of Quebec. The official purpose of *Bill 78* was to enable "students to receive instruction from the postsecondary institutions they attend", by suspending the current academic sessions and regulating when and how classes would resume in order to save the academic year. More interestingly for our discussion, *Bill 78* also included "further provisions to maintain peace, order and public security as well as various administrative, civil and penal measures to ensure enforcement of the law" (*Bill 78*, explanatory notes). In short, the legislation aimed at controlling students' protests, mostly in Montréal, but also in other cities, by regulating political demonstrations more strictly (*Bill 78*, s.16 and s.17) and by making students' associations liable for breaches committed by their members. The Act provided for specific sanctions, namely fines ranging from \$1,000 to up to a shocking \$125,000, if a student association committed the offence. Fines also doubled in value for a second or subsequent offence (*Bill 78*, s.26). The Act came into force immediately and was supposed to cease to have effect on 1 July 2013.

Bill 78 (Quebec) created a legal hole similar to that created by *Regulation 233/10* under the *Public Works Protection Act* (Ontario), but there were two main differences in the Quebec case. First, there were no official mechanisms to control those responsible for enforcing the Act, no fines or imprisonment for breach of duty of guards, leaving the police forces with enough discretion to decide whether they would enforce it or not.

¹⁷⁵ <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2012C12A.PDF>

Secondly, the public and the political reaction to the Act, and more importantly the timing of such reactions, differ. In Quebec, the reaction was not as fast and furtive as in Ontario. In Ontario, the reaction arose after the damage was already done. In Quebec, the reaction started in the legislative assembly: the twenty hours of debate constituted a first form of resistance. Subsequently, different institutional actors reacted criticizing *Bill 78*, especially the restrictions on the rights to freedom of expression, freedom of association and peaceful assembly, including the three major students' associations in Quebec, political parties (the *Parti québécois*, *Québec solidaire* and *Option nationale*), the main unions of Quebec, the Quebec Bar, the Quebec Human Rights Commission (*Commission des droits de la personne et des droits de la jeunesse du Québec*), various legal experts and NGOs, and last but not least, the population of Quebec who literally and in great numbers took the streets in support of students' rights and democracy. The Quebec government built a legal hole, but it was not really implemented in terms of governance. In this political context, the Montreal police chose not to use the new legislation. Instead, the police turned to existing by-laws and to the *Criminal Code*, which nonetheless allowed them to proceed to mass arrests (3509 between February 16 and September 3, 2012) and to a massive distribution of fines (2433 tickets were issued during the same period) (Ligue des droits et libertés et al, 2013).

Finally, the Quebec strategy of governing through legal holes arguably backfired for two reasons: first, there was already a light gray legal hole in place via regulatory criminal law, and secondly and more importantly, the reaction to what seemed to be an unnecessarily darker legal hole was very strong. In Toronto, the police asked for more policing power (and discretion) to deal with the G20 and they paid the political price of

its excesses, at least symbolically. In Montreal, two years and some G20 reports later, the police said “*non, merci!*”, kept doing its job as usual and the City asked for extra money to the provincial government to cover the expenses of additional hours of police work¹⁷⁶ to clean up the mess Quebec created and intensified¹⁷⁷ with *Bill 78*. This brings politics back into the discussion once again: juridically, legislatively and in the streets, creating new possibilities of resistance.

III) The Penal Complex as a Totality: towards multiple sites of resistance

It is important to think of the penal complex as a dynamic process and as a totality. This is not only helpful to better understand punitive social reaction, but also to evaluate and

¹⁷⁶ Karim Benessaïeh, Heures supplémentaires au SPVM : Montréal veut au moins 10 millions, La Presse.ca, 15 June 2012 : retrieved from <http://www.lapresse.ca/actualites/dossiers/conflit-etudiant/201206/14/01-4535114-heures-supplementaires-du-spvm-montreal-veut-au-moins-10-millions.php>, last accessed on 13-01-2014. Denis Lessard, Aide financière de Québec au SPVM : Bachand en accord, LaPresse.ca, 15 June 2012, retrieved from <http://www.lapresse.ca/actualites/dossiers/conflit-etudiant/201206/15/01-4535304-aide-financiere-de-quebec-au-spvm-bachand-en-accord.php> , last accessed on 13-01-2014.

¹⁷⁷ Hugo Pilon-Larose, Commission Ménard : la loi spéciale a amplifié la violence selon le SPVM, LaPresse.ca, 24 October 2013, retrieved from <http://www.lapresse.ca/actualites/dossiers/conflit-etudiant/201310/24/01-4703360-commission-menard-la-loi-speciale-a-amplifie-la-violence-selon-le-spvm.php>, last accessed on 13-01-2014

strategically plan our real capacities of intervention in the penal field. When I argue that we should think twice before proposing the simple decriminalization of conflicts because it may only get worse in administrative law-based regimes, criminologists frequently ask me whether my position ends up legitimating the criminal justice system. This is not the case. First, I never phrased my argument in these terms; and second, this is a false paradox. It is a legitimate question, of course, but it does not make sense when you are working with an extended conception of the penal field as a mobile and a totality. The paradox lies somewhere else, in how criminocentric approaches perceive the phenomenon of decriminalization. Abolitionist-oriented innovations in the field of criminal law can make the penal complex globally more severe by increasing the punitive use of other normative systems that have less procedural guarantees for the defendant. In short, liberal, and even radical, criminal law reform can pave the way for a new configuration of the penal complex in which conflicts are administratively translated and eventually punished in a more operative way because wider enforcement capacity, speed and lack of formality are the main characteristics of regulatory criminal law and of administrative law procedures.

The same argument can be made within criminal law and sentencing. For instance, the increasing use of life without parole sentences in the U.S.A can be partially explained by the fact that they do not require the “super due process” procedures of capital punishment cases (Gottschalk, 2006: 231-232). As a result, the legal and political battle against capital punishment may have produced important collateral effects. By presenting life without parole sentences as an alternative to murder cases, but also to other criminal offences, it may have contributed substantially to mass incarceration in the U.S. (Steiker and Steiker, 2002, 2005, 2008, 2010, 2012). Unfortunately, even the “best intentions are fraught with

disappointment”¹⁷⁸. Death penalty abolitionists in the United States or penal abolitionists worldwide can, by their actions, produce adverse systemic effects that are not well addressed or planned. The same thing can be said about “bad intentions”, as conservative fiscal responsibility policies may result in decarceration (Webster & Doob, 2014). This makes the penal abolitionist and penal parsimony enterprises much more complicated than we had imagined. It is hard to know how the mobile will adjust and temporarily settle to changes of policies and law reforms. There is a lot of variables at play, including the practices of political and legal actors. Moreover, we still do not know the actual scope of the penal complex because the studies on the different elements of the mobile are fragmented, if not inexistent. We still have a lot to learn about those less prominent sites of punishment, and in particular about the interactions between the different normative systems or funnels and on the possibilities or resisting in an integrated manner.

Resistance may also come from the judiciary. Many judges are fighting back the Canadian federal government *order and order* agenda. Most of them are doing it silently through their everyday routines, but some of them decided to speak out and to make themselves heard¹⁷⁹. For instance, in 2011, an Ontario judge opposed the *Truth in Sentencing Act*

¹⁷⁸ This quote is attributed to Gil Grisson, one of the main characters of the TV series CSI played by William Petersen. What would be a criminology thesis without a quote from CSI ?

¹⁷⁹ See more generally Andrew Stobo Sniderman, *Harper v. The Judges*, August 21, 2012, retrieved from <http://www2.macleans.ca/2012/08/21/harper-v-the-judges/>, last accessed on 13-01-2014. See also the most recent controversy with respect to the mandatory victim fine surcharge: Sean Fine, *Judges defy order to impose Tories’ victim services surcharge*, *The Globe and Mail*, 9 December 2013, retrieved from: <http://www.theglobeandmail.com/news/politics/judges-defy-order-to-impose-tories-victim-services-surcharge/article15820100/>, last accessed on 13-01-2014; Sean Fine, *The new face of Judicial Defiance*, *The Globe and Mail*, 13 December 2013, retrieved from <http://www.theglobeandmail.com/news/politics/the-new-face-of-judicial-defiance/article15971207/>, last accessed on 13-01-2014; Sean Fine, *Judges showing contempt by not imposing victim fine*, *Justice Minister says*, *The Globe and Mail*, 16 December 2013, retrieved from <http://www.theglobeandmail.com/>

which changed the rules for taking into consideration the time spent in pre-trial custody and called on other judges to impose shorter sentences to compensate the harshness of preventive detention conditions. Surely more research should be done on how courts and judges are adapting to the recent conservative law reforms, but it seems that we are witnessing an intriguing battle over discretionary power and the level of deference the judiciary should grant to the executive (and to the legislative).

R. v. Arganda and *R. v. Pham* are clear examples of how the judiciary is becoming more and more aware of the fact that the State is using multiple normative systems at the same time in order to implement penal policies. In these cases, the courts said that if the executive branch of the State intends to use the immigration regime as a complement to the criminal justice system, then sentencing judges must have to take these consequences in consideration when evaluating what is the just measure of pain. We know that the government responded to these rulings in adopting the *Faster Removal of Foreign Criminals Act* and by limiting the access to the IAD. But other actors may also respond and it is still hard to predict how legal actors and institutions will adapt to these changes.

The *Faster Removal of Foreign Criminals Act* may very well backfire by producing unexpected effects in the legal field. For instance, one could argue, and a judge could agree, that a sentence of six months in jail is not proportional in light of the possible immigration consequences under the new regime, in the same way that a two-year criminal sentence was not considered proportional for the same reasons under the old regime. Perhaps I am too optimist, but I would not be surprised if a criminal judge ended up

news/politics/justice-minister-says-judges-breaking-the-law-by-not-imposing-victim-fine/article15985270/, last accessed on 13-01-2014

imposing even lower sentences in response to the adoption of the *Faster Removal of Foreign Criminals Act*. Interestingly, if decriminalization may create more punitiveness, the imposition of mandatory removals for minor criminal offences through administrative measures may actually result in less punitiveness. The same reasoning may apply to mandatory minimal sentences. In the debate surrounding the adoption of the *Safe Streets and Communities Act*, Quebec and Ontario made it clear that that they would not necessary enforce this Act if they had to pay for it¹⁸⁰. Other provinces soon followed them¹⁸¹. The provinces have jurisdiction over the administration of justice and as such, they also have a word to say about how the penal complex mobile may look like on their territories. Is it therefore possible for a provincial prosecution service to issue guidelines suggesting not to press charges in the case of certain dispositions with mandatory minimal sentences, which could most likely affect the provincial budget.

Dealing with the penal complex (trying to depenalize it or to avoid excessive punishment) is exactly like squeezing an under-inflated balloon trying to explode it. You squeeze one of its sides and the air may flow to the other side, expanding it. The only way to explode the under-inflated balloon is through an integrated action. One should squeeze both sides at

¹⁸⁰ Hélène Buzzetti, *Projet de loi C-10 sur la justice criminelle : Le Québec et l'Ontario affrontent Ottawa*, LeDevoir.com, November 2, 2011, retrieved from <http://www.ledevoir.com/politique/canada/335064/justice-criminelle-le-quebec-et-l-ontario-unis-contre-ottawa>, last accessed on 13-01-2014; Hélène Buzzetti, *Justice criminelle : petit manuel pour ne payer pour C-10*, LeDevoir.com, November 5, 2011, retrieved from <http://www.ledevoir.com/politique/canada/335378/justice-criminelle-petit-manuel-pour-ne-payer-pour-c-10>, last accessed on 13-01-2014

¹⁸¹ Hélène Buzzetti, *Justice criminelle, cinq provinces se joignent au Québec et à l'Ontario*, LeDevoir.com, November 3, 2011, retrieved from <http://www.ledevoir.com/politique/canada/335142/justice-criminelle-cinq-provinces-se-joignent-au-quebec-et-a-l-ontario>, last accessed on 13-01-2014

the same time and if the air is still flowing to an available spot, producing an expected knob, a second person must press there too while the first one is still grasping the damned balloon in order to finally explode it. An abolitionist or penal parsimony enterprise is exactly the same thing. It is a matter of folding the penal complex mobile, changing its structure to a configuration that involves fewer possibilities of social reaction or less punitiveness as a whole. This can be better visualized through the mobiles designed by Russian constructivist Aleksandr Rodchenko. Rodchenko's kinetic sculptures consist in two-dimensional objects made of plywood, and cut in concentric bands able to move into three dimensions when extended, taking different shapes and volumes¹⁸² (see Figure 15). This kind of mobile is visually very different from Alexander Calder's hanging mobile presented in chapter 2 (figure 3, p. 79), and this makes it easier to understand what I mean by folding the penal complex mobile. The idea of the "widening of the carceral archipelago" is not about creating more elements in the penal complex, but rather about particular shapes taken by the mobile and creating a perspective of more volume. The elements of the penal complex are the same; they are just configured in a different disposition. In this sense, penal parsimony or even penal abolitionism are about playing with the different elements of the mobile, folding it into a configuration in which there is less or no volume in terms of punitiveness. Patience you must have to do such a thing.

¹⁸² "When flat, each sculpture was a unitary form: an oval, a circle, a triangle, a square, a hexagon, and an octagon. Suspended from the ceiling instead of placed on a traditional pedestal, the sculpture fanned out into space, articulating a complex volume whose shadow was still more complex and variable." – excerpts from the exhibition of Aleksandr Rodchenko's works at *The Museum of Modern Art*, New York, retrieved from: www.moma.org/interactives/exhibitions/1998/rodchenko/texts/spatial_construct.html, last accessed 2013-12-12.

FIGURE 15:
Aleksandr Rodchenko's *Spatial Construction No. 9. (Circle in a Circle)*



At this point in the historical development of our discipline, we should, as criminologists, review our biases and maybe unlearn criminology a bit in order to better understand how the different structures of the mobile work, how the selectivity funnels interact (and if they interact in a given situation), what are their uses and the receptions of the communications among them (if any), what are their ‘external’ forces and ‘internal’ resistances (‘non-judicial’ discourses, policies, major events, etc.). In doing so, we can improve our capacities of evaluating systemic trends and therefore of promoting broader and combined propositions of law reform and anti-penal policies. Building a society in which human diversity is “not subjected to the power of criminalize” (Taylor et al., 1974: 282) misses the point of resisting to punitiveness and to setting limits to State punitive intervention. After sailing through the

storm, I am very confident that the criminology of the future will not be criminocentric and that it will most likely review its own biased all over again as every science should do. As Taylor, Walter and Young predicted: “this ‘new’ criminology will in fact be *old* criminology, in that it will face the same problems that were faced by classical social theorists.” (*id.*: 278). Framing social reaction and punitiveness as they are, beyond crimes and penalties, raises various methodological and theoretical challenges for a discipline that has the study of crime in its own name. In that sense, it is not only desirable, but also indispensable to enter in a dialogue about the penal field with other areas of socio-legal scholarship, and with other disciplines. This new wave of justice studies in criminology must venture out in the non-criminal world, even if to do so, criminologists have to partially abandon their traditional objects of study and their approaches. Otherwise, our fate will be a certain obscurantism that will disconnect critical thinking from the increasingly recurrent forms of social reaction and their exclusionary effects. And obscurantism, more than any sort of correctionalism or penal populism, is the path to the dark side.

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