The Actuarial Subject: Legitimacy and Social Control in Late Modernity

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<u>Declaration</u>

I declare that none of the work contained within this thesis has been submitted for any other degree at any other university. The contents found herein have been composed by the candidate, William G. Munro.

William G. Munro.

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Abstract

The following thesis can be read as a socio-historical case study of the emergence of risk discourses within the Scottish Criminal Justice System, particularly in relation to offenders who are defined by their dangerousness. It focuses on the emergence of the Risk Management Authority (RMA) which was set up under recommendation of the MacLean Committee in 2000. The thesis examines the broader social and cultural forces from which the Risk Management Authority emerged by drawing on Hegel's notion of 'Ethical Life' (*Sittlichkeit*) as a means of framing institutional change. By way of a re-interpretation of Hegel, through the lens of critical theory, it seeks to historicise and make problematic the concepts and assumptions surrounding our understanding of modernity. Through the concepts of reflexivity, legitimacy and indeterminacy it offers a critique of the existing sociology of risk, which places risk at the centre of debates on modernity, contingency and the self-understanding of society. This critique offers a conceptualisation of penal institutions as not just administering punishment, but as instrumental in the constitution of human subjectivity.

Contents

FAUST:

…who are you then?

MEPHISTO:

Part of that force which would

Do evil evermore, and yet creates the good.

FAUST:

What is it that this puzzle indicates?

MEPHISTO:

I am the spirit that negates.

And rightly so, for all that comes to be

Deserves to perish wretchedly… GOETHE (1808/1961:160-161)

INTRODUCTION

The following chapter introduces the thesis as a whole. It locates the origin of the thesis in Scottish criminal justice practice of a decade ago, particularly government reports and debates surrounding the emergence of the Risk Management Authority and the growing interest in Risk/Needs[1] approaches to offender behaviour being developed in Canada at that time. The chapter goes on to describe how the thesis developed and, to an extent, had to refocus, in order to address the broader contradictions and antinomies related to these approaches. In particular, it introduces the framework - a re-interpretation of Hegel's ethical life (*Sittlichkeit*) – which was created as a way of engaging with these contradictions. In doing so, the chapter situates the thesis as a 'groundwork' – that is, a body of work whose primary aim is to generate concepts through which we can develop our understanding of the human subject and our relationship to modernity, and inform future empirical work on criminal justice responses to risk and dangerousness.

This thesis began in 2000 when I was working as a research officer for Perth and Kinross criminal justice social work department. At that time, criminal justice social work was going through a period of change in relation to professional practice; in particular, change concerning the understanding and interpretation of risk. When I started in this post in 1996, risk referred to risk of reconviction and the likelihood of custody for an individual offender (see Creamer and Williams, 1996); the higher the risk of custody, the more social work intervention should be targeted to reduce that

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[1] Risk/needs approaches are not linked to incapacitation, as in actuarial justice. The main purpose of risk schedules is to assign offenders to programmes that will most effectively deal with their needs and reduce recidivism. (see O'Malley, 2004)

risk. By the time I left in 2004 the context of risk had shifted and referred to risk of harm to the community; the higher the risk posed by an offender the greater the difficulty in justifying a community based programme. One of the key documents, published by the Social Work Services Inspectorate for Scotland in 1997, that both reflected and helped to instigate this change of focus, was *A Commitment to Protect - Supervising Sex Offenders: Proposals for More Effective Practice* (The Scottish Office, 1997). The aim of this report was to review arrangements for the supervision, treatment and monitoring of sex offenders in the community; it was also instrumental in establishing the Expert Panel on sex offenders in 1998 under the Chairmanship of the Honourable Lady Cosgrove, and further influenced the MacLean Committee on dangerous and violent offenders established in 1999 and the Millan Committee, established in the same year, which had a remit to investigate the management of mentally disordered offenders. As well as the greater attention given to risk assessment and management within these committees, there was also an interest in the Risk/Needs approaches to offender behaviour being developed in Canada; with the work of Hanson (1997), Hanson and Bussière (1998), Andrews (1995) and Andrews and Bonta (1998) being particularly influential. This latter text, *The Psychology of Criminal Conduct,*[2] attempted to provide a general theory for understanding individual differences in criminal activity and became the theoretical basis for 'What Works'[3] and risk/needs

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[2] This document was not only published as an academic textbook but also doubled as the theoretical underpinning of the 'Level of Service Inventory-Revised' (LSI-R), the general risk assessment instrument. This was the main competitor of the Scottish Executive's in-house risk assessment tool within Scottish criminal justice services at that time; the RMA I-IV.

[3] 'What Works' refers to a broad range of government led evidence-based policy initiatives. In criminology it generally refers to the effectiveness of offender rehabilitation programmes and had its origin in the results of the Lipton, Martinson and Wilks' (1975) review of offender rehabilitation literature.

approaches to offender management. In this book Andrews and Bonta (1998: 4) write:

> *'Empirically, PCC [the psychology of criminal conduct] seeks knowledge not only of the observable facts regarding the nature and extent of individual variation in criminal conduct, but also knowledge of the personal, situational and social variables associated or correlated with criminal behaviour. These are termed <u>covariates</u> and include the <u>correlates</u> of individual differences in a criminal history and the <u>predictors</u> of the criminal futures of individuals. Perhaps more importantly, PCC seeks knowledge of the causes of the criminal conduct of individuals.'*

The above quotation attempts to outline a methodological relationship between observable facts and inferences of causality based on the singular individual as the basic unit of scientific investigation. Within Andrews and Bonta's framework the social is understood and conceptualised as an external influence on individual action: 'the full range of potential covariates of individual behaviour, and to the full range of the moderators and mediators of those covariates (i.e. soma, psyche, social, cultural, political, economic, and the immediate situations of action)' (1998:4). What is significant about this conceptualisation of the relationship of the individual to the social is that it presupposes a community of isolated 'empirical' subjects which in turn is then treated as the 'natural' starting point of human socialisation. Crime in this context is perceived as the isolated acts of solitary individuals against an external, passive and non-criminogenic community. This individualistic characterisation of human nature is not only highly positivistic, but is often accepted as a common sense[4] representation of the human subject in both legal and practice settings.

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[4] The prevalence of this understanding is reflected in the fact that it is at the centre not only of rehabilitative approaches towards offenders but also theories of deterrence (see Norrie, 2001).

This 'common sense' understanding of criminal conduct formed the background to the ruminations of the Committee on Serious Violent and Sexual Offenders in 2000, and provided the philosophical grounding for their recommendation in establishing what was to become the Risk Management Authority (RMA).

The origins of this thesis are located in these initial debates surrounding the Risk Management Authority – debates which are outlined in more detail in chapter five. However, as the thesis progressed, it, too, experienced its own shift of focus: the main area of interest no longer lay with the criminal justice concerns of sentencing and the calculation of risk per se, but with how to *conceptualise* the concomitant intersection of the institutional culture of criminal justice and the construction of subjectivity, specifically the actuarial subject or, as it is repositioned in this thesis, the 'dangerous other'. The concern of the thesis is, therefore, the ontological and epistemological contexts, not just of the new risk/needs approaches to offender rehabilitation programmes, but of identity or subjectivity formation.

To achieve this broader understanding it was necessary not only to locate the emergence of the Risk Management Authority as part of a longer history of legislative responses to dangerousness and risk, but to develop an approach that opposed the naturalism at the heart of these debates. This was achieved by drawing on Hegel and the work of the Frankfurt School. By way of a re-interpretation of Hegel, through the lens of critical theory, the thesis seeks to historicise and make problematic the ideologies and assumptions surrounding the emergence of the Risk Management Authority. In this way, the aim is less to import theory into the thesis to illuminate our understanding of the RMA – though this is hopefully also the case

– but rather to use the RMA to illuminate the work of theory. In particular, the thesis is an exploration of how Hegel's theoretical ideas can help us think through the relationship between criminal justice and the subject.

Why Hegel?

It is appropriate here to explain why the thesis uses Hegel's interpretation of 'ethical life' to frame a contemporary constellation of problems concerning risk and the management of offenders. There exist a considerable number of criminological perspectives which have attempted successfully to theorise risk (Ericson, and Haggerty, 1997; Feeley, and Simon, 2003; Garland, 2001; O'Malley, 2004; Sparks, 2000), why not draw on that body of work to develop a framework? Why instead draw on a philosopher whose reflections on the state are almost two hundred years old?[5] The answer to this question relates to Hegel's notion of modernity and its reflexive relationship to the development of the subject.

It is important to note however, that the choice of Hegel was not immediate. His influence and the adoption of 'ethical life' only became significant as the thesis progressed. What made his work important to the thesis was the relationship between his work and its unconscious, or at least unacknowledged, reflection in contemporary texts on modernity; texts which dealt with themes of risk, the reflexivity of modernity (Beck 1992, Giddens, 1990), and theories of the self and self-identity (Giddens, 1991 Taylor, 1992). Ethical life therefore was a means of addressing what I perceived as the one-sidedness or positivity of such accounts of

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[5] The *Philosophy of Right* was published in 1821

modernity. In other words, such accounts lacked the negative and critical aspects of Hegel's account. This is an argument developed in chapters one and four.

In relation to the individualistic aspects of the new risk/needs approaches to offender rehabilitation programmes, Hegel's work allowed me to problematise the conceptualisation of the relationship of the individual to the social, central to these accounts, in three key ways:

First, by emphasising how the world of meaning and the intersubjective basis of subjectivity has been ignored in such approaches. Hegel argued that the main weakness of the new sciences' methods – collectively termed 'empiricism' by him and which included physiognomy and phrenology - was that they posited a false perspective of the subject and its relationship to the world. He argued that the empiricists presupposed the individual to be the primary mode of being and as a result merely ended up reifying the concrete human qualities of the individuals that they were attempting to understand. Hegel countered positivist discourses on subjectivity that decontextualise social action and individualise social conduct by raising important questions about the intersubjective nature of subjectivity and its embeddedness in social institutions.

Second, a Hegelian perspective highlights how such approaches treat crime as a 'natural' category and avoid questions of power and the role of the State in the construction of law. For Hegel, it was impossible to theorise the individual separately from their social and historical context. A key concept Hegel used to do this was the notion of *Sittlichkeit* (Ethical Life).

Third, Hegel's work offers a critique of the positivistic representation of scientific expertise, particularly in the prediction and treatment of deviant behaviour (see Bottoms, 1977). Hegel's account of physiognomy and phrenology makes clear that individual traits are indeterminate and therefore cannot be used as the basis of prediction. His basic understanding of scientific knowledge was not predictive: the owl of Minerva 'first takes flight with twilight closing in' (Hegel, 1967: 13) suggests that knowledge appears on the scene too late. Critical science does not predict the future but articulates the true significance of events only once these events have passed.

While the concerns above are not new, what is of current relevance in the work of Hegel is that his critique of empiricism has been left un-answered by much contemporary criminological thought. This thesis argues that ethical life provides a way to conceptualise intersubjectivity and in doing so allows us to understand crime and its relation to the state. It aims to explore how such concepts challenge the notion of crime as a 'natural' category and bring questions of power and the role of the State to the fore. In particular, it aims to achieve this 'de-naturalisation' by using an Hegelian reading of the concepts of indeterminacy and legitimacy.

Chapters one and two of this thesis explore these problems in detail. Chapter one re-evaluates the work of Hegel and his legacy in the form of Critical Theory. Hegel provides a series of concepts and their opposites through which the relationship of the subject, and the institutions through which it is formed, can be traced. It examines Hegel's notion of '*Sittlichkeit*' and how this relates to intersubjectivity

and what Hegel called *struggles for recognition*. The chapter ends with Hegel's critique of positivism in the form of physiognomy and phrenology. Chapter two explores further the concept of recognition through its relationship to legitimacy. It outlines the relationship between legality and legitimacy and examines the concepts of recognition, legal validity and their relation to subjectivity. The chapter ends with a discussion of the rationality of science and how the acceptance of an authority of a social order is based as much on technical rationalisation and expertise as it is on the legality of its system of law. It introduces the topic of the legitimacy of the scientific expert: a form of legitimacy shared by a number of scientific disciplines, including psychology, psychoanalysis and criminology.

While the above makes clear Hegel's theoretical influence on the thesis, chapter three explores the influence of Hegel on the thesis methodology. In this case the socio-historical *casus* of André Jolles (1930), a model which allows for the generation of theoretical analysis as well as provides the 'ground' for the thesis.

A unifying thread, drawn from Hegel's thought, which runs throughout the first three chapters, is a conception of modernity that preserves an internal relationship between modernity and rationality. The importance of this link between modernity and rationality lies in the dialectical structure of Hegel's thought. Chapter three therefore also provides the basis of a critique of modernity which is outlined in chapter four. In the early chapters it is argued that Hegel's relevance to this thesis is related to recent developments in social theory that, while not explicitly drawing on Hegel, appear to return to central themes in Hegel's work. Chapter four explores how notions of modernity are reframed in the conceptualisation of the risk society.

Drawing on Hegel and what has been loosely called the 'classical' critique of modernity, it aims to recover what has been erased, forgotten, or repressed in these contemporary works of social theory. Chapter four, then, can be read as a critical confrontation with the history of social theory and modernity and as such provides a reference point and context for chapter five in its account of the centrality of risk in contemporary decision making.

Chapter five provides a socio-historical framework for, and traces the reconceptualisation taking place within, Scottish debates on dangerous offenders. It provides the historical background to the notion of the dangerous offender and the legislation that relate to this category of offender and looks at the influence of psychiatry and positivist criminology on the creation of the dangerous offender. The chapter also argues that the reconceptualisation taking place within Scottish debates on dangerous offenders has been brought about by the intersection of three key discourses concerning community, modernisation and the resurgence of dangerousness

Throughout the thesis, the limitations of working within an Hegelian framework are palpable; particularly in the relationship between theory and empirical data. I will return to this theme in the conclusion.

CHAPTER ONE

SPIRIT IS BONE: THE ANTINOMIES[6] OF ETHICAL LIFE

'Hegel was the first philosopher to develop a clear concept of modernity. We have to go back to him if we want to understand the internal relationship between modernity and rationality……We have to get clear on the Hegelian concept of modernity to be able to judge whether the claim of those who base their analysis on other premises is legitimate'. (Habermas, 1987:4)[7].

Introduction

In 1906 Benedetto Croce (1915) published a book on Hegel called *What is Living and what is Dead of the Philosophy of Hegel?* At the beginning of the twentieth century Croce felt that it was necessary to re-examine Hegel's work and to question its relevance for the new century. It is possible that Hegel would have appreciated such a question. For Hegel the history of thought was characterised by the emergence of 'great liberating ideas which inevitably turn into suffocating straightjackets' (Berlin, cited in Bernstein, 1979:57). Most of his writing was concerned with the question of what was vital in the products of human thought and what had become ossified in such knowledge.

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[6] As Jameson (1994:1) writes, 'It is conventional to distinguish an antinomy from a contradiction, not least because folk wisdom implies that the latter is susceptible of a solution or a resolution, whereas the former is not. In that sense, the antinomy is a cleaner form of language than the contradiction. With it, you know where you stand; it states two propositions that are radically, indeed absolutely, incompatible, take it or leave it. Whereas the contradiction is a matter of partialities and aspects; only some of it is incompatible with the accompanying proposition; indeed, it may have more to do with forces, or the state of things, than with words or logical implications. Contradictions are supposed, in the long run, to be productive; whereas antinomies […] offer nothing in the way of a handle, no matter how diligently you turn them around and around'.

[7] Habermas' question of legitimate heirs to modernity was originally focused on Foucault, Derrida, Bataille, Lyotard and Luhmann. However the question remains relevant to the recent 'return to modernity' by contemporary social theory.

Hegel's influence on twentieth century thought was not insignificant, both in terms of those directly influenced by his work: Lukács, Sartre, Lacan, Gadamer and the Frankfurt School among others, and, those who developed their thought in opposition to Hegel: writers such as Althusser, Foucault and Derrida. One hundred years after Croce's book the same question may be asked of Hegel's relevance to a social science thesis at the beginning of the 21st century. In the context of this thesis there are two reasons why Hegel can be regarded as important. Firstly, recent developments in social theory which form a background to this work, while not explicitly drawing on Hegel, reflect a return to Hegelian themes. Works dealing with the reflexivity of modernity (Beck 1992;Giddens, 1990), theories of the self and self-identity (Giddens, 1991; Taylor, 1992) and the renaissance of the category of the 'imaginary' (Carlen, 2008; Taylor, 2004) have been central to social scientific debate from the 1990s onward. These themes, although touched on in this chapter, will be examined in greater detail in chapter four. The second reason why Hegel's work is relevant to a criminology thesis is the important role that the concept of crime and the figure of the criminal played in the development of Hegel's philosophy. Although there has been little acknowledgement of Hegel's work in criminology[8], crime and its punishment, and the criminal's reconciliation with the community were central to his early Jena manuscripts as well as his later work on 'ethical life' (Flechtheim (1947), Žižek, (2000), Honneth, (2000)).

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[8] Work on Hegel's theory of crime usually focus on his ideas in the context of retributive punishment (see Bloch 1996). However Flechtheim (1947) also points out that in order to comprehend the significance of the concept of punishment within Hegel's work, it is essential not to mistake his theory with traditional theories of retribution. Within Hegel's philosophy of punishment, in addition to its function of retribution, punishment becomes invested with the capacity of reconciliation; law assumes the power of absorbing and effacing crime. There is in Hegel's work strong themes that were later to emerge in restorative justice philosophies. Punishment in Hegel's early work loses its stigma; the criminal, in serving his sentence, rehabilitates him/herself and is finally restored to the ethical community.

Drawing from a body of work now coming up for two centuries old is problematic and it is important to outline what is usable in a contemporary context. Due to the problems of interpretation in relation both to the age and to the systematic aspects of Hegel's work there can be no pure application of Hegel's ideas. Those such as the Frankfurt School[9] who have developed his thought have tended to foreground certain texts, passages, themes or concepts over others. In this way, Hegel's influence has been based on a selective response to particular elements of his thought and a rejection of others (see Sinnebrink, 2007). This thesis is equally selective and in no way does it attempt to adopt Hegel's philosophy as a whole. The following work also does not claim to be a work of Hegel scholarship. The concepts outlined in the following chapter, and in the thesis as a whole, although originating in the work of Hegel, have been interpreted through the lens of Critical Theory. In light of this, the present dissertation does not adopt a unified or tightly bound theoretical framework or method - as one would do when carrying out an interpretative or ethnographic study for example - but rather more loosely draws on, what Adorno called, a 'constellation' of themes and concepts. We will discuss the notion of 'constellation' - what Jay (1984:15) termed a 'dialectical model of negations' - further on in this chapter when we outline the work of the Frankfurt School. However its relevance here is in its affinity with Hegel's insights on the relationship between modernity and rationality highlighted in the quotation at the beginning of the chapter by Habermas (1987).

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[9] In this thesis I will refer to the Frankfurt School generically, although it should be made clear that the theorists who are associated with the Institute of Social Research, past and present, are by no means united under one philosophical or scientific paradigm. Wiggershaus (1995: 1) argues that the 'term 'Frankfurt School' was a label first applied by outsiders in the 1960's, but Adorno in the end used it himself with obvious pride. To start with, it described a critical sociology which saw society as an antagonistic totality, and which had not excluded Hegel and Marx from its thinking, but rather saw itself as their heir […] the label itself has long since become an indispensable part of the history of the influence of the ideas it represents, quite apart from the question of the extent to which we can speak of a 'school' in the strict sense.'

The relationship between modernity and rationality originally outlined by Hegel is very different from that as understood in the recent developments in social theory mentioned above, despite its return to Hegelian themes. As Bloch (2000: 179) remarked, '[t]he essence of Hegel is to have brought all inwardness outside'. For Hegel rationality referred not only to the property of an individual mind, but was a property of institutions, their practices and of the symbolic order itself (Habermas, 2006). This external embodiment of reason, as Habermas argued, was fundamental to later developments in the theory of modernity[10] from Marx to Weber, Lukács and the Frankfurt School.

The notion of embodied reason was further developed in Hegel's notion of *Sittlichkeit* (Ethical Life). The concept of ethical life plays a central role in Hegel's later work in resolving the issues that concerned him earlier regarding the nature of human subjectivity and its relation to the state and its institutions. The significance of ethical life to this present work is in the following three areas:

1. The concept of ethical life provides a structure that maintains the relationship between modernity and rationality, i.e. understands rationality as an external property of institutions.

2. Ethical life provides a concept of intersubjectivity that is more critical than the more positive English language notion of 'community'[11].

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[10] In particular Weber's association of modernity with rationalisation.

[11] See Williams (1989: 112-113) 'Community is unusual among the terms of political vocabulary in being, I think, the one term which has never been used in a negative sense. People never, from any political position, want to say that they are against community or against the community. You can

3. Ethical life provides the thesis with a framework to conceptualise crime and its relation to indeterminacy and legitimacy.

The notion of Ethical life was inspired by the republics (*polis*) of ancient Greece and Rome and articulated a notion of a unified ethical community (Beiser, 2005). Hegel's theory was a theory of social bonds and was developed to counter what he saw as the abstract, atomised individual of positivism and classical legal thought[12]. The subject as understood by Hegel was not the autonomous individual of scientific positivism or law but was intersubjectively embodied within a community. In other words, it was produced and intimately dependent on the recognition of others. For Hegel, crime was central to what he called *struggles for recognition*, and necessary for the achievement of ethical life. As Honneth (1995: 26) argues, 'Hegel granted criminal acts a constructive role in the formative process of ethical life because they were able to unleash the conflicts that, for the first time, would make subjects aware of underlying relations of recognition'.

Drawing on the concept of ethical life as contextualised in this chapter, I will argue that Hegel's concept can provide the basis of a critique of criminological approaches developed from individual positivism and classical legal theory. It is particularly relevant to those developments based on the principle of risk management as the dominant goal of crime control, and what Garland (2001) has

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have very sophisticated individualist arguments about the proper sphere of society, but the community, by contrast, is always right.'

[12] See Smith (1989: 4-5) 'contemporary Hegelians deny the tenet of methodological individualism by arguing that rationality may be predicated not merely of individuals but also of the institutions and even the political cultures that make these actions possible'.

called the 'criminology of the "dangerous other"'. This discussion will be developed in chapters four and five.

In order to make a case for the above argument, in this chapter I outline a theory of institutions drawn from Hegel's notion of 'Ethical Life' (*Sittlichkeit*). Institution as it is used in this thesis is defined in its basic sense as 'standardised modes of behaviour' (Radcliffe-Brown cited in Giddens, 1979: 96); in other words, it is concerned with structured social interaction and its reproduction. The chapter is divided into three sections: part I provides an account of ethical life and its relation to Hegel's theory of the state; part II will describe how the notion of ethical life was developed by Critical Theory - particularly that of the Frankfurt School (the lens through which this interpretation of Hegel has been drawn); and lastly part III will detail the relationship between ethical life and crime and its relation to *indeterminacy* and *recognition* in both legal and scientific settings. Through these three sections, I will outline the overall conceptual framework for the thesis.

I

Ethical Life: Modernity and the Organic State

In the eighteenth century people could still remember what it was like to live in a world that was not modern at all (Berman, 1983). This sense of living in two worlds simultaneously - traditional or customary life and modernity - was reflected in the work of Hegel and in particular his notion of *Sittlichkeit* (Ethical Life). Ethical life plays a central role in Hegel's *Philosophy of Right (1821)*. It was used as an attempt to formulate a social and political ideal that had been first outlined in his Jena

Lectures written earlier in 1805-6. This ideal was the synthesis of the community with the individual (Beiser, 2005).

Although the concept of ethical life was fundamental to Hegel, it was also ambiguously formulated in his work. Beiser (2005) argues that this ambiguity begins with translation. Hegel first developed the notion of *Sittlichkeit* as a translation from the ancient Greek '*ethos*', a term which refers to the moral character, disposition, or custom of a nation or people. The German word *'Sittlichkeit'* also has no exact English counterpart; although it can often denote morality, its meaning can be broader and is often used to refer to manners, standards of politeness and decency, as well as to what is traditional or customary (*Sitten*). Hegel used the term in reference to the whole way of living and acting of a people. However in using the term Hegel makes an important distinction between ethical life and morality (*Moralität*). For Hegel morality referred to the individual consciousness[13], the *inner* life of the individual, whereas ethical life was intersubjective; it was structured via interaction with others. Morality is abstract because it separates the individual from the social substance, ethical life is concrete, the individual is related to the social substance in such a way 'that the very identity of the individual depends on its place in the whole' (Beiser, 2005: 234). One can

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[13] Kaufmann (1951:470-471) warns that we will misunderstand Hegel if we construe his remarks about morality (individual conscience) as being allied to an authoritarian view of the state. 'When Hegel asserts […] that "the State cannot recognize conscience [Gewissen] in its peculiar form, i.e., as subjective knowledge [Wissen], just as in science, too, subjective opinion, assurance, and the appeal to subjective opinion have no validity," he is not at all inconsistent. Conscience, as Hegel insists, is fallible; and, while no government or church has the right to dictate to our conscience, no government can afford to recognize conscience as a legal standard. As several of his interpreters have pointed out, Hegel, when he wrote the Philosophy of Right, was concerned about the recent assassination of the poet Kotzebue by a student who was convinced that he was a Russian spy and deserved death'.

reject morality but one cannot reject ethical life, except via suicide or mental illness (Habermas, 1996).

At the heart of the *Philosophy of Right* was an interpretation of ethical life and its relation to law and morality. Its intent was to make the abstractions of law and morality concrete, to provide his philosophy with what Harvey (1981) calls a 'political body'.

> *'Ethical life'(Sittlichkeit) contains the thesis that in social reality, in that of modernity…, spheres of action are already present in which inclination and moral norms, interest and values have been fixed in the form of institutionalised interaction' (Honneth 2000:19).*

Through this interpretation Hegel describes a series of mediations necessary for individual consciousness to realize itself within ethical life. Hegel first describes the family as a sphere of ethical life. This sphere is characterised by personal altruism. In contrast to the family was civil society. This second sphere was one of 'universal egoism', characterised by market competition and the social division of labour. Here individuals sought to use others as a means towards their own private ends. The tension between the two spheres, between the family and civil society, the private and the public, can only be resolved, according to Hegel, through the possession of a universalistic consciousness on the part of all. The objective expression of that consciousness could be realised only through the institutions of the modern state (Harvey, 1981).

That ethical life could only be realised through the acceptance of the authority of the 'rational state' over the individual, has led many authors to criticise Hegel's politics

for being both conservative and authoritarian (Marx, 1975, Popper, 1966, Bloch, 1996). This is a view confirmed for many by Hegel's description of the institutions of 'the rational modern state' as being reminiscent of the Prussian state of his own time. However there is what Harvey (1981) calls an 'intriguing ambiguity'[14] which runs through Hegel's work that is also combined with a radical critique of modern institutions of the state that would belie such interpretations. It is to his theory of the modern state that we must now turn in order to gain a clearer perspective of ethical life.

Hegel's philosophy was grounded in an organic vision of the world. It was based on the perception of the universe as a single living organism. Not only does Hegel's philosophical system reflect this, but his language and central concepts can only be interpreted with this in mind. When Hegel advises us to observe the state objectively as a 'thing in itself' he means us not only to understand the state as something by itself, standing apart from its relations to other things, 'but also as something potential, undeveloped and inchoate' (Beiser, 2005:81). It was in his theory of the state that Hegel departed from much Enlightenment thought.[15] His view of the organic state, inspired in part by the ancient republics of Greece and Rome, was based on the romantic ideal of unity with others. The inspiration for Hegel's organic worldview – and indeed for other nineteenth century philosophers who shared it – was Plato's *Timaeus*. This work provided the root metaphor behind

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[14] There is a debate among Hegel scholars as to whether he intended the later section of the Philosophy of Right to be a normative account of what ethical life should be as facilitated by state institutions or whether his work merely reflected the actual institutions of the State at that time. Although parts of Hegel's Preface to the Philosophy of Right would suggest the latter, other sections would contradict this interpretation (see Marx, 1975; Marcuse, 1954; Norrie, 1993; Fine, 1993 and Honneth, 2000).

[15] Enlightenment thought drew its political philosophy from the French Revolution and tended towards individualist and voluntarist models of political participation (Smith, 1989) as opposed to models based on unity with others.

organicism, as it conceived the world as 'a single visible living being', a 'living

being that contains within itself all living beings' (Plato, cited in Beiser, 2005:87); a

macroanthropos wherein all nature was conceived as resembling a single human

being. This model of the state had a profound influence on Romantic philosophy

and nineteenth century scientific thinking.

Although Hegel's concept of the state, as well as the language used to describe it

might now appear rather archaic and obscure[16], to dismiss it as not being relevant to

our times is to overlook what is uniquely modern in his work. As mentioned earlier,

there is in Hegel's work a radical critique of nineteenth century state institutions.

Although his ideal of the state was inspired by classical Greece and Rome it was

also a contemporary reaction against the 'nightwatchman'[17] state of liberalism, a

state formation that was safeguarded by a contract between self-interested

individuals (Beiser, 2005). In other words, a state dominated by the realm of civil

society and 'universal egoism'.

As mentioned above, Hegel desired a political formation that synthesised the

community and the individual, to bring together the classical freedom of democratic

participation with the modern freedom of rights (Harvey, 1981). These are not the

ideals of the conservative and authoritarian defender of the absolutist state painted

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[16]See Engels criticism of Hegel's theory of the state, 'The state is therefore by no means a power imposed on society from without; just as little is it "the reality of the moral idea", "the image and the reality of reason," as Hegel maintains. Rather, it is a product of society at a particular stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it is cleft into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms, classes with conflicting economic interests, might not consume themselves and society in sterile struggle, a power seemingly standing above society, became necessary for the purpose of moderating the conflict, of keeping it within the bounds of 'order'; and this power, arising out of society, but placing itself above it, and increasingly alienating itself from it, is the state.' (Engels, 1954: 277-278)
[17] The 'nightwatchman' state was based on 'negative liberty' i.e. of doing as you pleased as long as you did not interfere with private property of others.

by Popper (1966)[18]. The institutions and practices of ethical life were more than a set of formal procedures for arriving at decisions. As Smith (1989) writes, although rooted in the customs and practices of a community, these customs and ways of life should not be imposed on the citizens of a state, but must be reflexively accepted as an expression of the popular will. If the necessary communicative channels are not adequate and decisions are enforced by the state, they will lack legitimacy.

> *'Hegel starts from an ethical concept of individual freedom and derives from it the relative importance of formal right and of morality, mainly in order to show that they have necessarily to be included in the various communicative spheres which together represent the ultimate conditions for individual self-realisation; therefore, he believes that the legitimacy of a modern legal order depends upon its capacity to guarantee each citizen the chance to participate in those spheres, which have all at the same time to be secured in their distinct normative integrity' (Honneth, 2000:60)*

Hegel claims that the *rational* state as the 'actuality of the ethical idea', can transcend the dualities of private and public life and therefore heal the 'wound of the social body' (Žižek, 2000: 95) In this way Hegel presented a theory of ethical life that would enable people to live their lives rationally according to socially accepted aims and thus experience their life as meaningful. However, he was also profoundly aware of the constraints at the heart of modern liberal society which prevented this happening. Contrary to contemporaries such as Adam Smith, Hegel argued that 'negative liberty' and economic regulation by the market were not only defective means by which to achieve social harmony, but they also generated contradictions within social life. Hegel argued that self-interest and individual right

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[18] In The Open Society and its Enemies Vol II, Popper argued that Hegel was a precursor of Hitler. The book not only painted Hegel as authoritarian but also as a nationalist, a racist and an apologist for tribalism.

based on property[19] were incapable of generating institutions that could lay the foundations for the ethical unity of the people. At the heart of these constraints was what seemed to Hegel an unavoidable aspect of liberal democracies: the inability of such societies to accord recognition to all its members. This aspect of liberalism not only meant that modernity was unable to solve the problems that it created,[20] the problems of poverty and of the increasing polarization in the distribution of wealth and income, but it also excluded a significant number in those societies from the opportunities to develop a meaningful and self-determined life (see Hegel, 1967, Avineri, 1974: Harvey, 2006: Arrigi 2007: Honneth 1999).

There is a paradox at the heart of Hegel's ethical life: although he argues strongly for the transcendence of civil society and for the state as the 'actuality of the ethical idea' he nowhere explains how this can be achieved within the constraints of the modern bourgeois state. Avineri (1974) points out:

> *'Few people around 1820 grasped in such depth the predicament of modern industrial society and the future course of nineteenth-century European history. What is conspicuous in Hegel's analysis, however, is not only his farsightedness but also a basic intellectual honesty which makes him admit time and time again – completely against the grain of the integrative and mediating nature of the whole of his social philosophy – that he has no solution to the problems posed by civil society in its modern context. This is the only time in his system where Hegel raises a problem – and leaves it open. (Avineri, 1974: 154)*

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[19] For Hegel property was a form of recognition, 'subjects mutually recognise each other as bearers of legitimate claims to possession' (Honneth 1996: 19). The 'nightwatchman' state was not legitimate because those who lacked property were not accorded recognition, and therefore were denied rights.
[20] Hegel showed in the Philosophy of Right that 'bourgeois society appears to be incapable of solving through internal mechanisms the problem of social inequality and instability that arises from its tendency to over-accumulate wealth at one pole and deprivation at the other. A 'mature' civil society is thus driven to seek external solutions through foreign trade and colonial or imperial practices.' (Arrighi, 2007: 220)

'[C]ompletely against the grain of the integrative and mediating nature of the whole of his social philosophy'; as we will see later in the chapter, this will not be the only time that we find Hegel running against the grain of his own system.

Earlier it was mentioned that Hegel's view of the state was ambiguous. This ambiguity also reappears in his views on ethical life and punishment. This occurs in the often unclear shift, (Flechtheim, 1947), from an actual ethical community to an ideal ethical community. As we have seen the notion of ethical life was derived from the ancient Greek (*polis*) republic and referred to a unified ethical community. However, in Hegel's own time, modern society had become fragmented by market competition and was based on 'universal egoism'. Individuals had become reified by abstract law in the form of an imagined social contract and society had become polarised by wealth and power (Arrighi, 2007). What then is the status of ethical life in Hegel's theory?

Hegel's starting point was a theory of social bonds. These bonds, intersubjectively constituted and reproduced, already have an existence. As Honneth (1995: 14) argues, Hegel assumes, a natural basis for human socialization, a condition in which basic 'forms of intersubjective coexistence are always present'.

What Hegel sought to make clear was not the origins of community formation in general, but rather the restructuring and expansion of these embryonic forms of ethical life into more immediate relations of social interaction. He argues that this restructuring takes the 'form of a teleological process in which an original substance gradually reaches its full development' (Honneth, 1995: 15).

'Hegel sets out to conceptualize the path by which 'ethical nature attains its true right' as a process of recovering negations, by which the ethical relations to society are to be successfully freed from the remaining one-sidedness and particularities (Honneth, 1995: 15).

Ethical life then is presupposed as intersubjective social bonds, it already exists, however its realisation is constrained by the existing social/institutional structure of society. As mentioned above although Hegel argues strongly for the transcendence of civil society he remains trapped within the constraints of the modern bourgeois state (Avineri, 1974). The intriguing questions that Hegel leaves open, however, concern the legitimacy of state institutions. Legitimacy, for Hegel, depended on those institutions ability to guarantee each citizen the opportunity to participate actively in civil society in a way that made possible their individual self-realisation; and it was only through this realization of an 'objectively' possible reason - the rational potential already inherent in society's institutions, practices, and everyday routines - that legitimation could be grounded. If the constraints mentioned above cannot guarantee citizens a free and self-determined life then the intersubjective relations of 'ethical life' that Hegel envisaged is transformed into what previously he referred to in the Jena Lectures as 'the night of the world' (Žižek, 2000). As Eagleton (2009: 124) points out, while ethical life can refer to the positive notions of a community - habitual virtue, local affections, and kinship - it can also be used to describe the more negative, such as 'cultural conformism, unreflective custom, the blind coerciveness of tradition'; the result of a failure in the restructuring and expansion of the embryonic forms of ethical life. For Hegel immersion in ethical life, the symbolic order, can also then be pathological. This pathological aspect of

ethical life was reflected in Adorno's concept of 'ethical violence'[21] (see Butler, 2005).

> '*Scheler talks about the disintegration [Zersetzung] of ethical ideas, an expression I do not care for [...] you will find this expression recurs again and again and particularly in treatises on morality. And whenever you hear it, it suppresses the fact that in all likelihood nothing is more degenerate than the kind of ethics or morality that survives in the shape of collective ideas even after the World Spirit has ceased to inhabit them – to use the Hegelian expression as a kind of shorthand. Once the state of human consciousness and the state of the social forces of production have abandoned these collective ideas, these ideas acquire repressive and violent qualities. And what forces philosophy into the kinds of reflections that we are expressing here is this element of compulsion which is to be found in traditional customs; it is this violence and evil that brings these customs [Sitten] into conflict with morality [Sittlichheit] – and not the decline of morals of the kind lamented by the theoreticians of decadence. (Adorno, 2001: 17)*

What Adorno is highlighting here is that moral questions do not always appear solely in relation to their current social context. The concrete universality of ethical life can take on repressive and violent forms and attempt to impose 'a false unity that attempts to suppress the difficulty and discontinuity existing within any contemporary ethos' (Butler, 2005: 4). Ethical life can adopt, according to Hegel, pathological forms. It is these darker more melancholic[22] thoughts of Hegel, the thoughts against the grain of his system as a whole, that influenced Critical Theory and its development of the concept *Sittlichkeit* as second nature. This notion of

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[21] Bourdieu (1977: 192) uses the term 'symbolic violence' in relation to 'socially recognised' domination (legitimate authority): ' symbolic violence, the gentle, invisible form of violence, which is never recognised as such, and is not so much undergone as chosen, the violence of credit, confidence, obligation, personal loyalty, hospitality, gifts, gratitude, piety […] cannot fail to be seen as the most economical mode of domination, i.e. the mode which best corresponds to the economy of the system'.

[22] These darker musings of Hegel and Critical Theory are often labelled pessimistic and certainly there is a deep sense of melancholy in the preface of The Philosophy of Right (1967) , however as Anderson (1998: 77) notes, with regards to Hegelian thought, because of its general negativity '[c}ategories such as optimism or pessimism have no place in Hegel's thought'. In that sense even the 'melancholic science' of Adorno resists the pessimism that many (Eagleton 2003, Anderson, 1998) have accused him of.

second nature will be discussed in detail later in the chapter in relation to Critical Theory. It is to Critical Theory's continuation of Hegel's thought that we now turn our attention.

II

Hegel and Critical Theory

Critical theory, as an established programme of critical research, originated over 70 years ago as the collective project of the Frankfurt School under the directorship of Max Horkheimer. In 1937, in exile in the United States, Horkheimer wrote a paper entitled 'Traditional and Critical Theory', in an attempt to formulate the theoretical and political intent of a critical theory of society. In this paper Horkheimer outlined *'a paradigm of a social theory in which the intention of a philosophically guided diagnosis of the times is combined with an empirically grounded social analysis.' (Honneth, 1993: 187).* Horkheimer argued that traditional theory did not recognise its own historical context. In its desire for purity, modern science cut itself off from the social processes of its own production; in other words it was unconscious of its own constitutive context. Traditional theory was therefore, unreflexive[23]. Horkheimer attempted to explain this self-forgetting of traditional theory in terms of an interpretative framework, derived from Hegel's philosophy of history.

Unlike contemporary accounts of modernity, Critical Theory is not a theory of society – although Horkheimer had ambitions for it to be - nor is it a school of

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[23] In this context, reflexivity' relates to the principle where a particular discipline has the ability to reflect on its own constitutive and historical context (Horkheimer 1978, Rose 1978) and 'reflective' refers to the process of reflection which as Bernstein (1995) explains refers to the ability of the theorist or researcher to locate him/herself in the research process or moment of theory production. Both terms will be discussed in detail in chapter three.

thought (despite its most famous advocates commonly being referred to as one); nor is it a method. Connerton (1976: 15) also suggests that it should not be considered either as a branch of sociology but as a specific 'phenomenon of German intellectual history',[24] a tradition of social thought that stands between philosophy and social theory (Bernstein, 1995). What connects Hegel with Critical Theory is the notion that 'no partial aspect of social life and no isolated phenomenon may be comprehended unless it is related to the historical whole, to the social structure conceived as a global entity' (Connerton, 1976:12). For Hegel the 'impurity' of reason refers to its unavoidable entanglement in history. Yet what is it that allows history to be both a source of reflection, and therefore a means to access the 'social', and at the same time the foundation of *constraint* which serves to occlude the 'social' from our categories of thought? The answer to this question is that we are often made blind to the sedimented forms of history by our own subjection to the social through language[25]. That which appears most 'natural' and 'immediate' in society is a reflection of what has already been imposed by tradition, power and human interest. Part of this historical and 'totalising' method involves making the 'reflective self-understanding of the theorist a central moment in theory' (Bernstein, 1995:12). However, what made this socio-historical and reflexive approach 'critical' was the opposition or negation of what exists. Both aspects of Critical Theory, the 'reflexive' and the 'negative', were drawn from Hegel and were considered by its

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[24] Although critical theory has not been influential within British or American sociology, it has strong affinities and influences on American Pragmatism. See Habermas 'there is a certain difference of climate between England and the Continent. There are no deep elective affinities between the spirit of empiricism, which is still dominant in England, and German Idealism. A fermenting agent is lacking in the philosophical metabolism, which could mediate between the two mentalities—as pragmatism does, for example, in America. I believe I can detect this estrangement in basic philosophical convictions. For example, I observe a certain incomprehension in the way in which English social scientists write about my concerns. In their case the ontology of empiricism has become second nature'. (Habermas, 1985:79)

[25] This alienating aspect of language (symbolic alienation) was developed by Lacan (2006). See Jameson (1988) for an elaboration of Lacan's concept.

founders as a radical re-conceptualisation of scientific reason. Reflexivity will be discussed in more detail in relation to Critical Theory in chapter three, while the importance of the concept of negativity will be discussed later in this chapter. Before that, in order to provide a more comprehensive account of the relationship between Hegel' critique of reason and Critical Theory, we must turn our attention to one of the founding works of Critical Theory; *The Dialectic of Enlightenment.*

Up until the publication of *Dialectic of Enlightenment* in 1944, the Frankfurt School's notion of 'critique' was still grounded in Karl Marx's theory of history. However, with this work, written under the influence mainly of Adorno, the Frankfurt School drew on Hegel's critique of the Enlightenment. The dialectic of Enlightenment referred to what Adorno and Horkheimer (1979) regarded as the paradox of the late eighteenth century concept of reason. Instead of Enlightened reason bringing emancipation, it was revealed instead to bring about new forms of domination (Rose, 1978). The book's key theme was that 'the Enlightenment has extinguished any trace of its own self-consciousness' (Adorno and Horkheimer, 1979: 4); however, in this work, the Hegelian conception of 'self-consciousness' or 'reflexivity' appeared in the form of a Nietzschean 'irony'. In this book Horkheimer and Adorno (1979) used an 'ironic inversion' - 'Myth is already enlightenment; and enlightenment reverts to mythology' (Adorno and Horkheimer, 1979: xvi), - to expose ambivalences in the ideals and tenets of the Enlightenment project. Horkheimer and Adorno (1979: xvi) both acknowledged Nietszche's influence on the work in the introduction. Adorno in particular was influenced by Nietszche's use of irony as a means of immanent critique:

> *'Nietzsche belongs to that tradition of bourgeois thinkers who since the Renaissance have revolted against the untruth of society and cynically played its reality [deren Wahrheit] as an 'ideal' against its ideal, and by the critical power of the confrontation have helped that other truth [i.e. its ideal] which they mock most fiercely as the untruth.' Adorno (1976, cited in Rose 1978: 21)*

However, it was not only Nietzsche's use of irony that influenced Adorno but his fragmentary and epigrammatic writing style. Nietzsche, like Hegel, developed a negative and oppositional philosophy and was, according to Horkheimer and Adorno (1979), one of the few philosophers apart from Hegel to recognise the dialectic of Enlightenment. Unlike Hegel, Nietzsche was opposed to philosophical systems and wrote in an epigrammatic, allegorical and ironic style to avoid the systematic explication of his ideas (see Rose, 1978). It was from Nietzsche's influence that the metaphor 'constellation' comes.

The term 'Constellation', as a means of organising a collection of interrelated fragments of writing, however, was originally coined by Benjamin (1973)[26] who used it as a method of interrupting the narrative flow of his writings. Benjamin wished to emphasise discontinuity in history and the fragmentation of modernity's consciousness (Löwy, 2005). Adorno's use of the term, however, had more philosophical intentions and drew more directly from Nietzsche, as he notes:

> *'from my theorem that there are no philosophical first principles, it follows that one cannot construct a continuous argument with the usual stages, but one must assemble the whole from a series of partial complexes [...] whose constellation not [logical] sequence produces the idea.' Adorno (1976, cited in Rose, 1978: 13)*

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[26] See Löwy (2005: 4), 'The expression "philosophy of history" may be misleading here. There is no philosophical system in Benjamin's writings: all his thinking takes the form of essays or fragments, if not indeed of quotation pure and simple – the passages wrenched from their context being made to serve his own approach. Any attempt at systematising this mode of "thinking poetically" (Hannah Arendt: 1973) is, then, problematical and uncertain.'

Jay (1984:15) writes, that for Adorno, the metaphor of 'constellation' denoted a *'juxtaposed rather than integrated cluster of changing elements that resist reduction to a common denominator, essential core, or generative first principle'*. When investigating cultural and social phenomena, Adorno drew on the metaphor in order to capture the subtle relationships between and among their component elements. Adorno's approach, according to Jay (1984:15), grew out of his refusal to:

> *'subordinate arguments and observations in a hierarchically entailed manner, grew out of an unwillingness to privilege one element of the constellation over another. The result was not a relativistic chaos of unrelated factors, but a dialectical model of negations that simultaneously constructed and deconstructed patterns of a fluid reality'* (Jay, 1984:15).

The central reason that such a model was adopted however was not merely related to style, but because the authors were aware of the theoretical limitations of applied social science. In justifying the unusual stylistic aspect of the work, Horkheimer and Adorno (1979: xi) write:

> *'Even though we had known for many years that the great discoveries of applied science are paid for with an increasing diminution of theoretical awareness, we still thought that in regard to scientific activity our contribution could be restricted to the criticism or extension of specialist axioms. Thematically, at any rate, we were to keep to the traditional disciplines: to sociology, psychology, and epistemology [...] However, the fragments united in this volume show that we are forced to abandon this conviction.'*

The Dialectic of Enlightenment was not then a systematic work of philosophy, but a series of essays and fragments arranged around themes and antinomies based on the history of the subject and the domination of nature. The following section provides a summary of its main ideas and relates them to Hegel's philosophy of the subject.

The key argument of the *Dialectic of Enlightenment* is that the traditional opposition of the Enlightenment – the opposition between tradition and reason – instead of disenchanting the world of myth and superstition, merely suppressed them.

The Dialectic of Enlightenment

Up until the end of the nineteenth century enlightened thinking had generally always been understood as a force opposing myth. Enlightened thinking countered the authority of tradition with the coercive force of reason. The opposing force of reason broke the spell of custom and superstition and thereby allowed humanity to escape from the enchantment of mythical thinking (Habermas, 1982). The *Dialectic of Enlightenment* challenged this opposition and uncovered a dark and hidden bond between myth and enlightenment, *'The program of the Enlightenment was the disenchantment of the world; the dissolution of myths and the substitution of knowledge for fancy'* (Adorno and Horkheimer, 1979: 3). However, the myths which were victim to the Enlightenment were also its own products. Adorno and Horkheimer (1979) argued that dissolution of myths had been accompanied by fragmentation and loss of meaning. As a result of this loss the Enlightenment domination of nature had brought about greater existential insecurity.

> *'Man imagines himself free from fear when there is no longer anything unknown. That determines the course of demythologisation of enlightenment [……] Enlightenment is mythic fear turned radical. The pure immanence of positivism, its ultimate product, is no more than a so to speak universal taboo. Nothing at all may remain outside, because the mere idea of outsideness is the very source of fear. (Adorno and Horkheimer, 1979: 16)*

A rationalised modern world only seemed to be demystified; scientific knowledge by distancing itself ever further from its pre-scientific origins did not rescue

humanity from fear, but made it hostage to 'the curse of demonic objectification and fatal isolation'. (Habermas 1982: 16). The process of Enlightenment resulted in the technocratic domination of an objectified external nature under the shadow of which returned unseen, the 'old gods ascended from their graves'[27]. These old gods anticipated earlier by Max Weber, returned in the form of 'impersonal forces to resume their eternal struggle with one another'. (Habermas 1982: 16).

> *'We live as did the ancients when their world was not yet disenchanted of its gods and demons, only we live in a different sense. As everybody sacrificed to the gods of his city, so do we still nowadays, only the bearing of man has been disenchanted and denuded of its mystical but inwardly genuine plasticity. Fate, and certainly not 'science', holds sway over these gods and their struggles……Many old gods ascend from their graves; they are disenchanted and hence take the form of impersonal forces. They strive to gain power over our lives and again they resume their eternal struggle with one another' (Weber, in Gerth and Mills, 1967: 148-149)*

Thus, via the processes which Weber first outlined in 1922, humanity has become further removed from its origins through the process of Enlightenment, yet has not managed to free itself from its mythical origins. Not only was external nature objectified and dominated by modern rationalisation so, too, was the modern subject. It was this 'radical break with scientific reason' and the domination of the modern subject, that brought Critical Theory into 'proximity with crime, madness and the deviant imagination' (Pearson 1977: 90).

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[27] Similar themes of the domination of nature and the role of instrumental reason are to be found in Schiller's (1795/2004: 40) *On the Aesthetic Education of Man*: 'Man himself grew to be only a fragment; with the monotonous noise of the wheel he drives everlastingly in his ears, he never develops the harmony of his being, and instead of imprinting humanity upon his nature he becomes merely the imprint of his occupation, of his science'. See Taylor (1985) for an account of the influence of this text onFoucault's theory of disciplinary power.

In the chapter 'Odysseus: Myth and Enlightenment' Adorno and Horkheimer, explore the themes of ritual and identity formation and uncover the self-deception involved in Enlightenment project.

> *'The idea that people develop their identity by learning to control external nature at the price of repressing their inner nature contains an element of deception insofar as people attempt to redeem themselves from the curse of the vengeful powers through the offering of symbolically enhanced substitutes' (Habermas 1982: 15).*

Whereas 'pre-enlightened' society understood that 'symbolic communication with the deity through sacrifice is not actual' (Adorno and Horkheimer, 1979: 50) modern society in rejecting the pre-Enlightenment forms of ritual merely internalise ritual's mythical core; the fear of vengeful external powers.

In *The Dialectic of Enlightenment* the Frankfurt School and Foucault's analysis of power are very close[28]. Honneth (1995: 127) argues that both share the notion that

> *'the overriding process of rationalisation perfects the technical means of social domination under the cloak of moral emancipation and thus produces the modern, forcefully unified individual. The increase of domination and the formation of identity are two sides of the one process of instrumental rationalisation'.*

The 'reality' behind the ongoing process of rationalisation, what Foucault would call the 'dark side' and the Frankfurt School the 'underground history' of European modernisation, is revealed in the 'history of suffering, barely hidden by the juridical

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[28] See Foucault (1996: 353) on his relation to the Frankfurt School: 'If I had known the Frankfurt School at the right time, I would have been spared a lot of work. Some nonsense, I wouldn't have expressed and taken many detours as I sought not to be led astray when the Frankfurt School had already opened the ways.'

superstructure and marked by the progressive disciplining and subjection of living subjectivity' (Honneth 1995: 127).

The importance of ritual for the collective consciousness and social cohesion in modern societies is an important theme. This internalisation of myth points to an ambivalence of a type of consciousness for which both *rationalisation* and *myth* are entwined. In his book *Modernity and Ambivalence,* Bauman (1993: 17) attempted 'to wrap historical and sociological flesh around the *Dialectic of Enlightenment* skeleton' He argued that existence is modern in as far as it is influenced and controlled by planning, management and engineering. Ambivalence was a side-product of rationalisation and was created through the administrative process of classification. By its very nature classifying involves inclusion and exclusion. Bauman contends that modern rationalised society is motivated towards the reduction of ambivalence[29]. How this is achieved is a managerial problem, that is, it is a problem of the correct administration and application of the appropriate technology. The key task that modernity has set itself is the task of order. For Bauman part of that order is achieved through the 'ritual offering of symbolically enhanced substitutes' and can be traced through the social construction of the 'stranger'. The construction of the 'Other' in relation to the production of subjectivity will be discussed later in this chapter and in chapter two. Before that we will look at the notion of myth as second nature.

Language and Second Nature

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[29] The 'struggle for order is not a fight of one definition against another, one way of articulating reality against a competitive proposal. It is a fight against ambiguity, of semantic precision against ambivalence, of transparency against obscurity, clarity against fuzziness' (Bauman, 1998: 6).

For Hegel a central aspect of modernity was a continuous restructuring of the ethical order of social life. As mentioned before, ethical life was based on Hegel's view that Reason unfolds within history by recreating universal 'ethical' institutions and, by taking these institutions into account, individuals are able to design their lives according to socially acknowledged aims and thus to experience life as meaningful (Honneth 2000). The cultural life embodied in such institutions should not be imposed on the citizens of a state, but must be reflexively accepted as an expression of the popular will. Hegel developed his notion of 'ethical life' through a critique of an abstract and universal morality that he saw as being removed from the motives or inclinations of moral actors. For Hegel, the limitations of such an abstract form of morality must be made good at an institutional level where ethical norms become embodied via law to provide social life with a 'political body'. These previously abstract laws then become a 'second nature', intersubjectively shared and normatively binding for subjects (Habermas, 2006).

> *'The conception of ethical life rests on the insight that the human mind (der menschliche Geist) is not merely subjective but also has both a constructive and a social character, because it can only exist in the symbolic objectifications of a second nature […] The human mind encounters itself only indirectly, through symbolically mediated relations to the world; it does not exist 'in the head' but in the totality of publicly accessible and intersubjectively comprehensible symbolic expressions and practices'. (Habermas, 2006: 59-60)*

The medium of human subjectivity in the world was language. Subjects are not prior to, but a function of, forms of life and systems of language; they do not 'constitute the world but are themselves elements of a linguistically disclosed world' (Rose, 1981). Rose (2004:158), in an essay on Julia Kristeva, writes that language 'fails us, both because of what it cannot speak and because the entry into

language is a type of forced passage in itself'. It is a forced passage for the simple reason that we do not choose our language, but rather, it is something we are born into. The symbolic world pre-exists us and because of this our conceptual horizons are determined by the habitual manners and consciousness of what Williams (1980) calls an 'immediate community of interests' and Hegel, *Sittlichkeit*, ethical life. It is the 'name-giving power' of language, according to Hegel, through which we internalise the world and recognise ourselves as a subject with interiority.

> *'This is language*, *as the name-giving power. The power of imagination provides only the empty form; [it is] the designative power positing the form as internal. Language, on the other hand, posits the internal as* being *(*seyendes*). This, then, is the true* being *of spirit as that of spirit as such. It is* there *as the unity of two free Selves [i.e., imagination and language] and [as] an entity (*Daseyn*) that is adequate to its concept. (Hegel, cited in Rauch 1983: 2)'*

What Hegel terms objective spirit, the external cultural forms of second nature, becomes inner experience and is reflexively externalised again as language. It is this dialectical process that allows the universe to be *'open to human knowledge and that the structure of the universe is ultimately rational'* (Avineri, 1974: 118). It is this dialectical process that Hegel defines as historical reflexivity, 'the rose in the cross of the present'.

> *'To recognise reason as the rose in the cross of the present and thereby to enjoy the present, this is the rational insight which reconciles us to the actual, the reconciliation which philosophy affords to those in whom there has once arisen an inner voice bidding them to comprehend' (Hegel, 1967: 12)*

Although the universe is 'open to human knowledge' we must reconcile ourselves to the actual, 'philosophy as its own time apprehended in thought'; it cannot

transcend its own time. However, in the same work Hegel articulates a darker aspect of second nature as frozen history. Because mind 'can only exist in the symbolic objectifications of a second nature' (Habermas, 2006:60) the owl of Minerva that 'first takes flight with twilight closing in' is 'out of time'. Knowledge here appears on the scene too late. This metaphor can be read here as meaning that we never live entirely in the present, that the true significance of events is only evident once these events have passed. Although Hegel believed that his own philosophy could indeed apprehend the world, the 'Owl of Minerva' passage also indicates that the moment of reconciliation occurs only when that historical epoch reaches its demise[30]. When understanding arrives it appears in the 'shape of a life grown old' (Hegel, 1967: 13), frozen in time.

This darker distinction between nature and second nature is vital to critical theory. As a concept, s*econd nature* is closely related both to Marx's theory of alienation (the mis-recognition of relations between people as relations between things) and Weber's notion of objectification (*Versachlichung*). It was developed firstly by Lukács (1971) to describe the process of reification (*Verdinglichung*): the petrifaction of living processes into dead things that in turn are perceived as natural, as second nature.

> *This second nature is not dumb, sensuous and yet senseless like the first: it is a complex of senses – meanings – which has become rigid and strange, and which no longer awakens interiority; it is a charnel-house of long-dead interiorities………the modern sentimental attitude to nature, is only a projection of man's experience of his self-made environment as a prison instead of a parental home. (Lukács, 1971a: 64)*

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[30] It is clear from the Preface in the Philosophy of Right that Hegel considered the actual Prussian State to be in demise. This would contradict those scholars who consider Hegel to be its apologist. Kaufmann (1951) suggests that Hegel, at the time of writing the Philosophy of Right, was looking toward the emerging American model of democracy as the future model for European States.

The awakening of interiority so important for Hegel's historical reflexivity is now gone. Second nature understood in these terms refers to our habitual mode of thinking; it homogenises the social world and makes what is different appear the same. Second nature is therefore ideological. It is a reflection of a world of objects frozen in their 'monotonously self same being'. In binding us to what is 'given', it blinds us to the truth that *'what is, is more than it is'* (Eagleton, 1991:126).

Like Hegel, Critical Theory argues that the limits of our thought are not related primarily to the internal limits and constraints of the individual but are determined by the limits of the self-understanding (reflection) of society and its institutions as a whole. Therefore the mutilation and distortions of second nature reflected in language relate not only to 'ordinary language' and to the individual but to the language of specialised social practises (religious, legal, political, scientific etc), what Freud referred to as the 'mental assets of civilization'.[31] This is the world of 'projective formations and objective appearances' which although real represents the unconscious processes of social forms (Habermas, 1971: 279). The theme of 'unconscious' aspects of social institutions will be returned to in chapter four. The following section will deal with how the pathological aspect of second nature can be overcome by its negation.

Negative Thinking

If second nature refers to our paradigmatic mode of thinking, a reflection of a world of objects frozen in their 'monotonously self same being' (Eagleton, 1991: 126);

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[31] This also includes the language of the social sciences, and in particular, the field of social interaction that Habermas (1995) refers to as the therapeutocracy; that is, the socially scientifically trained bureaucratic network of welfare organisations.

then the purpose of a critical theory must be to negate that world. Critical Theory is characterised by what came to be termed by Adorno and later by Marcuse as *negative thinking*.

> *'Hegel's philosophy is indeed what the subsequent reaction termed it, a negative philosophy. It is originally motivated by the conviction that the given facts that appear to common sense as the positive index to truth are in reality the negation of truth, so that truth can only be established in their destruction. (Marcuse, 1954: 26-27)*

Adamson (2005:4) argued that Hegel's thought can be understood as a 'perpetual motion machine', an 'internally agitated mechanism' brought to life by the consciousness of its own demise. Negativity must be made to work in order for scientific knowledge to penetrate beyond externalities 'to the inner core of the object to be known' (Avineri, 1974: 123). For Hegel, therefore, the ground of knowledge is always in flux and unstable. This negation of the appearance of the world was summarised neatly by Bloch (1987, xvii) in the anti-positivist epigram 'that which is cannot be true'[32].

What Hegel termed as 'tarrying with the negative' (Hegel, 1977) was an attack on empiricism[33] and the forms of positivism existent at the time of his writings. The positivist notion that all social questions of significance could be answered by formal or empirical methods was an historically important and liberating idea that

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[32] See Adorno (1994:30), 'Hegel's philosophy is indeed essentially negative: critique. In extending the transcendental philosophy of the 'Critique of Pure Reason' through the thesis of reason's identity with what exists and making it a critique of what exists, a critique of any and every positivity, Hegel denounced the world, ……he denounced it as a web of guilt [Schuldzusammenhang] in which, as Mephistopheles says in Faust, everything that exists deserves to perish'.

[33] This relates to Hegel's critique of Natural Law theories which presupposed the individual to be the primary mode of being. Hegel labelled such approaches 'empirical' as they started out from a 'fictitious or anthropological characterisation of human nature and then, on the basis of this and with the help of further assumptions, propose a rational organisation of collective life within society' (Honneth, 1996:12).

had its origins in the Enlightenment. The empirical and experimental sciences were a catalyst for a significant growth of human knowledge throughout the eighteenth and nineteenth centuries. Empirical science was a key force against superstition and prejudice as well as a standard with which to separate opinion from empirically grounded knowledge. However the doctrines of empiricism also claimed that all questions which cannot be formulated into the tenets of scientific discourse were meaningless, or, were seen to be raising pseudo-problems incapable of rational solution (Bernstein 1976:60). According to Hegel the main weakness of the empiricists' method was in their attempt to separate social reality into discrete units of observation divorced from their social and historical context. Defining social institutions by such methods merely drew empirical characteristics from the historical arrangements bearing their names. In other words they began from an arbitrary appearance rather than the 'actuality' of such institutions. Hegel argued that merely drawing up a list of empirical functions not only fails to teach us anything about the nature of institutions but also naturalises those institutions. Negative thinking was an attack on such naturalisation and a means of avoiding an affirmative stance towards actually existing institutions in order to conceptualise them as 'contingent products of power, history and human action' (see Calhoun, 2005:357).

The logical principle of negation is contradiction and it was this that gave the thinking of Hegel and the Frankfurt School its dynamism and provided it with the fuel for critical reflection. However, while Hegel conceptualised negativity as a singular moment within a larger dialectical process of synthesis and change, in other words, the negative is put to work as a necessary force in order for history to

progress; Critical Theory saw no possibility of reconciliation with the existing state of affairs. Critical Theory made negativity the hallmark of dialectical thought against Hegel's system as a whole, for them 'Hegel had been wrong: reason and reality did not coincide' (Buck-Morss, 1979: 63). It is perhaps this casting aside of the outward form of Hegel's system, while retaining its negative core, that connects Critical Theory with Derrida's *deconstruction*. Both are characterised by the refusal to reconcile theory with the present state of existence.

The salvaging of negativity from the shell of Hegel's system was not merely an adaptation by the Frankfurt School but was a consequence of Hegel's system itself. Derrida[34] (1978) argues that there is an excess in Hegel's text that is contrary to his own intentions and threatens his system from within. By allowing negativity to occupy such a privileged space, Hegel opens up his own system to degeneration[35] (Adamson, 2005). In this way Hegel's thought is still left open and has not found a resting place at the terminus of history. As Elliott (2008: 33) wrote with regard to the re-emergence of 'end of history' discourses in contemporary social theory. *'In defiance of Hegel's instruction, the Owl of Minerva took wing at dawn and spelt out the signs of end times [...] with dusk yet to fall, it is clear that, in more ways than one, this sense of an ending was only the beginning.'* Hegel's thought and that of Critical Theory has not yet ossified, the following section will argue for the

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[34] 'Hegel [...] blinded himself to that which he had laid bare under the rubric of negativity [...] This is why 'he did not know to what extent he was right.' And was wrong for being right, for having triumphed over the negative [...] Hegel saw this without seeing it, showed it while concealing it. Thus he must be followed to the end, without reserve, to the point of agreeing with him against himself and of wresting his discovery from the too conscientious interpretation he gave of it' (Derrida 1978: 328)

[35] See Žižek,(2000 : 95) 'In this sense, the mature Hegelian 'reconciliation' remains utterly ambiguous: it designates the reconciliation of a split (the healing of a wound of the social body), as well as a reconciliation with this split as the necessary price of individual freedom.'

continued relevance of ethical life as a concept for describing the relationship between crime, indeterminacy and the constitution of subjects.

III

Indeterminacy and Subjectivity

Habermas (2001) argues that Hegel's conception of modernity, what Habermas called a theory of the 'pathology of modernity', and which was later developed in the social theories of Marx, Weber, Lukács and the Frankfurt School, was central to the classical conception of modernity. For Hegel, as society becomes more complex it comes to rely on new reflexive institutions in order that social actions will be rational and take a foreseeable course of events. However, if these new forms of social reflexivity are hindered by the interests of civil society and 'universal egoism', then it is not reason that guides social action but *indeterminacy*. For Hegel, human action remains perpetually caught in dialectic where the discrepancy between intention and consequence is never eliminated due to the perpetual struggle between the embryonic forms of ethical life and the constraining social/institutional structure of society[36]. Indeterminacy is described by Benhabib (1986:88) when she writes:

> …*Hegel criticizes this indeterminacy of action in order to show the antinomies of moral consciousness [...] [i]n acting a human agent seeks to embody her or his purpose in the world, but the act which embodies this purpose becomes a link in a chain of other acts and assumes a life of its own. The consequences of our actions are like waves in water: Once the stone is cast, concentric waves unfold from it; upon reaching the shore these waves break, but in human affairs, upon reaching the shore our actions may*

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[36] As such Hegel 'recognizes that human life is spent partly in bondage, and only partly in freedom' (Flechtheim, 1947: 299).

boomerang and return to their original point with increased intensity.
(Benhabib 1986:88).

The original action has become 'the prey of external forces which attach to it something totally different from what it is explicitly and drive it into alien and distant consequences' (Hegel, 1967: 80, cited in Benhabib, 1986: 367) This discrepancy between intention and consequence where people were prevented from living their lives according to rational aims was due to the inability of society to properly express the rational potential already inherent in its institutions, practices, and everyday routines (Honneth, 2004). Indeterminacy, a concept which came to prominence in a mode of thought influenced by an organic worldview, has retained its significance in an era where 'system' has replaced the 'organic'. As Luhmann (1993: vii) notes, *'[a]s society increasingly becomes concerned with the regulation of social action and management of complexity, it develops an extreme sensitivity to deviance from the norm and unanticipated harm and dangers'.* A central concept for understanding modernity in the new developments in social theory mentioned earlier is risk; for Hegel, the central concept for the diagnosis of the pathologies of his own time was indeterminacy.

The reification of risk as a category in recent social theory as a means of minimising unanticipated harms and dangers and its definitional role in the conceptualisation of modernity is very different to how risk was conceived in the work of Hegel and Weber. For Hegel (1977) the development of the subject was a life and death struggle to achieve freedom. Freedom demands risk taking.[37] Sahni (2001) from a

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[37] Hegel speaks of risk (in the terms of a wager) as being necessary in order to live a full and self – conscious life. In the section on the master and slave in the Phenomenology of Spirit, he argues that it is necessary to risk one's life to avoid non-productive death (abstract negativity), or, what he called earlier in the Jena manuscripts 'the night of the world'; the pathological immersion of the self in second nature (see Derrida, 1978).

rather different perspective argues that in Weber's[38] writing there is an emphasis on a 'will to act' that is strongly influenced by German idealism, most notably by Goethe's vision of active asceticism. The motivational power of conviction and emphasis on the importance of decisive action outlined in Weber's (1921/1948) article *Politics as a Vocation* would be at odds with the current concerns with risk in the social sciences. This theme will be discussed further in chapter four. Before that and before we move on to the discussion on the relationship of crime to indeterminacy we must first look at Hegel's understanding of the subject and its relation to indeterminacy in more detail.

According to Honneth (2000: 36), Hegel was aware that the modern age was characterised by a loss of meaning. He was convinced that the two abstract models of freedom characteristic to modern society: 'abstract right' and 'morality', had not only become influential powers within that society, but had already led to distortions in the 'practical self-relations of subjects'. This, according to Hegel, was due to them being applied improperly and transgressing their legitimate limits. This observation brings him to refer on a number of occasions in the *Philosophy of Right* to pathological conditions and phenomena which he attempts to articulate through concepts such as 'solitude', 'emptiness' and 'labouring under a burden'; concepts which taken together, suggested that the age was 'suffering from indeterminacy'. Indeterminacy, for Hegel, however, was also linked not just to a time but also to the nature of the subject.

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[38] The 'risk society' might then be seen as a refuge for Weber's 'last men', those 'specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved' (Weber, 2001, 124)

The *Subject* as it is used in Critical Theory, modern continental philosophy and psycho-analysis had its origins in Hegel.

> *'Introduced in Hegel's Phenomenology of Spirit, this subject's desire is structured by philosophical aims: it wants to know itself, but wants to find within the confines of this self the entirety of the external world [...] not merely to incorporate the world but to externalize and enhance the border of its very self (Butler, 1999: xix).'*

In the *Phenomenology of Spirit* Hegel sought to describe the process by which the subject is constituted by, in his words, 'the mediation of its self-othering with itself' (Hegel, 1977: 10). The Hegelian subject expands in the course of its journey by internalizing the world that it desires, and incorporating what it at first confronts as other to itself. The subject's desire then, is to be conscious of itself,[39] and to locate within itself the external world. The end point to this journey is self-awareness of the subject as substance; for the subject to experience the world as a confirmation of that subject's imaginary sense of being in the world[40]. The subject for Hegel was 'pure *simple negativity',* a function of the social structure that only experienced itself as a unity by purposively negating the very diversity it itself had produced (Butler, 1999). This is what Hegel termed the *negation of the negation*. This construction of the subject was at odds with the autonomous unitary subject that was the basis of the liberal theory of the social contract. The critique of reason for Hegel was a critique of the sovereign rational subject - atomistic and autonomous,

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[39] see Laplanche (1999: 101) 'The use of the word 'consciousness' by Hegel, in expressions such as 'unhappy consciousness', 'pious consciousness' or even that of Freud himself in 'consciousness of guilt' (Schuldbewusstsein), brings us closer to what is in question. With the word 'con-sciousness', one should let etymology play its part (cum-scire) – it is a 'knowledge' of oneself in every human being, of one's surroundings and one's fate which is relatively organised, coherent (co-haerens).'
[40] Bourdieu (1977) uses the term habitus to theorize the internalization of objective social structures into the subjective, mental experience of agents.

disengaged and disembodied, potentially and ideally self-transparent (McCarthy, 1991).

Hegel's notion of the subject was challenged in many ways as a metaphysical construct by Marx, Nietzsche and Freud (see Ricoeur, 1974[41]) and later still by Foucault and Althusser. Hegel's rejection of the autonomous unitary subject of liberal thought however, was accepted and developed by all of the above mentioned authors. The latter two were particularly significant in following Hegel in emphasizing the productive force of language as a vehicle through which human beings internalise the world and recognise themselves as a subject with interiority. In both Critical Theory and psychoanalysis, the concept of recognition is essential to an understanding of subjectivity. In both, subjectivity refers to how individuals are constructed as the 'I' via the bearer of the gaze (see Rose, 2005)[42].

However, Žižek (2000: 78) outlines how Hegel, in his earlier work, repeatedly returns to the theme of the subject's failure to impose its vision on the world and to realize itself in the symbolic order.

'Hegel insisted that subjectivity is inherently 'pathological' (biased, limited to a distorting, unbalanced perspective on the Whole). Hegel's achievement was thus to combine, in an unprecedented way, the ontologically constitutive character of the subject's activity with the subject's irreducible pathological bias: when these two features are thought together, conceived as co-

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[41] On the Hegelian problem of the 'archaeology of the subject' Ricoeur (1974: 245) writes 'the Hegelian Phenomenology cannot be repeated today; new figures of the self and the spirit have appeared since Hegel, and new abysses have been hollowed beneath our feet. But the problem remains the same […] The task of a philosophical anthropology after Freud is to pose this problem in ever more rigorous terms and to resolve it in a synthesis which satisfies both Freudian economics of desire and the Hegelian teleology of spirit.

[42] 'the subject relies on the Other in the imaginary relation, not to constitute a full identity but in order to circumscribe a void' (Rose, 2005: 188).

dependent, we obtain the notion of a <u>pathological bias constitutive of 'reality' itself.</u>

This split nature of subjectivity and its misrecognition of the world, the 'pathological' aspect of subjectivity, is central to our understanding of indeterminacy in Hegel's work. Although indeterminacy was the result of social pathology, the age 'suffering from indeterminacy', it was also central to human subjectivity and becoming. It is this duel aspect of indeterminacy that, as we will see below, relates indeterminacy to crime.

Inderminacy, Recognition and Crime

As mentioned earlier, the concept of crime and the figure of the criminal played an important role in the development of Hegel's philosophy; for Hegel the community's representation of the criminal has political, ethical, and as we shall see, scientific aspects. The dialectic of crime[43] was a means for Hegel of conceptualising the institutional structure of society in relation to the state, the emergence of the modern subject and the nature of intersubjectivity. Crime was not analysed as a social problem to be solved but as a central component of modernity. Crime, for Hegel, was both a negation[44] (Hegel, 1976) central to a *struggle for recognition* and necessary for the achievement of ethical life (Honneth 1995).

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[43] Hegel sees retribution as 'the turning back of crime against itself'. For Hegel the unbroken relationship between crime and its punishment is part of 'the dialectical evolution of reason'. (Flechtheim, 1947: 300).

[44] Habermas (1771: 148) discusses Hegel's notion of crime as a negation, in the example of the 'punishment which strikes the one who destroys the moral totality. The 'criminal' who revokes [aufhebt] the moral basis, namely the complementary interchange of non compulsory communication and the mutual satisfaction of interests, by putting himself as individual in the place of totality, sets in motion the process of a destiny which strikes back at him'.

As argued in the previous section, one becomes conscious of oneself as an individual only via the intersubjective exchanges with others. Subjectivity is constructed through a process of mutual recognition. Recognition from others is necessary to the development of a sense of self (Honneth, 1995, Fraser and Honneth, 2003). Recognition is posited by Hegel as an ideal reciprocal[45] relation between subjects. In this ideal relationship that is constitutive for subjectivity, each views the other as equal but separate from the other. However, for Hegel, what was dialectical in this reciprocal recognition of oneself and the other, was 'not the unconstrained intersubjectivity itself, but the history of its suppression and reconstitution' (Habermas, 1971: 148).

As we have seen earlier in the chapter, Hegel was opposed to the abstract, atomised subject produced by positivism and classical legal thought. Hegel argued that both the law and criminal acts were dependent on each other, and that therefore, criminal acts were actions that were tied to the conditions of those particular legal relations. In that sense, they stem, as discussed earlier, directly from the indeterminacy that flows from 'abstract right'. It was due to the indeterminacy of legal relations that misrecognition occurred and as a result the criminal is only negatively integrated into the collective life of society (Honneth, 1995). In other words the criminal was only partially recognised by law, he/she was not recognised as whole. In relation to the criminal, the suppression and distortion of unconstrained intersubjectivity is therefore not in relation to what the criminal has done, it is not the misrecognition of the crime by the other, but the abstraction of that crime to the exclusion of all other

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[45] Fichte in his *The Foundations of Natural Law* (1796) originally conceived of recognition as a 'reciprocal effect' [*Wechselwirkung*] between individuals and the law and which validated those legal relations (see Honneth 1995). We shall return to the theme of the legitimacy of law and recognition in chapter two.

human attributes; the reification of a singular quality into the attribute of a thing. In an article entitled *Who Thinks Abstractly?*, written around 1808,[46] Hegel writes:

> *'One who knows men traces the development of the criminal's mind: he finds in his history, in his education, a bad family relationship between his father and mother, some tremendous harshness after this human being had done some minor wrong, so he became embittered against the social order [...] and henceforth did not make it possible for him to preserve himself except through crime. There may be people who will say when they hear such things: he wants to excuse this murderer! [...] This is abstract thinking: to see nothing in the murderer except the abstract fact that he is a murderer, and to annul all other human essence in him with this simple quality. (Kaufmann, 1966: 116)*

The dialectic between recognition and misrecognition in relation to crime can be seen on two levels. On the first level crime can be understood with regards to the suppression of one side of the reciprocal relationship between the criminal and others. The motive for crime consists in the experience of the criminal being inadequately recognized in some way (Honneth, 1995). On the second level, it is in the social response to crime that Hegel saw the constructive and formative process which is the 'dialectical evolution of reason' (Flechtheim, 1947: 300); and it is this process that is important for the status of crime with regards to the formation of ethical life.

Hegel argued that criminal acts were constructive because they were able to bring to light conflicts that, allowed subjects to become aware, for the first time, of constraining relations of recognition. It was only through crime that 'ethically more mature relations of recognition can be formed at all, relations that represent a precondition for the actual development of a 'community of free citizens''

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[46] See Kaufmann (1966) the exact date or place of publication is not known. It was thought by the editors of Hegel's collected work that the article was written in 1807 or 1808.

(Honneth, 1995: 23). Crime and its punishment then, becomes a means of educating

an individual for society part of a lengthy process of Bildung: the self-development

of Geist (mind)[47](Averini, 1972, Honneth, 1995). To this extent, Hegel's theory of

recognition, although in many respects very different,[48] is an early precursor to

Durkheim's (1964, Lukes and Scull (Eds), 1984) theory of punishment, as for

Hegel, crime was also necessary for solidarity. As Honneth (1995: 24) writes:

> *'[b]y violating first the rights and then the honour of persons, the criminal makes the dependence of individuals on the community a matter of common knowledge. To this extent, the social conflicts that shattered natural ethical life prepare subjects to mutually recognize one another as persons who are dependent on each other and yet also completely individuated'.*

In terms of societal responses to crime, however, the key focus of this thesis is not

concerned with how to establish more ethically mature relations of recognition, than

it is to show that if society's response to crime is based on misrecognition, if the

responses are reified or too abstract, then they may contribute to further

indeterminacy.

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[47] For Hegel this self-development is achieved through resistance to and the negation to what exists. It is a concept particular to German literature, particularly to the work of Schiller and Goethe (Bildungsroman). Hegel's work, particularly the Phenomenology of Spirit, can be read as part of this tradition, or, what Williams (1977) would call 'structure of feeling'. See Lukács (1969:28), 'This conception of the last great intellectual and artistic period of bourgeois humanism has nothing to do with the barren and shallow apologia of capitalism which sets in later (and to some extent simultaneously). It is founded upon a ruthlessly truthful investigation and disclosure of all the contradictions of progress. There is no criticism of the present from which it will shrink. And even if it cannot consciously transcend the spiritual horizon of its time, yet the constantly oppressive sense of the contradictions of its own historical situation casts a profound shadow over the whole historical conception. This feeling that - contrary to the consciously philosophic and historical conception which proclaims unceasing and peaceful progress - one is experiencing a last brief, irretrievable intellectual prime of humanity manifests itself in the greatest representatives of this period in very different ways, in keeping with the unconscious character of this feeling. Yet for the same reason the emotional accent is very similar. Think of the old Goethe's theory of 'abnegation', of Hegel's 'Owl of Minerva' which takes flight only at dusk'.

[48] For Hegel, crime could not be separated from its legal aspect (Flechtheim (1947); therefore notions of deviance from social norms are absent from his work. Hegel's theory is negative and is focused on conflict, social change and the struggle against constraint, whereas Durkheim is concerned with how society maintains equilibrium with regards to solidarity.

Spirit is Bone: Hegel's Critique of Empiricism

In the *Phenomenology of Spirit*, published in 1807 Hegel developed this argument in a section of the book criticising what he regarded as the pseudo-sciences of physiognomy and phrenology. Developed by the works of Lavater (1741-1801), Gall (1758-1828) and Spurzheim (1776-1832) both of these sciences gained prominence during the latter half of the eighteenth century in Germany, France and England. The discussion in the Phenomenology centred on the relationship of mind to the physical body, and, in particular, the relationship of mental characteristics to bone formation (see Hegel, 1977). Hegel raised important issues in this work such as the shift in interest in the early nineteenth century from the criminal *act* to an interest in the *capacity* of an individual to be a murderer or thief; in other words to the likelihood of an individual committing crimes in the future based on a presumed inner motive that could be uncovered by a physical attribute of the person under observation.

> *Observation relates such and such a sensuous fact to just such a supposed or presumed (gemeintes) inner. It is not the murderer, the thief, that is to be known; it is the capacity to be a murderer, a thief (Hegel, 1977: 192)*

As we saw earlier in the chapter, Hegel attacked empiricism and the forms of positivism existent at the time of his writings. Empiricism presupposed the individual to be the primary mode of being, and according to Hegel, in these new sciences, attempted a rational explanation of human nature based on a series of fictitious assumptions derived from a list of observed physical attributes of an individual. The explanations of physiognomy and phrenology not only failed to teach us anything about human nature but also reified concrete human qualities

(attributes of Spirit) into that of a dead thing; what Hegel (1977: 540) referred to as the ossification of Spirit into bone.

> *Recognising the relation of inner and outer to be contingent, observation ceased to look for an organ, a symbol of Spirit, and pinned down its external immediacy in a dead 'thing'. The reality of Spirit was thereby made into a thing, an inert being given the significance of Spirit. To treat Spirit as a merely existent, objective thing is certainly to make it into something like a bone.*

At the heart of the new sciences, Hegel argued, was a false perspective of the subject and its relationship to the world. Earlier we saw how by misrecognising itself and its relation to the external world, the subject imagines itself and the world as being made for one another, and how the image produced by an imaginary misrecognition appeared both coherent and familiar to the subject. The human subject not only misrecognised the external world but its own nature as subject. Since the social world appeared as external and transparent, the new sciences must now make the latter its object via observation and the false separation of the observer from that world. The sciences of physiognomy and phrenology wanted to make such a relationship into a *law* connecting subject (in this case the observer) with object (external world). The main weakness of the empiricists' method, according to Hegel, was this attempt to separate social reality into discrete units of observation divorced from their social and historical context. Hegel (1977: 188) argued that in using such methods, physiognomy and phrenology were no more scientific than astrology or palmistry which also wished to explain one external thing with another completely disconnected sign.

> *'Physiognomy, however, would claim distinction from other spurious arts and unwholesome studies on the ground that in dealing with determinate*

> *individuality it considers the necessary opposition of an inner and an outer, of character as a conscious nature and character as a definitely embodied organic shape, and relates these moments to one another in the way they are related to one another by their very conception, and hence must constitute the content of a law. In astrology, on the other hand, in palmistry and similar 'sciences', there appears merely external element related to external element, anything whatsoever to an element alien to it'*

Physiognomy methods were no different than the unscientific speculation of a person's character from the way he or she dresses or presents themselves to the world. For Hegel it makes no difference that the new sciences spoke in terms of capacities and propensities; the complexity and range of an individual's nature could not be captured by such capacities and propensities. To abstract a single attribute 'murderer', 'thief', or 'good-hearted', 'unspoiled', from no more than a 'flat brow', or a 'long nose', was to lose 'the concrete indefinite characteristic nature of the particular individual'. For Hegel (1977: 193), the 'science' of physiognomy, was tautological. It claimed to deal with the presumed reality of human beings, yet merely raised to the 'level of knowledge uncritical assertions of everyday physiognomy'. It was without either foundation or finality; 'it cannot manage to say what it 'means' because it merely 'means', and its content is merely what is 'presumed' or 'meant'.

The measure of the individual for Hegel (1977: 194) was not in what could be deduced or presumed from physical characteristics but what the individual did[49]. Individuality was real in the deed. What was presumed or *imagined* takes the form of 'passive bodily being'.

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[49] i.e. their action in the context of their 'whole' social being and outside the sphere of 'abstract right' or the abstract observations of phrenology.

Hegel's work offers both an account of the relationship between the development of social institutions and changes in individual subjectivity and how this relationship can become pathological and constrain human freedom. The models of freedom particular to his time had, he thought, led to distortions in the 'practical self-relations of subjects' (Honneth, 2000: 36). Yet he also argued that a false perspective of the subject was to be found in the new positivist sciences. These new sciences that placed the observer as separate from the world prevented knowledge from breaking out of its un-reflexive relation to that world. The methodological separation of the observer from the world was underpinned by a language that assumed that every concept was equal to its object. Reification, what Hegel referred to in the quote above as the ossification of Spirit into bone, was the result of an un-reflexive knowledge, distanced via language from the social context of its own production.

Such ossifying tendencies have been identified recently by Carlen (2008: xiv) in her analysis of imaginary penalties.[50] Carlen draws on the imaginary[51] to show how various political and populist ideologies on crime and security structure an image of penal policy and practice that naturalises the discourse of governance, and in turn inhibit, corrupt and diminish 'any suggestions and opportunities for more open-ended imaginative discourses on social cohesion and justice'[52]. Being captive to the

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[50] See also Burton and Carlen (1979) for an earlier criminological treatment of Lacan's imaginary.

[51] Carlen (2008) also emphasises the productive aspect of the imaginary; that aspect that is related to the imagination and the alternative ways of becoming a society through imagining different courses of action and of possible social goals that we may take.

[52] In Pat Carlen's edited volume Imaginary Penalties (2008) she begins her introduction with an excerpt from Hans Christian Andersen's The Emperor's New Clothes. This story offers an allegory on the power of ideology and the imaginary. It is not that individuals are duped by ideology. They are aware of it as ideology, i.e. in this case everybody can see the Emperor is wearing no clothes; however, the important thing is that despite this knowledge they act and respond to him as if he were. It is when the small child makes public 'the truth' that the Emperor has no clothes that the spell of ideology is broken. An Hegelian interpretation of this story might argue that, it is not because the

naturalised discourse of governance, we are not aware of the more open-ended alternatives. Unger (2002) argues that blindness towards alternative possibilities not only excludes other possible choices but is in itself a mutilation. Recent penal policy and practice, particularly those relating to risk, security and community protection, have sought to eliminate indeterminacy and replace it with mechanical predictability. They have attempted to develop methods of decision-making or legislation for preventive detention that can close off, what Lippens (2009) calls, 'the hole of indeterminacy' at the crossroads of the imagined and the real. However for Unger (2002), in choosing one social vision to the exclusion of all others as a means of avoiding indeterminacy in social life, we cast aside other aspects of our humanity. However, Unger (2002) also argues that we have no choice but to choose, and by choosing we must also reject other possible means of action. It is this forced choice that makes him say that although such choices are indispensable to our self-development, they also represent a mutilation. In order not to completely cast off these other aspects of our humanity we must somehow find ways of learning to feel the movements of the limbs that we have cut off. To learn how to do that, argues Unger (2002), is the work of the imagination.

What this work of the imagination might refer to, in relation to recent penal policy and practice relating to risk and community protection, is that the social response to crime must be open to embryonic forms of ethical and reasoned alternatives within social institutions. In other words to encourage, what Carlen (2008) identified as,

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Emperor imagines that he has clothes on when he has not, that makes him appear mad; what makes him appear mad is the fact that he believes himself to be an Emperor. It is the recognition of his subjects that give him status as an Emperor AND sustains his belief in his new clothes. A more likely scenario for the end of this tale is not laughter as in the original, but violence. If it is the threat of violence that underpins the power of legitimacy, then a far more likely ending would be that the crowd turn on the small boy for uttering the truth and tear him to pieces (See Zupančič, 2006 on Lacan's account on the imaginary nature of sovereignty)

more open-ended and imaginative policy discourses on justice and social cohesion. For Hegel, it was only through these struggles of recognition in relation to crime that ethically more mature relations of recognition could be formed (Honneth, 1995).

Conclusion

This chapter began by asking what relevance Hegel had to a social science thesis at the beginning of the 21st century. It argued that although the relationship between modernity and rationality maintained by Hegel was no longer seen as relevant by contemporary social theorists, developments in recent debates concerning late modernity and the risk society, as we will see in chapter 4 appear to reflect a return, albeit not an intended one, to Hegelian themes. It has, therefore, been necessary to outline Hegelian concepts in order to engage with these recent debates later in the thesis A second reason outlined, was that Hegel's work was relevant to criminology due to the important role that the concept of crime and the figure of the criminal played in the development of Hegel's philosophy.

The chapter outlined a theory of institutions drawn from Hegel's notion of 'Ethical Life' (*Sittlichkeit*). It noted that while ethical life was an ideal notion of a community, it could also be used to as the basis of explaining its opposite, the pathological immersion in the symbolic order. It was argued that the usefulness of ethical life as a concept was that it maintained the conceptual link between modernity and rationality and was also a more critical concept than the positive English-language notion of 'community'. Most importantly for this thesis is that

ethical life provided a framework to conceptualise crime and its relation to indeterminacy and legitimacy.

The concepts outlined in the chapter, although originating in the work of Hegel, were interpreted, through the lens of Critical Theory. One characteristic of Critical Theory that was noted was the casting aside of the outward form of Hegel's system, while retaining its negative core. Another was its concentration on language and its role in the struggle of the subject for recognition. We saw how language for Hegel could also be the source of alienation as well as of knowledge. The Frankfurt School argued that the increase of social domination and the formation of identity were two sides of the single process of instrumental rationalisation and that a side product of this process, influenced and controlled as it is by planning, management and engineering, was what Bauman (1998) called the social construction of the 'stranger'; an aspect that we will return to in chapter four and five.

We saw that for Hegel, the journey of the subject had an ethical dimension to it. This ethical dimension was related to his notion that subjectivity was constructed through a process of mutual recognition. Recognition from others is necessary to the development of a sense of self. However we also saw that for Hegel, what was dialectical in this reciprocal recognition of oneself and the other was 'not the unconstrained intersubjectivity itself, but the history of its suppression and reconstitution' and it was in relation to the suppression of recognition that was important for Hegel's understanding of crime. Hegel argued that it was due to the indeterminacy of legal relations that misrecognition occurred and as a result the criminal is only negatively integrated into the collective life of society. We have

seen however that crime, for Hegel (1967) was a constructive and formative process and it was in how society responded to it, that not only marks the maturity of its social relationships, but allows its subjects to develop and grow.

For Hegel the social world would be prey to indeterminacy unless its legal or customary rules (ethical life) can be made good at an institutional level where ethical norms become intersubjectively shared and normatively binding for subjects (Habermas, 2006). In other words, drawing on Hegel's notion of indeterminacy not only helps us to understand why crime occurs but also how responses to crime, if they are too abstract, contribute to further indeterminacy. It is the latter emphasis that is the focus of this thesis. Such a scheme imagines a form of human association that is far removed from contemporary social institutions. The following chapter will draw on the concept of *recognition* outlined above and relate it to the legitimation of the institutions of law and science. In this way both chapter one and two will provide the theoretical background for the socio-historical account of the Risk Management Authority.

CHAPTER TWO

RECOGNITION AND THE INSTITUTION OF LEGITIMACY

> '*We are primarily interested in 'domination' in so far as it is combined with 'administration'. Every domination both expresses itself and functions through administration. Every administration, on the other hand, needs domination, because it is always necessary that some powers of command be in the hands of somebody. Possibly the power of command may appear in a rather innocent garb; the ruler may be regarded as their 'servant' by the ruled, and he may even look upon himself in that way. This phenomenon occurs in its purist form in the so-called <u>immediate democratic administration.</u> (Weber, 1954: 330)*

Introduction

This chapter explores the concept of recognition and its relationship to legitimacy. The question at its heart is why is a particular social order accepted by its subjects as legitimate? Part I outlines the relationship between legality and legitimacy and begins with Weber's (1954) assertion that a legal system which is logically coherent and free from internal contradictions is necessary for the legitimation of modern societies. It examines questions of recognition, legal validity and their relation to subjectivity. In particular it focuses on Hegel's attempt to move beyond the legal subject of liberal classicism and develop, not only more dynamic conceptions of recognition and subjectivity, but also ones that are sociologically grounded. Part II deals with the principles and values that validate law in relation to procedural and substantive law; a change within the strategies of legitimation of modern society. Legitimation here is grounded both 'scientifically' and in terms of the imperatives of the economy. Part III addresses the problem of legitimacy and the structuring of subjectivity and argues that legitimation struggles extend not only to law and to the economy as argued in the previous two sections but also to the knowledge claims of

elites. This final section looks at legitimation in relation to science and psychiatry.

Lastly, because of the dialectical relationship between the production of subjectivity and the construction of political authority, the chapter argues that a legitimation *crisis* must also be understood as a crisis of identity (see Habermas, 1976).

I

Legitimacy and Law

> *'Conduct, especially social conduct, and quite particularly a social relationship, can be oriented on the part of actors toward their <u>idea (Vorstellung)</u> of the existence of a <u>legitimate order.</u> [...] [L]egitimacy can be ascribed to an order by virtue of positive enactment of recognised <u>legality</u>. (Weber, 1954:3-8)*

Domination, which Weber viewed as necessary within all social systems for the reason that the powers of command must 'be in the hands of somebody', often appeared to those subject to it, in a masked or more 'innocent' form. These forms, what Weber called the 'basic *legitimations* of domination', were internalised by a community and were drawn from traditional, charismatic or legal forms of authority[53]. The 'innocent garb' was necessary according to Weber, because power, or domination, was based on the legitimate use of violence. In his 1919 article *Politics as a Vocation*, Weber (Cited in Gerth and Mills, 1948: 78) writes:

> *'Today the relation between the state and violence is an especially intimate one. In the past, the most varied institutions – beginning with the sib[54]- have known the use of physical force as quite normal. Today, however, we have to*

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[53] Traditional authority rests on the 'established belief in the sanctity of immemorial traditions'; charismatic authority rests on 'devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him'; while in 'the case of legal authority, obedience is owed to the legally established impersonal order.' Weber (1978: 215)
[54] A sib is a name for a kin group.

> *say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory'*

The arbitrary and irrational aspect of law and its relation to violence was highlighted by Pascal (1966: 46-47) over two hundred years earlier in his *Pensées* (1662) when he writes of the founding act of usurpation,[55] which underlies the Constitution and all legal systems; that which is 'law and nothing more'.

> *'Custom creates the whole of equity, for the simple reason that it is accepted. That is the mystic foundation of its authority. Anyone who tries to bring it back to its first principles destroys it. Nothing is so defective as those laws which correct defects. Anyone obeying them because they are just is obeying an imaginary justice, not the essence of law, which is completely self-contained: it is law and nothing more. Anyone wishing to examine the reason for this will find it so trivial and feeble that, unless he is used to contemplating the marvels of human fancy, he will be amazed that in a century it has acquired so much pomp and reverence.'*

Pascal writes of the imaginary justice and the 'mystifying' power behind the construction of legitimacy. He argues that because the truth could only threaten the political order, then the people must be deceived and not allowed to see the inaugural violence in which law is rooted. Law must be perceived as authoritative and eternal (Bourdieu, 2000: 168). At the base of any legal system, therefore, is something which is not law, something which is pre-legal[56].

Legitimacy then is related to belief, but it is also distinct from coercion in that it describes the acceptance of an authority or social order without a direct threat of

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[55] See also Žižek, (2002:204) 'the ultimate truth about the reign of law is that of usurpation, and all classical politico-philosophical thought rests on the disavowal of this violent act of foundation. The illegitimate violence by which law sustains itself must be concealed at any price, because the concealment is the positive condition of the functioning of law: it functions in so far as its subjects are deceived, in so far as they experience the authority of law as 'authentic and eternal' and overlook 'the truth about usurpation'.

[56] Marxist jurisprudence would argue that this something which underlies the legal system is merely class interest (see Pashukanis, 1978) and would give a more *restricted* meaning to the concept of legality in relation to legitimacy (see Miliband, 1973).

violence. However as the quotes above by Weber (1954) and Pascal (1966) suggest the nature of that acceptance is controversial and may involve the misrecognition as much as the recognition of such an authority.

Weber (1954) regarded the legitimacy[57] of the political systems of modern Western societies as based upon the belief in the legal form of political authority: that is in the *legality* of their exercise of political power. Belief in law was distinct from belief in custom or charismatic authority in that it was based on the *recognition* of its rational character.

The question at the heart of this chapter is the question of legitimate social order. In other words, why is a particular social order accepted by its subjects as legitimate? As we see for Weber (1954) it was legality itself that was important in establishing legitimacy. However, this legality legitimated something in the legal system upon which legality was founded but which was not law. This other at the heart of the legal system was, for Weber (Gerth and Mills, 1948) the threat of physical force or coercion[58]. The foundation of law was something that interested Hegel and his own understanding of the relationship of legality to legitimation. Part of that understanding relates to the concept of *recognition*. For him recognition was an important concept in the elaboration of his history of the life-and-death struggle of the subject for self-realisation. However recognition is also a key concept in liberal jurisprudence and is employed in this perspective as a means of understanding legal

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[57] For Beetham (1991), philosophers and social scientists differ in their interpretations of legitimacy. What is legitimate for the philosopher is what is morally justifiable or rightful; the moral justifiability of power relations. Legitimacy for the social scientist is understood as *belief in legitimacy* by particular historical subjects in particular historical societies.
[58] H.L.A. Hart's (1997) *The Concept of Law* was written as a rebuttal of the thesis that the content of all law was a series of orders backed by a threat.

validity (Hart, 1997). Before we go on to discuss recognition in detail we must look at the question of legality in more detail and how this relates to an understanding of legitimate authority.

Legality and Legitimate Authority

The establishment of a legal system which was logically coherent and free from internal contradictions (Weber, 1954: 11) was, alongside the discarding of all metaphysics[59], the main aim of legal positivism[60]. However, the understanding that law is perceived as rational and internally consistent is necessary for the legitimation of all law. As Norrie (2001: 8) writes:

> *'Legality (the 'rule of law') depends upon making and applying legal rules in a non-arbitrary way. It depends upon a system of norms that do not contradict each other, that are consistent and coherent. It requires that judges recognise and obey already existing rules through a system of precedent. All these things can only happen if the 'glue' that holds a system of laws together is logic or reason. Rationality is fundamental to legality'*

Norrie (2001: 10) goes on to argue, however, that although lawyers make their arguments based on these rational assumptions, their commitment to them is ambiguous. '[I]n their moments of doubt, or when pushed to a position they do not accept, they jettison logic or insist on its limits'. Norrie (2001) contends that these limits should be understood as the historical and social limitations of law itself. In other words, Norrie (2001) argues that law should be understood as a contradictory phenomenon. Drawing on a similar theme of indeterminacy outlined in chapter one,

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[59] For Hegel the answer lay in the opposite direction of the legal positivists, not in the eradication of metaphysics but in its firmer establishment: in other words, to place metaphysics in question (Critchley, 2001).

[60] Legal positivists required the break from morality as, for them; there were no adequate means of affirming legal positivity within a universal moral theory of society (Norrie, 1993).

the Critical Legal Studies movement[61] argued that the 'inability of legal doctrine to generate logically consistent outcomes from rules and distinctions that have a clear formal basis'[62] (Fish, 1993: 168), make the entire legal process insidious and empty.

Duff (1998) in response to Norrie's argument that criminal law is necessarily contradictory, asks the question: what does it means in practice for it to be so? He argues that Norrie's contention is pejorative in that it identifies a defect of reason in criminal law. Duff (1998: 163) writes:

> *'Contradiction is a <u>fatal</u> defect in an assertion or a theory that aims at truth. One cannot admit to the contradiction and yet insist that the assertion of the theory is acceptable as it stands: One might hope that further inquiry will remove the contradiction, by disproving one of the contradictory propositions; but if the contradiction cannot be eliminated, the assertion or theory must be rejected as fatally flawed'.*

Duff (1998) argues that there are unambiguous examples of how the legal system could be said to be defective because it is contradictory; if for example there is a contradiction between what a law prohibits and what it may require an individual to do in relation to the same action. Such examples would express incompatibilities between different legal policies or principles and as such can be addressed by law providing appropriate resources to address such conflicts. However, according to Duff (1998), these are not the kind of contradiction which Norrie (1993) or critical theorists maintain exists in criminal law.

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[61] Influenced by the twin experiences of the civil rights movement and the anti-war movements of the late 1960s; the Critical Legal Studies movement developed a critical stance towards the dominant legal ideology of modern Western society. It sought to demystify what they saw as myths at the heart of the mainstream legal practice. Roberto Mangabeira Unger was associated with the Critical Legal Studies movement for a brief period in the late 1970s and early 1980s and was the key figure associated with the 'indeterminacy debate' in legal theory (see Unger, 1986)

[62] This threat of indeterminacy is touched on also by liberal jurisprudence when Hart (1997) writes that there are a variety of ways in which the general obedience to the law break down and leads to the pathology of legal systems.

What makes criminal law contradictory for Norrie (1993) and critical theory is not merely incompatible legal doctrines and rules, but irresolvable and deep seated conflicts which reflect a conflict between distinct visions of human nature. Law for them is a system of thought that is torn by internal contradiction and 'by systematic repression of the presence of these contradictions' (Kelman, 1987, cited in Duff, 1998: 168)

Duff (1998) suggests that if law is contradictory, then an important question for critical theory to answer is: how far the law can be perceived as a potential instrument for good?[63] The answer to that question for critical theorists, according to Duff (1998), must be in the negative. We can only have hope in the law if it is not contradictory. Duff (1998) suggests that critical theory has missed the target when they argue that there are fundamental contradictions within the criminal law. The starting point of the enquiry, for Duff (1998: 196), lies not in the contradictions of law, but with 'the conditions that undermine the law's claim to illegitimate authority'[64].

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[63] See Thompson (1990: 264-265) on legality and legitimacy in relation to C18 law in England: 'We reach, then, not a simple conclusion (law = class power) but a complex and contradictory one. On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers; not only is this so, but as the century advanced the law became a superb instrument by which those rulers were able to impose new definitions of property to their even greater advantage […] On the other hand, the law mediated these class relations through legal forms, which imposed again and again, inhibitions upon the actions of the rulers. For there is a very large difference […] between arbitrary extra-legal power and the rule of law.'

[64] See Duff (1998: 196) 'That is why my argument that is at least doubtful whether the law's preconditions (preconditions that reflect values internal to the law itself) are satisfied is distinct from a critical theorist's claim that the law is internally 'contradictory'. The law might well be internally as principled and coherent as one could expect a human institution to be; and I argued that in dealing with the relevance of motives to criminal liability it is. But its legitimacy, its authority, in relation to some of those whom it claims to obligate might still be questioned, on the ground that its preconditions are not satisfied'.

This question of the nature of contradiction and where such contradictions if they do exist lie - whether within the law itself, or, in the principles and values that validate such laws – have divided liberal and critical legal scholars. As Duff (1998) notes, the question's importance lies in relation to the legitimacy of law's authority. If law is contradictory, then there is little justification to obey it. It is to the question of the validity of the law that we now turn.

Rules of Recognition and Legal Validity.

The question of legal domination, according to Hart (1997), can only be understood if contextualized in terms of social obligations. Hart argues that human behaviour can be divided into two categories: social habits and social rules. Law is located within those social rules that constitute obligations. There are moral rules of obligation and there are rules of obligation that take the form of law. For Hart there is no necessary relationship between the two.

Legal rules can also be divided into primary and secondary rules. Primary rules are ones which tell people to do things, or not to do things; secondary rules provide the criteria for identifying primary rules of obligation. They enable individuals to find out whether or not a primary rule has been broken but also specify who has the *power* to alter the law. Secondary rules are what Hart calls rules of *recognition* (Riddall, 1999). As these rules are related to authority over others, rules of recognition are central to questions of legitimacy in modern societies.

Rules of recognition are more complex within modern legal systems where there may be a number of sources of law. Therefore in these situations the criteria on

which such rules of recognition are based can take more than one form. These may include 'reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases' (Hart, 1997: 100). The criteria for identifying the law are numerous and most commonly include a written constitution, enactment by a legislature, and judicial precedents. Hart argues that in most cases, possible conflicts are provided for by ranking such criteria in order of primacy and relative subordination. To illustrate this, Hart gives the example of common law being subordinate to statute law (Hart, 1997: 101).

As mentioned above, when rules of recognition are accepted they are used for the identification of the primary rules of obligation that take the form of law. It is the inter-relation of both types of rules that, according to Hart, lie at the foundations of modern legal systems. However, in the everyday functioning of the legal system, rules of recognition are seldom formulated as rules and for the most part are not stated as such. Their existence is shown more often in the way in which primary rules are identified (Riddall, 1999). In other words, what is important with regards to rules of recognition, as they relate to the legitimation of law, is that they are accepted without argument and they are internalised by those who are subject to a particular legal system[65].

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[65] Hart argues that rules of recognition are capable of being looked at from two points of view - from an *internal* and from an *external* point of view. Those *internal* to the system accept rules of recognition without reflection i.e. therefore such rules are valid *unconsciously* (although this does not mean that subjects are unaware of them). Those who are *external* to the system will understand the rules as valid with reference to a particular system of meaning, i.e. they are consciously aware that the rules of recognition refer to a particular system. Hart (1997:102) gives the example of a non-British national saying; 'in Britain they accept as law what the Queen in Parliament enacts'.

Hart (1997) argues that there is a hierarchy of rules of recognition where one is dominant[66]. For Weber (1954) this dominant rule of the recognition was *legality* itself. In other words, as we have seen, the authority of law was both rational in character - it was the rationality inherent in law itself that secured the legitimacy of power implemented in legal forms - and 'just'; the law was applied equally across society. Weber's concept of law can therefore be described as positivistic[67] in the sense that law was unambiguously what the legislator enacted as law in conformity with legally institutionalised procedures.

> *'The juridical point of view, or, more precisely, that of legal dogmatics[68] aims at the correct meaning of propositions the content of which constitutes an order supposedly determinative for the conduct of a defined group of persons: in other words, it tries to define the facts to which this order applies and the way in which it bears on them. Toward this end, the jurist, taking for granted the empirical validity of the legal propositions, examines each of them and tries to determine its logically correct meaning in such a way that all of them can be combined in a system which is logically coherent, i.e., free from internal contradictions.' (Weber, 1954: 11)*

Thus the rationality of law, according to Weber, was grounded in its formal properties, i.e. from it being carried out transparently, in a formally legal manner and in accordance with its own internal logic; and did not draw its legitimating power from an association with morality or ethics (Habermas, 1986b)[69]. Justice becomes formal when:

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[66] Although Hart warns that this should not be interpreted to mean that in any one legal system there is a supreme legislative power which is legally unlimited (Riddall, 1999).

[67] Legal 'positivism' in the sense attributed to Weber's understanding is closer to the idea behind the Latin *positum*, 'which refers to the law as it is laid down or posited' (Wacks, 2006: 18) than to the definitions of positivism relevant to the social sciences.

[68] Dogmatics refers to the 'legal science of the law' as opposed to its philosophical, historical or sociological understanding (Weber, 1954).

[69] It is important to note that legitimation through traditional and charismatic forms of authority are not absent from modern societies. Notions of sovereignty and custom are absent from Weber's account of law because they refer to these other forms of authority. See Weber (1978: 1146) 'As domination congeals into a permanent structure, charisma recedes as a creative force and erupts only in short-lived mass emotions with unpredictable effect, during elections and similar occasions.

1. 'the systematic perfection of a body of clearly analysed legal provisions brings established norms into a clear and verifiable order'.

2. 'the abstract and general form of the law, neither tailored to particular contexts nor addressed to specific persons, gives the legal system a uniform structure.'

3. 'a judiciary and an administration bound by law guarantee due process and a reliable implementation of law'. (Habermas, 1986: 221-222)

Weber argued that it was recognition of these three formal principles, while guaranteeing classical liberal law, which provided legitimacy to the liberal state.

The authority of law then was grounded on it being both rational in character and 'just'. For Weber it did not, nor should not, draw its legitimating power from an association with morality or ethics. However, as Hart (1997) argues, just because particular rules of recognition become dominant at particular times or within different social orders, does not mean that a single legislative authority is secure in its legitimacy. In terms of Weber's three principles, would the rationality of the administration of the law be enough to guarantee legality as the basis of domination? As we saw above primary rules are valid within a legal system because they comply with the rules of recognition of that system.[70] Although the three principles outlined above may become under certain circumstances what Hart (1997) calls the 'ultimate' rules of recognition, there is no rule of recognition to test

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However, charisma remains a very important element of the social structure, even though it is much transformed'.

[70] The validity of the rule does not depend on the fact that it is obeyed or not. According to Hart (1997) , the validity of a rule and whether it is obeyed or disobeyed are separate matters.

the validity of those principles themselves. A rule of recognition can therefore be neither valid nor invalid - it is simply accepted within the legal system as being appropriate for deciding what a valid primary rule of law is and what it is not (Riddle, 1999).

Hart (1997), as noted above, makes a distinction between rules and habits. Rules are different from habits because rules are self-examining; they imply acceptance and reflective reasoning on the part of those who follow the rules. Habitual behaviour in contrast is performed mindlessly and involves endless repetition (Douzinas and Gearey, 2005). As suggested above, rules of recognition are neither valid nor invalid – they are accepted within the system simply as being appropriate for deciding what is and is not a valid primary rule of law; there is no rule of recognition to test the validity of secondary rules themselves. This is the ambiguity at the centre of Hart's (1997) formulation of rules of recognition. Although rules of recognition can be reflected on and are open to critical scrutiny, they are more often than not accepted without argument and internalised by those subject to a legal system. If there is no rule of recognition to test the validity of secondary rules and law is accepted merely by advocating agreed criteria of recognition, then, when those criteria are in conflict, law becomes open to indeterminacy (Unger, 1983). In this case it is the lack of fit between the primary rules and the secondary rules that bring us again to the unsolved question of the relationship of legitimacy and law.

The concept of secondary rules of recognition is therefore problematic on two counts: first, they appear to rely on habit, or passive acceptance, and therefore are blind to broader social and political influences on legal decision making; and

second, related to the first point, because rules of recognition are neither valid nor invalid, they do not provide an answer to why a legal system is accepted.

Earlier I noted that the question of contradictions within the law itself, or in the principles and values that validate such laws had divided liberal and critical legal scholars. An important dividing point has been the understanding of recognition and legal validity. In other words, liberal scholars argue that contradictions, if they exist, are the result of badly formulated law, or laws badly applied or that these contradictions may be the result of conditions that are external to law. As Duff notes, if the law is contradictory, then there is little justification to obey or recognise it. In other words, in liberal theory, contradiction and recognition are both related to the validity of law. Critical scholars, following Hegel, would argue that contradiction is a fundamental aspect of law. This contradiction is not external, but is expressed in the dialectical relationship between the abstract universality of justice (which acts as a constraint to justice) and the actual social relations in which the law functions. Recognition, or misrecognition, is therefore not about the validity of the law as such, but relates to conflicts that individuals pursue via law in order to have their ' identity claims ' confirmed   (see Honneth 1995, 2007).

The Legal Subject

The Enlightenment faith in the authority of reason was evident in what has now been designated within criminology as the Classical School. Within classicism 'crime' was a concept and not simply an outcome of a particular form of human behaviour (Bottoms, 2000). In 1764 Beccaria published *On Crimes and Punishment*, in this work Beccaria was concerned with an exploration of the moral

and political justifications for punishment. This work, along with the writings of Bentham (1748-1832) in England, was concerned with the principles of justice and how crime was to be dealt with by the state. Both theorists drew on the most authoritative 18th century theories of democratic liberalism and related them to issues of criminal justice. Liberal jurisprudence bases its understanding on the motivations of conduct of individual actors (Lilly et al, 1995). Here the individual is elevated above a particular individual's concrete existence in the world and comes into existence in the *abstract* form of the legal subject (Foucault, 1991). The singular most important contribution of this school was its focus on the individual criminal as a person capable of rationally calculating the risks and rewards they would receive for their actions. In liberal criminal law theory it is a common theme that individual responsibility is the proper basis for legitimate punishment. Norrie (1998: 104) argues that both the liberal understanding of criminal law theory and philosophy of punishment:

> *'fail to locate individual responsibility where it should be located, between the two domains of the personal and the social. Both are structured by a primary antinomy between the ideal and the actual that establishes an artificial separation, a second antinomy, between the individual and social. The falsity of this dichotomy undermines the logic of retributive and criminal law theory and renders them incoherent and unsustainable. Subjectivity, as represented in liberal criminal law and retributive philosophy, focuses on an ideal conception of the individual to the exclusion of actual social and moral context in which individual agency occurs'.*

In law, the legal subject stands fully autonomous at the centre of the world in full possession of their rights and transparent in their motives[71]. Legal recognition places the individual in the form of universality, in other words the subject is founded on the minimum commonalities of people and not on the properties that

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[71] See Barthes (2000: 44) on how language erases social difference in criminal trials, 'Periodically, some trial […] comes to remind you that the Law is always prepared to lend you a spare brain in order to condemn you without remorse, and that […] it depicts you as you should be, and not as you are'.

make them unique individuals. The legal subject is an abstract category; it is constructed by the legal system as a universal subject beyond the particularities of class, gender, race or religion (Douzinas and Gearey, 2005). This reasoning autonomous legal subject, located within a structure of universal legal rights and protected by the rule of law, was a powerful mechanism of ideological legitimation from the eighteenth century onwards, for the very reason that it erased *particularity.*

As we have seen in chapter one, Hegel not only opposed the abstract atomised individual of classical legal thought, but also the abstract categories of scientific positivism. Both presupposed the 'being of the individual' to be 'the primary and supreme thing' (Honneth, 1995: 12). In this context Hegel labels all those approaches 'empirical' that start out with such an abstract characterization of human nature and which conceive of human behaviour exclusively as the isolated acts of solitary individuals. Both areas of thought, scientific positivism and liberal law, presuppose as the basis for human socialization, the existence of subjects who are isolated from each other. In both, a 'community of human beings' can only be conceptualized on the abstract model of a 'unified many' that is, as a cluster of single subjects, and thus not on the model of the ethical unity outlined by Hegel (Honneth, 1995: 12). Norrie (1978) writes:

> *'The central problem for the classical retributive theory of punishment was that it relied upon an ideal conception of the individual in order to do two things: to construct a conception of the <u>responsible moral subject</u>, whose punishment was justified because of his or her prior act, and to construct a conception of a <u>moral community</u> with agreed norms that would make judgment, condemnation, and punishment possible. This idea of community was itself based upon a prior conceptualization of the responsible moral subject. The problem was that the ideal conception of the individual contrasted, and could not be reconciled, with the actuality of individual life in modern society' Norrie (1998: 107).*

Although Hegel rejected the formal legality of classical liberal law and, as we saw in chapter one, argued that abstract Right led to indeterminacy, he did share some of the concerns about classical retributive theory. The next section will outline Hegel's theory of punishment and show how it differs in terms of his conceptualisation of recognition and its relation both to the responsible subject and to the moral community.

Recognition and Retributive Justice

Hegel (1967) considered the law to be a 'realm of freedom,' and like Weber after him, he argued that the increasing rationalisation of legal structures, the codification of law which attempts to systematise the legal heritage of the past, was to be encouraged and was seen by him as a standard of historical progress (Avineri, 1972). Hegel conceived of the relationship between crime and the criminal wholly in terms of its legal aspect. In this way Hegel is close to classical theorists in restricting the legal subject to a juridical existence. However, despite this aspect it is important not to mistake his theory with traditional theories of retribution[72] (Flechtheim, 1947).

Within Hegel's philosophy of punishment there exists an unbreakable relationship between the criminal act and its penalty. Hegel sees in retribution 'the turning back of crime against itself'. In Hegel's interpretation, punishment becomes the criminal's subjective right rather than his/her legal obligation. For Hegel, in addition to its function of retribution, law, as it becomes invested with the capacity of

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[72] Retributive punishment has historically been associated with *lex talionis* (an eye for an eye and a tooth for a tooth').

reconciliation, assumes the power of absorbing and effacing crime (Flechtheim, 1947).

Consequently, punishment ceases to be dishonourable or shameful; the criminal in serving his sentence, 'rehabilitates himself and regains his former status in life'[73]. Thus the penalty does not express itself as constraint or violence, but as free and rational self-determination on the part of the offender. (Flechtheim, 1947: 298). As Bloch (1987: 125) writes:

> '*Punishment should be so little constraint that it even returns to the criminal his freedom by respecting his human dignity; in the restoration of law through punishment, justice (which as a pure nullity is nothing less than freedom) is once again established as part of the substantial will, and thus of objective freedom.*'[74]

Punishment rests upon the free and rational consent of the criminal as a 'person'. However, there is a tension between Hegel's account of punishment, and its relationship to classical legal theory, and his scathing analysis of the pathologies of civil society explored in chapter one, which needs further exploration.

We saw earlier in chapter one how ethical life was a theory of social bonds that was developed by Hegel to counter the abstract, atomised forms of abstract Right. We saw that ethical life was concrete and many-sided while penal justice, being

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[73] According to Flechtheim (1947), Hegel, in his criticism of relativistic theories of punishment, anticipates C20 arguments about rehabilitation, particularly those that argued that forced rehabilitation, ruthless intimidation, and arbitrarily imposed re-education may be less compatible with human dignity and personal responsibility than traditional retribution.

[74] The controversial aspect of Hegel's theory of retributive punishment is related to the death penalty and is outlined by Bloch (1987: 125) directly after the above passage: 'It is a paradox, or a mockery, that Hegel is not embarrassed in calling the death penalty the greatest happiness of freedom: Beheaded, the criminal becomes human again. That is how easily Hegel's judicial conscience regarding punishment conforms to the supreme power of the existing state and social order: Hegel only recognises justice as penal justice, and this is found in the iron hand of the dominant order'

abstract, was associated with limitation and constraint. Retributive punishment under such constraints would appear not only of limited value, i.e. it is not based on justice grounded in an ethical community, but would also seem to be counter to Hegel's intention. In other words, if law was not grounded in ethical life, it would remain abstract and prone to indeterminacy. In this context Hegel's objection, both to monarchical absolutism as well as to majoritarian democracy, was that law in those conditions becomes arbitrary and opposed to reason (Hegel, 1967). However, Hegel did find a way of reconciling his theory of ethical life with a theory of retributive justice, and he did this by reinterpreting Fichte's theory of recognition (see Honneth 1995, 2007).

Fichte, in his *The Foundations of Natural Law* (1796), originally conceived of recognition as a 'reciprocal effect' [*Wechselwirkung*] between individuals and the law, which validated those legal relations between the two. He argued that subjects can only develop a consciousness of freedom if they recognise each other as free beings and appeal to one another to make use of their autonomy. Hegel removes the transcendental[75] indications from Fichte's model and applies it directly to the different forms of reciprocal action among individuals. As we have seen, Hegel argued that ethical progress unfolds in the intersubjective struggles that individuals pursue in order to have their identity claims confirmed. By situating Fichte's model of recognition within a theory of conflict, Hegel not only provides a more dynamic

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[75] Transcendental idealism was the name given to Kant's early philosophy. See Körner (1955: 93-94):'The objects of experience are the only objects which we can know […] [y]et we are committed, according to Kant, to the thesis that there are things in themselves although we cannot know what they are […] Kant calls the things in themselves 'nomena' […] and contrasts them with 'phenomena' which are or can be objects of experience.' Fichte's early work was influenced by Kant's transcendental idealism (Beiser, 2002).

conception of recognition, but also makes its 'negative' course of development[76] more concrete (see Honneth 1995, 2007).

The criminal as outlined in Hegel's theory has a juridical existence, as does the classical legal subject, however Hegel's conceptualisation of recognition is a very different notion of recognition than the legal recognition of liberal law. For Hegel, the 'general will is the will of individuals made into an object within the institutions of the state' (Avineri, 1972:102). The objectification of the individual will as it appears in the state – the general will - entails the recognition by the individual of something that appears alien and external. This external power is nothing more than the externalisation of the subject's own will. In other words, for Hegel, the system of law is the objectification of the subject's will (Averini, 1972). With regards to crime and its punishment, recognition was posited by Hegel as an ideal reciprocal relationship between subjects and the law. Laws, Hegel argues:

> *'are not something alien to the subject. On the contrary, his spirit bears witness to them as to his own essence, the essence in which he has a feeling of his selfhood, and in which he lives as in his own element which is not distinguished from himself. The subject is thus directly linked to the ethical order by a relation which is more like an identity than even the relation of faith or trust'. (Hegel, 1967: 106)*

Hegel's theory contrasts with classical liberalism then in that it does not conceptualise the individual in the form of the autonomous legal subject described above, i.e. as an autonomous stable entity which, once formed, goes forth as a complete individual into the world. Hegel views the subject as *embodied* in institutions, by the very process of the institutionalisation of society's ideas,

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[76] See discussion on negativity in chapter one of this thesis.

customs and morals. For Hegel recognition was a reciprocal process that took the form of a struggle for self-actualisation via the legal system[77]. It is reciprocal in the dialectical sense that the struggles for recognition were processes of self-development for all parties, and were a reflection of broader social conflicts and struggles for social emancipation. For Hegel, moral and social conflicts are expressions of a struggle for recognition which is necessary both for the creation of the subject and for its socialization (see Honneth, 1996 and Douzinas and Gearey, 2005). In this way Hegel introduces an understanding of social struggle that treats practical conflicts between subjects as an 'ethical moment in a movement occurring within a collective social life' (Honneth, 1996: 17). This struggle is captured vividly by Thompson (1990: 261) in relation to eighteenth century property rights in England:

> *'What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights: for the landowner, enclosure – for the cottager, common rights; for the forest officialdom, 'preserved grounds' for the deer; for the foresters, the right to take turfs. For as long as it remained possible, the ruled – if they could find a purse and a lawyer – would actually fight for their rights by means of law; occasionally the copyholders, resting upon the precedents of sixteenth-century law, could actually win a case. When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.'*

As the quote above illustrates, the conception of a struggle for recognition includes not only the site of moral conflict but also the institutional setting by which such struggles are settled. The subject in this case is no longer the abstract legal subject who draws their identity from the recognition of their status as legal agents; instead,

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[77] Hegel's belief in the self-determination and self-liberation of the criminal cannot be separated from the importance that he attributes to trial by jury and to a parliament with public proceedings, institutions lacking in the Prussia of his time (Kaufmann, 1951).

the subject involved in this 'life and death' struggle for recognition is a 'whole person' who gains his/her identity from the intersubjective recognition of their 'particularity' (Honneth, 1996: 23). In the above example, it is the particularity of landowner, cottager, forester etc.

However, the dialectic of punishment outlined above, 'the turning back of crime against itself', still appears slightly at odds with the sociological dialectic of intersubjective recognition and 'particularity' described here in the civil struggle over property rights, in particular with regards to the legal subject and the reconciliation of the universal within the particular. As Norrie (1998: 107) argues:

> *'this abstract conception of the individual as worthy of respect in and through punishment was at odds with a more 'sociological' understanding of actual individual life that was repressed by the theory but that threatened nonetheless to disrupt it. The essential problem was the gap between the ideal image of the individual who stands up to be punished as a rational or consensual being and the empirical reality of crime and criminality as a social issue associated with poverty and attendant problems'.*

As we have seen, for Hegel, law was both a mechanism of civil society and a manifestation of reason within ethical life. However, at the edge of his theory, as Norrie points out, and as we have seen in chapter one, Hegel acknowledged that civil society presented a darker dialectic that undermined the existence of ethical life by exposing it to deep-seated structural conflict. Therefore, the liberation of the criminal through law and reconciliation with the ethical community fails if

recognition is denied by that community[78] (Norrie, 1993, 1998). It is to this problem that we now turn, and explore the relationship of ethical life to legitimacy.

Recognition, ethical life and Legitimacy

> *'Modern political philosophy, from Hobbes to Kant, maintains that rational consent is the basis of legitimate political authority. In dismissing this claim…Hegel…reveals a profound ambivalence towards modernity and its characteristic differentiation of social life into the public, private, and intimate realms' (Benhabib, 1986: 9-10)*

Modern political philosophy maintains that rational consent is the basis of the general will (Benhabib, 1986). As we have seen, for Hegel, political authority can only be legitimated through reciprocal recognition within a genuine ethical unity of the people. However, if recognition was not universal, and according to Hegel it wasn't under the conditions of the liberal state, then the political authority of the state was compromised. If the rational potential of social institutions was constrained then they could not be legitimated by rational consent. In this state of affairs, the state and its institutions - which importantly include the penal system - becomes the physical manifestation of social contradiction. The result of this split - between the liberal guarantees of the constitutional state and democratic self-determination - is not only that 'moral judgements, decoupled from concrete ethical life, no longer immediately carry the motivational power that converts judgments into action' (Habermas, 1986: 245), but that the state loses its legitimacy.

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[78] In writings on Hegel and law, this dialectical aspect is often neglected in place of a normative reading of Hegel. Therefore attention tends to be placed on the free reciprocal relationship between the offender and the law (see Flechtheim, 1947 and Bloch, 1987 above). This is not surprising as Hegel himself emphasises the eventual reconciliation of contradiction, while writers such as Adorno and Derrida emphasis the tensions within the contradiction.

In the *Philosophy of Right,* Hegel in outlining his theory of the state, insisted that we should look objectively at the thing itself and not at the aura of sanctity which surrounds it (Fine, 1993). The ideal, the legitimating myth of the system which allows its subjects to perceive it as 'authoritative' and 'eternal', hides, in Hegel's analysis, the founding of Right on the security of private property.

It is important to note that Hegel regarded property as a necessary element in the struggle for recognition. Possession cannot become actual until the fact of possession is recognised by others. It is this recognition that property rights achieve. A subject's right to possession is recognised by others on condition that the subject in turn recognizes the property of others. Property is secured to all through the operation of law. For Hegel, 'property helps constitute subjectivity as intersubjectivity through the mediation of objectivity' (Douzinas and Gearey 2005: 183). It is the fact that this form of recognition is denied to some that the question of legitimacy is raised.

In other words Law is founded on particular rather than universal interests. In this state of affairs, following Hegel's logic, law, in the form of abstract Right, becomes the handmaiden of social antagonism rather than a conciliator to that antagonism (see Norrie, 1993, Fine, 1993)[79]. At the core of Hegel's work, although not explicit and against Hegel's own intention in the sense that Hegel regarded the recognition of property as essential in modern society, there is a sense that illegitimate personal

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[79] As we saw in chapter one, the aim of *The Philosophy of Right* did not 'consist in teaching the state what it ought to be'; but to 'show how the state, the ethical universe, is to be understood' (Hegel, 1967:11). Fine (1993) argues that Hegel's work on the philosophy of Right, exposed the 'hardened prejudices' and degeneration of liberalism from its earlier defence of 'absolute freedom' to its 'vulgarised' subordination to the demands of private property.

domination by the community (the universal will) is a central attribute in the make up of the modern subject[80]. As Rose (1981: 73) writes:

> *'Hegel argued that it was "immoral" for Kant to "universalize" any subjective maxim of the will which presupposes the institution of private property, since private property cannot, by definition, be universal, "property itself is directly opposed to universality; equated with it, it is abolished" […] Private property is a contradiction, because an individual's private or particular possession (Besitz) can only be guaranteed by the whole society, the universal. Property means the right to exclude others, and the exclusion of other individuals (particular) is made possible by the communal will (universal). But, if everyone has equal right to possess, to exclude others, then no-one can have any guaranteed possession, or, anyone's possessions belongs to everyone else.'*

However as Rose (1981) states, Hegel begins from the actuality of individual private property. Property as a universal notion has not been preserved and its private form prevails. Each private owner exists abstractly, for themselves and outside the community.

As we have seen in chapter one, Hegel was aware that the two abstract models of freedom characteristic to modern society: 'abstract right' and 'morality', had already led to distortions in the 'practical self-relations of subjects'; and this led him to refer, in the *Philosophy of Right*, to the age as 'suffering from indeterminacy' (Honneth, 2000: 36). Throughout his writings Hegel was concerned by those pathological conditions that threatened to undermine the modern ethical community. Hegel portrayed such a community ideally as a realm in which individual rational activity could flourish. He wrote that against nature human beings can claim no

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[80] This idea is also a key feature of the writings of Roberto Mangabeira Unger (see Unger 1977 and 1996).

right, but once society is established, poverty,[81] one of the pathological results of misrecognition, takes the form of a 'wrong done to one class by another'. Hegel argued that poverty led to a loss of the sense of right and wrong, but as Norrie (1998: 110) notes, what was really required was a '*consensual* view of right and wrong, the possibility of universal norms in a moral community.

For Hegel the struggle for recognition was necessary both for the creation of the subject and for its socialization. So what from the standpoint of the 21st century can Hegel's notion of recognition offer our understanding of legitimation? In this chapter we have seen how Hegel rejected the formal legality of classical liberal law and provided a more sociologically grounded concept of recognition than that outlined by classical legal theory. However, a return to Hegel with an intention of reconciling the 'is' with the 'ought' and generating institutions entailing a genuine ethical unity of the people is beyond the bounds of possibility. Hegel's project collapsed in his own lifetime and regardless of its metaphysical sophistication and powerful influence, it was clear soon after the publication of the *Philosophy of Right* that the possibility of a grand intellectual synthesis of the ideal and the actual was not possible under modem social conditions (Norrie, 1993).

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[81] 'Not only caprice, however, but also contingencies, physical conditions, and factors grounded in external circumstances […] may reduce men to poverty. The poor still have the needs common to civil society, and yet since society has withdrawn from them the natural means of acquisition […] and broken the bond of the family […] their poverty leaves them more or less deprived of all the advantages of society, of the opportunity of acquiring skill or education of any kind, as well as of the administration of justice, the public health services, and often even the consolations of religion […] It hence becomes apparent that despite an excess of wealth civil society is not rich enough, i.e. its own resources are insufficient to check excessive poverty and the creation of a penurious rabble'. (Hegel, 1976:148-150)

As discussed earlier, the question of the nature of contradiction in law, and where such contradictions lie - whether within the law itself, or in the principles and values that validate such laws – have divided liberal and critical legal scholars. Critical theorists, drawing on Hegel, have argued that the contradictions are related to constraints within the social order that the law helps to obscure by providing a legitimating myth that allows subjects to perceive that order as just. Liberals, on the other hand, argue that injustice, or contradictions in the application of justice are not a necessary aspect of the law, but of law poorly or unjustly applied. The following section deals with the principles and values that validate law in relation to procedural and substantive law; values which in the eighteenth and nineteenth century were external to the law but which in the twentieth century became central to social regulation. This shift, outlined by Habermas (1976) and Unger (1977), was characterised by them as a shift from liberal to post-liberal societies and signified a change within the strategies of legitimation of such societies.

II

The Rise of Purpose in Law

> *'A society's law constitutes the chief bond between its culture and its organisation; it is the external manifestation of the embeddedness of the former in the latter'. (Unger, 1977:250)*

The classical liberal model of formal law outlined by Weber bore little resemblance to the reality of the law, and the enduring influence of Weber's analysis is due more to the theoretical question of the relationship of legality and legitimacy than to how legal systems function in reality. Weber (1954) himself recognised in the early

1920's a shift from formal to substantive law[82]. For Weber, the penetration of substantive justice into formal law was interpreted as an example of the moralisation of law. The moralisation of law that Weber perceived at that time was an early precursor to the politicisation of law that led to the fall of the Weimar Republic. At that time, Weber argued that the substantive tendencies in law pointed towards a disquieting fusion of pre-modern conceptions of morality with legality that was likely to undermine political freedom (Scheuerman, 1997)[83]. The expansion of regulatory law that heralded the arrival of an interventionist state erased the classical ideal of civil law. Procedural and substantive characteristics that previously were external to the law began to increasingly influence legal provisions (Habermas, 1986, Scheuerman, 1997).

What both Habermas (1976) and Unger (1977) addressed in their respective works was a shift from liberal to post-liberal societies. A key feature of this shift was a corresponding movement within the legitimation systems of such societies, from formal to substantive law. When both wrote their key works on the subject it was in the context of the interventionist requirements of the post-war welfare state where purposive legal reasoning was required for the control of markets and the regulation of everyday life. Unger (1977) writes that the immediate causes of the post-liberal move toward purposive legal reasoning and procedural or substantive justice are

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[82] Substantive law is characterised by purposive reasoning (Habermas, 1986) i.e. it is opposite from formal law in that it has 'substance'.

[83] Weber's work on the relationship of legality to legitimation sparked key debates during the early years of the Weimar Republic, most notably with the work of Carl Schmitt (1932/2004) whose *Legality and Legitimacy* was published in 1932. This work was responded to by members of the Frankfurt School: Kirchheimer (1932:1933/1969) and Neumann (1937/1964, 1986). Carl Schmitt's texts on legality, or, to be more precise, the suspension of legality, have recently experienced a revival in relation to the legislation enacted after 9/11 (reference who you are thinking of??).

directly connected with the inner dynamic of the welfare state. In that way the form of law changes as a result of the altered historical imperatives within society.

According to Unger (1977: 194) justice is procedural when it 'imposes conditions on the legitimacy of the processes by which social advantages are exchanged or distributed'. In other words an external criterion is drawn upon to specify what would be a fair or just outcome to a judicial procedure (see also Rawls, 1973). This goes against the second of Weber's three formal principles as the law adapts its reasoning to particular contexts and individuals. It therefore threatens to reduce the uniform structure and the generality of the legal system. Substantive justice is when the law 'governs the actual outcome of distributive decisions or of bargains'. This form is contrary to all three principles of formal law and corrupts legal generality to an even greater extent than procedural justice. Both forms, procedural and substantive, require that rules be interpreted in terms of ideals that define the conception of justice. In the context of the 1920's it was this outcome-oriented purposeful law, that Weber interpreted as the moralisation of justice, which came about when legal discourse became policy focussed and forced into making explicit value choices based on political incentives. Both forms are characterised by the predominance of an individualised administration of justice and an instrumental rationality over other principles of thought. The cumulative impact of the above:

> *'is to encourage the dissolution of the rule of law, at least insofar as that form of legality is defined by its commitment to the generality and autonomy of law. To be sure, autonomy and generality could never be meant as completely actualised descriptions of the legal order in liberal society; they are no more than ideals which the liberal form of social life makes necessary to entertain and impossible to fully achieve. What distinguishes the law of the postliberal period is primarily the turning away from these*

ideals, a change of course that, despite its apparent insignificance, indicates important shifts in human belief and social order. (Unger 1977: 200)

These developments challenge Weber's original assertion that it was the formal rational aspect of liberal law that was central to legitimation. In the post-liberal era, the relationship between legality and legitimation appears to be derived from disembodied moral and ethical imperatives, the politicisation of justice related in turn to the imperatives of the economic system (Habermas, 1986).

The rise of the welfare state saw the transformation of formal law into policy-oriented legal programmes. This rise in substantive and procedural law was characterised by Habermas (1986) as a rise in *reflexive law*; a form of law directed by purposive reasoning. However due to the increasing complexity of the social system and the difficulties of the administrative system in regulating – and predicting - the crisis produced by the effects of goal oriented legislation, law begins to lose its binding character, which in turn, increases its deformalisation and its marginalisation. Habermas gives a number of examples of this: the assimilation of penal law to informal types of social control, and the substitution of private agreements for criminal prosecution by the state.

The crisis tendencies of capitalist accumulation have not lessened and the traditional legitimation systems of the liberal state have changed not only as a result of the corporatist state but the contemporary neo-liberal state. When Habermas wrote his account those traditional systems were being undermined by the purposive (substantive) legislation of the welfare state. What Habermas's (1976) analysis highlighted was not only the ideological nature of legitimation strategies, and their

different levels, but also the significance of the economic system in structuring them. In the next section I will outline Habermas's argument, which marked an important step in developing a different conception of contemporary legitimation struggles.

Legitimation Crisis

Habermas (1976) sought to trace the relationship between the development of new institutional forms of organisation and human consciousness within the crisis tendencies particular to late capitalism. Following Hegel, Habermas contended that changes in intersubjectivity were to be understood only in light of underlying historical developments. The new forms of organisation that he outlined were the post-war corporative structures of the welfare state. Habermas argued, that the fundamental contradiction of capitalism was the conflict between social production and the private appropriation of public wealth, and for him, it was this contradiction that determined the boundaries and logic of crisis tendencies within the various sub-systems of modern society. The problem that Habermas addressed was 'how to distribute socially produced wealth inequitably and yet legitimately' (McCarthy, 1978: 358).

> *'With the political anonymization of class rule, the socially dominant class must convince itself that it no longer rules. Universalistic bourgeois ideologies can fulfil this task insofar as they (a) are founded 'scientifically' on the critique of tradition and (b) possess the character of a model, that is, anticipate a state of society whose possibility need not from the start be denied by a dynamically growing economic society [...] The achievement of the capitalist principle of organisation is nevertheless extraordinary. It not only frees the economic system, uncoupled from the political system, from the legitimations of the socially integrative subsystems, but enables it [...] to make a contribution to social integration. With these achievements, the susceptibility of the social system to crisis certainly grows, as steering*

> *problems can now become <u>directly</u> threatening to identity. (Habermas, 1976: 23)*

As such, Habermas's thesis was a contemporary re-conceptualisation of Hegel's unresolved legitimation dilemma which haunted the *Philosophy of Right.*

The question of legitimacy was central to the development of the welfare state, as such states no longer recognised 'political domination in personal form' (Habermas, 1976: 22)[84]. The post-war welfare states were characterised by two key trends: a progressive anonymisation of class rule and an increased social integration via the economy. Although this shift from the classical liberal state to a corporate one came about as a means to regulate the economy via state intervention, both in the regulation of markets and in general patterns of everyday life, it could not reduce periodic economic instability. At the same time as capital became increasingly regulated by the state, crisis tendencies of capital accumulation became more acute[85] (Held and Simon 1975). Habermas (1976) outlines four types of crisis tendencies in late capitalist society. These four types of crisis are located within three basic subsystems: the economic, the political (administrative) and the socio-cultural.

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[84] See also Unger (1977)

[85] See also Mandel (1975: 501) on the links between crisis, legitimation and ideology: 'Belief in the omnipotence of technology is the specific form of bourgeois ideology in late capitalism. This ideology proclaims the ability of the existing social order gradually to eliminate all chance of crisis, to find a 'technical' solution to all its contradictions, to integrate rebellious social classes and to avoid political explosions. The notion of 'post-industrial society', whose social structure is supposed to be dominated by norms of 'functional rationality', corresponds to the same ideological trend […] The existing system cannot be challenged because of its technical rationalisation; emergent problems can only be solved by specialist functional treatment; the masses therefore willingly assent to the existing social order.'

Classification of Possible Crisis Tendencies

Point of Origin	System Crisis	Identity Crisis
Economic System	Economic Crisis	-
Political System	Rationality Crisis	Legitimation Crisis
Socio-Cultural System	-	Motivation Crisis

Fig. 1 source: Habermas (1976: 45)

Central to Habermas's theory of social evolution is the proposition that human beings evolve through two distinct but interrelated domains, each with a corresponding *mode of knowledge*. The first is via the forces of production *(the appropriation of outer nature)*, characterised by technical knowledge; the second is via the normative structures of social interaction *(the appropriation of inner nature)*, characterised by practical and moral knowledge. These domains Habermas (1987) later differentiated by referring to them as *system* and *lifeworld*. Each of these domains, the system and the intersubjective realm, has its own logic of development that cannot be reduced to the other. Production processes identifiable with the system are governed by rules of instrumental and strategic action which correspond to the increasing growth in scientific and technical knowledge, while socialisation processes, particular to the intersubjective realm, proceed according to the norms and rules of communicative interaction (Held and Simon, 1976). These two domains are each associated with two crisis tendencies. System crises consisted of economic crises and crises of rationality. Lifeworld crises were crises of legitimation and motivation. Habermas argued that a legitimation crisis was a crisis of identity. Early critical theory appropriated the medium of analytical social psychology as a way of defending the assumption that dominant patterns of

socialisation transmit the functional imperatives of state and economy from the level of institutions to the level of personality structures.

The subsystem from Fig.1 with which we are concerned with here therefore, is the administrative/political system. Using the language of systems analysis, Habermas describes each subsystem as having inputs and outputs. In order to function properly the administrative/political system 'requires an input of mass loyalty that is as diffuse as possible.' The 'output consists in sovereignly executed administrative decisions' (Habermas, 1976: 46). Output crises occur when the administrative system fails to accomplish the requirements demanded from the economic system and takes on the form of a *rationality crisis*. Input crises occur when the system fails to maintain the required level of mass loyalty in order to keep functioning; these take on the form of a *legitimation crisis*.

> *'A rationality deficit in public administration means that the state apparatus cannot, under given boundary conditions, adequately steer the economic system. A legitimation deficit means that it is not possible by administrative means to maintain or establish effective normative structures to the extent required' (Habermas, 1976: 47).*

As mentioned above, Habermas (1976) argued that ideology can fulfil the task of legitimation to the extent that it is both grounded 'scientifically' and can also provide a narrative in which the current condition of society does not contradict how that society performs economically. In other words the ideology must be based on a discourse that is both rational and equitable. What connects these two administrative forms is the idea of impartiality. It is to legitimacy and its relation to science that we turn to now in the following section.

From Legality to the Legitimation of Science

> *'Take any civil law as an example: it states that a given category of citizens must perform a specific kind of action. Legitimation is the process by which a legislator is authorized to promulgate such a law as a norm. Now take the example of a scientific statement: it is subject to the rule that a statement must fulfil a given set of conditions in order to be accepted as scientific. In this case, legitimation is the process by which a 'legislator' dealing with scientific discourse is authorised to prescribe the stated conditions (in general, conditions of internal consistency and experimental verification) determining whether a statement is to be included in that discourse for consideration by the scientific community'. (Lyotard, 1984: 8)*

So far this chapter has looked at recognition in relation to legitimation and the law, and as such has dealt with recognition with regards to questions of legality. It also provided an overview of Habermas's attempt to broaden the relationship of recognition and institutional legitimacy to the crisis tendencies of the economic system. In chapter one I argued that Hegel's critique of the atomised subject also related to his critique of science in the form of positivism. The following section will develop the themes of recognition and legitimation in relation to science, in particular to psychiatry. In doing so it will prepare the ground for chapter five in relation to criminological approaches based on the principle of risk management and the 'criminology of the 'dangerous other'' Garland (2001).

As we have seen, Hegel's account of the growth of the subject and its integration within a social order would appear to be contradictory in that the constitution of subjectivity could be interpreted as both liberating and oppressive; the subject dominated by a power external to it. The intimate relationship between the

embededness of subjectivity and the problem of legitimacy is highlighted by

Melossi (2008: 25) when he writes:

> *'This is the process of <u>subjectivation</u>: the constitution of subjects. The main instruments of social organization and control – whether they are managed by 'the State' or by 'private institutions' – have as their ultimate goal the creation of subjects constituted in such a way that they should be able to see the supreme rationality of those instruments and institutions. Beyond philosophical, political, and legal mythologies, the construction of political power on the one hand and of the subjects of/to that power on the other is the outcome of complementary processes within which the function of economic, political, and intellectual elites is crucial.'*

Melossi outlines the function of power to produce subjects in such a way that they

perceive institutions and their instruments as rational, and therefore legitimate,

regardless of whether or not they conform to justifiable criteria of legitimacy. The

quote above underlines this function well by focusing on the ideological nature of

legitimation - the *ultimate goal* of state institutions is to maintain belief in their

supreme rationality – and that the problem of legitimacy is broader than the

boundaries of the law or the penal system. As Habermas (1976) outlined above, the

problem of legitimacy and the structuring of subjectivity extend to the economy, the

political institutions of the state and in the knowledge claims of elites. It is to these

relationships between legitimacy and the recognition of the knowledge claims of

elites that we now turn. The following section will examine the relationship

between law and psychiatry.

Law and Psychiatry

> *'It is strange that rationalism authorised this confusion between punishment and remedies, this quasi-identity between the act of punishment and the act that cures. It supposes a certain treatment at the junction of medicine and*

morality that was both an anticipation of the torments of eternal damnation and an attempt to bring the patient back to health. The key element is the ruse in medical reasoning that does good while inflicting pain.' Foucault (2006 :86)

Earlier in this chapter we saw that the existence of a legal system which was logically coherent and free from internal contradictions was central to the legitimation of modern western societies. Law was perceived as a universal form of social mediation based on the *recognition* of its rational character (Weber, 1954: 11). We saw also that the creation of the autonomous legal subject, located within a realm of universal legal rights, was a dominant mechanism of ideological legitimation from the eighteenth century onwards (see Thompson, 1990, Norrie, 2001). However this conception of the free modern individual of classicism was to come under fire during the nineteenth century.

Faith in the authority of reason was evident in the conceptualisation that individual actors were beings capable of rationally calculating the risks and rewards they would receive for their actions. It was this notion of free will that made individual responsibility the proper basis for legitimate punishment in liberal criminal law (Norrie, 1998). However, the notion, outlined earlier, that 'crime' was a concept and not the outcome of a particular form of human behaviour (Bottoms, 2000) was challenged by the rise of both psychiatry and criminology, which sought to classify crimes in accordance with typologies of criminal behaviour at odds with theories of rational choice. Medical experts began to focus on such approaches in revolutionary France; and it was these new discourses based on notions of irrationality and insanity that began to challenge classicism's authority in criminal courts. These new conceptualisations had contradictory effects in the punishment of those considered

dangerous to society. The liberal concept of the autonomous and rational legal subject based on political theory, established a barrier beyond which legal responsibility could not go. That is, it could not be applied to those who were not perceived as rational (Norrie, 2001, Foucault, 1975, 2000, 2006). As Foucault (2000: 182) writes:

> *'At a time when the new psychiatry was being established, and when the principles of penal reform were being applied nearly everywhere in Europe and in North America, the great and monstrous murder, without reason, without preliminaries, the sudden eruption of the unnatural in nature, was the singular and paradoxical form taken by criminal insanity or pathological crime [...] Nineteenth-century psychiatry invented an entirely fictitious entity, a crime that is insanity, a crime that is nothing but insanity, an insanity that is nothing but a crime'.*

The relationship between law and psychiatry can only be understood in light of the political, social and economic and scientific background of the time. The new discourses discussed above did not appear in a vacuum. As we have seen in chapter one, what Hegel (1977) termed 'the pseudo-sciences' of physiognomy and phrenology developed in the late eighteenth and early nineteenth century, and by the middle of the nineteenth century, criminology in the form of Lombroso's (1835-1909) atavistic theories of crime and the Italian Positivist School had established themselves as authorities on criminal behaviour. Here the influence of the natural sciences, in particular Darwin's theory of evolution, encouraged criminologists to study human behaviour as biologically determined rather than through free will. Punishment had become scientific and was being recast as social engineering (Lilly et al, 1995).

These shifts in knowledge were accompanied also by increased rationalisation and bureaucratisation within the penal system. The increased power of the modern nation state meant that punishment was regulated and administered by central government agencies, which in turn lead to the growth in the scale of the penal infrastructure. Modernization of the penal system also led to increasing professionalism and standardization within the institutions of punishment. Since the 1790's punishment had become increasingly rational in the eighteenth century meaning of that term, i.e. based on a normative social contract theory. By the late nineteenth century, however, the rationality of punishment had taken on a different meaning; here it meant that penalties be administered in a rule governed, routine and impassive fashion (Garland 1991). The rule governed and scientific administration of punishment was reflected in the development of rule governed and scientific explanations of crime. It is within this context that the conflict between psychiatrists and lawyers must be understood.

It was Pinel (1745 – 1826) who first formulated a science of mental illness; reproducing the eighteenth century classificatory methods of general medicine. His methods, based on observation, were drawn from English empiricism and conflicted greatly, not only with the existing physiological approaches to mental illness but with the law as well (Castel, 1988). In France, this struggle between classicism and the new science of psychiatry was to last from 1790 to 1838 when legislation was passed which altered the relations between the medical and the penal in a manner which still resonates to this day. The purpose of this legislation was the institutionalisation of the conditions of committal to special institutions. Committal by judicial warrant provided the condition for rapid confinement, it was as effective

as penal restraint, had equal authority, but it had an additional power in that it could be applied before a crime had taken place. Judicial inspection in the France of this period became an effective means for identifying states of *potential* danger (Castel, 1975).

The positivist development of classificatory schemes, explanations of criminal behaviour as being determined by individual pathology all lay the foundations for the development of a scientific penology based on therapy and the management of risk.

> *'The insane person, who surfaced as a problem in the rupture caused by the Revolution, will at the end of the process come under the aegis of a complete statute for the insane. He will have become completely a medical matter, that is to say wholly defined as a social person and human type by the authority that had gained for itself a monopoly in assuming legitimate responsibility for him.' (Castel, 1988)*

In terms of this new legitimacy, what was significant in the rise of psychiatry as a profession was the authority that it sought to acquire over a particular category of person. This struggle took place on two fronts. On one, it was the struggle against the general medical profession as a whole in the development of a specialist area under its own professional authority (Foucault, 2006); on the other, psychiatry sought to claim authority over certain categories of accused before the courts, an authority based on their special relationship to the mad (Foucault, 1975, 2000). As Norrie (2001: 177) writes:

> *'Society charged these early practitioners of psychiatry with certain control responsibilities in relation to the insane, and these were institutionalised within a legal framework [...] The early psychiatrists were thus given a*

certain measure of social legitimacy and a professional standing that they were keen to defend and develop. At the same time the potential for boundary dispute between law and psychiatry was established. Both insane and non-insane people could break the law, but the law would wish to exclude the insane from punishment on the basis of their irrationality, sending them as a consequence to the asylum rather than the prison. The psychiatrists in the asylum, on the other hand, were committed to accepting the insane, but expected and sought to be accorded a certain status in the courtroom as experts upon the nature of the problem they were uniquely positioned to study, and expected to contain.'

The legitimacy that society accorded psychiatry was the legitimacy of the scientific expert. Like law, the legitimacy of the scientific expert is based in the rationality of the discipline and in the formal properties of its methods i.e. from it being carried out transparently, in a formally scientific manner and in accordance with its own internal logic; and like law does not draw its legitimating power from an association with morality (see Weber in (Gerth and Mills, 1948)).

Earlier in this chapter we looked at procedural and substantive law and the influence of the economy and science on legal provisions in the twentieth century. We looked at the rise of the welfare state and how it influenced the transformation of formal law into policy oriented legal programs and how these programmes in turn influenced new institutional forms of organisation and human consciousness. The question of legitimacy was central to the development of the welfare state in relation to these new institutional forms and psychiatry, in particular, during the rise of the welfare state, enjoyed a substantial measure of legitimacy. In relation to that shift Norrie (2001) points out that it is important to be aware that in addition to the conflict between law and psychiatry, there are also important areas of compromise and cooperation. On a practical level, both professions participate in a relatively

strategic alliance and share power in circumstances where both benefit from a degree of legitimacy.

We have seen in this chapter that in terms of legality, the creation of the autonomous legal subject, with universal legal rights, was important for the legitimation of liberal societies. The legitimating power of this form of subjectivity came from how it erased the particularities of class, gender, race or religion (Douzinas and Gearey, 2005). Legal discourses based on such a notion of subjectivity therefore decontextualise social actions and individualise social conduct. In that way, Norrie (2001: 189) notes that there is a theoretical congruence between law and psychiatry.

> *'Theoretically, psychiatry, like law, decontextualises social agency, in its case by locating the problem of insanity in the constitution of the individual. Medical discourse hides the social significance of madness by betraying it in terms of <u>individual</u> mental illness'.*

This individualisation also ignores the complexities of all the categories of crime under its remit and not only that which comes under the heading of insanity. In other words, many cases in which psychiatrists are involved do not involve issues of mental illness or insanity, but deal with the grey areas on the border of such categories. The relevance of this becomes clear when we *'consider the ways in which psychiatry has operated to ameliorate, and thereby to cover up for both the law and society own responsibility for the mad criminal' (Norrie, 2001: 189).*

We saw above that Melossi (2008) argued that the function of power was to produce subjects in such a way that they perceived the social order as rational and therefore

legitimate, regardless of whether or not they conform to justifiable criteria of legitimacy. He further argued that the ultimate goal of state institutions was to maintain belief in their supreme rationality. In the previous section we saw how Habermas's work highlighted how ideology can fulfil the task of legitimation to the extent that it is both grounded 'scientifically' and can also provide a narrative conducive to how that society performs economically. In Part 3 we have seen how the legitimacy that society accorded psychiatry was the legitimacy of the scientific expert. Psychiatry developed as only one of a number of scientific disciplines, including psychology, psychoanalysis and criminology, which have taken the pathological subject as the object of their study. Their significance in relation to legitimation, however, is not only a question of knowledge, but also one of power. As Bernstein (1995: 40) writes:

> *'Science and technology extend the reach of human freedom by extending human possibilities for coping with the environment when applied to nature or to those problems of a social life which call for technological resolution; they come to occlude human freedom, however, when they are accepted as the only legitimate models for reflecting on 'practical' questions. The scientization of politics is precisely the repression of those modes of reflection and interaction which distinguish human social intercourse from our intercourse with the natural world: 'Technocratic consciousness reflects not the sundering of an ethical situation but the repression of 'ethics' as such as a category of life.'*

Concluding Thoughts

This chapter took as its focus the relationship between recognition and legitimacy, a relationship which in chapter one, through an analysis of Hegel, I identified as key to understanding how the social order responds to crime. In particular, it set out to address the question why is a particular social order accepted by its subjects as legitimate? It outlined the relationship between legality and legitimacy and

examined the concepts of recognition, legal validity and their relation to subjectivity through a discussion of Hegel's theory of punishment.

Habermas (1976)[86], as we have seen, argues that a belief in science is based in the certainty that the existing social order has the competence to eliminate crisis and to find a 'technical' solution to all its contradictions. The acceptance of an authority or social order is based as much on technical rationalisation and expertise as it is on the legality of its system of law. In Part two, it was argued that the two forms were becoming less distinct. It argued that the problem of legitimacy and the structuring of subjectivity extended beyond the reaches of law and of the economy to scientific knowledge. It is against this backdrop that the legitimacy of the scientific expert, whether in the forms of psychiatry, psychology, psychoanalysis or criminology, has developed.

Chapter one argued that Hegel's work offered an account of the relationship between the development of social institutions and changes in individual subjectivity. He argued that a false perspective of the subject was to be found not only in the constructions of law but also in the new positivist sciences. In both cases the construction of subjectivity was based on the decontextualisation of social actions and an individualised understanding of social conduct. This, Norrie (2001) argues, allows both law and social sciences such as psychiatry, to erase society's responsibility towards particular crimes and social disorder. It is this particularly modern context that brings us back to Hegel's notion of misrecognition.

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[86] See also Mandel (1975)

One group of crimes where such expertise is drawn upon is that group which lie on the borderline of the sane/insane category. Crimes often most frequently associated with this grey and indistinct border are those crimes of violence associated with a sexual element. Criminologists such as Simon (1998: 456) have argued that such crimes, at one time 'the most obvious example of crime as disease,' have been retranslated in recent criminal justice discourses from having an underlying psychopathological basis to one where it is treated as a crime of 'moral depravity' or 'evil'; categories absent from legal or medical discourses. Garland (2001: 184) has called this emerging criminological discourse, the 'criminology of the dangerous other'. Such a re-conceptualisation is significant in legal terms as such offenders, if they do not have a mental illness that can be treated, become ineligible for forms of preventive detention. This category of crime and its relation to the new social imaginaries of risk will be returned to in chapters four and five. The aim of this chapter has been to ground the emergence of the 'dangerous other' in a conceptual framework concerned with the relationship between recognition and the legitimacy of the scientific expert. In doing so, it provides a basis for the discussion on the Risk Management Authority in chapter five. Before going on to look at the case study of this authority, in the next chapter I outline the methodological basis of the thesis.

CHAPTER THREE

REFLEXIVITY, INTERPRETATION AND CRITIQUE

'Behind such notions of demystification and of the "critical" stand the unexamined models of Freudian psycho-analysis and of a confidence in the power of self-consciousness and reflexivity generally to transform, modify, or even "cure" the ideological tendencies and positions which have thereby been brought up into the light of consciousness. This confidence is at the least unseasonable in an atmosphere where nobody believes in the active capabilities of individual consciousness any more, and where the very ideologues of "critical theory"- the Frankfurt School – have left behind them, in works like <u>Negative Dialectics</u>, testaments of despair about the possibility for 'critical theory' in our time to do any more than to keep the negative and the critical (that is, critical theory itself) alive in the mind. (Jameson, 2007: 133)

Introduction

In the introduction to the thesis, it was stated that this work is influenced by Hegel on two levels, the theoretical and the methodological. While chapter one and two discussed the theoretical influence of Hegel; chapter three will discuss the methodological. It asks what methods are appropriate for the general approach outlined earlier in chapter one and two and outlines the two methodological strands of the thesis:

1. Meta-critique[87] – the critique of reason – is a self-reflexive principle and its importance for us as a method lies in its ability to submit our relationship to rationality to critique[88].

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[87] The term meta-critique (*Metakritik*) was first coined by Johann George Hamann (1730-88) (see Beiser, 1987: 9) 'Hamann attacked the main premise behind Kant's belief in the autonomy of reason', he opposed the reification 'of reason through its abstraction from language, culture and experience'. He stressed the social and historical dimension of reason and argued that the instrument and criterion of reason is language. His critique of Kant was developed most fully by Hegel.

2. A socio-historical account of the emergence of the Risk Management Authority set up under recommendation of the MacLean Committee in 2000 reconstructed through discourse analysis of a range of policy documents from the mid 1990's to 2000s. The discourse analysis is developed in chapters five.

The chapter falls into two parts. Part I elucidates the theoretical background to the metacritique outlined above. As a means of critiquing the new discourses of modernity that were briefly outlined in chapter one and which will be explored in chapter four, the metaphor used to ground the meta-critique is that of psychoanalysis. What the metaphor of psychoanalysis allows for here is to view history as a narrative category. The model of the case study has been drawn from the concept *casus* of André Jolles' (1930) who developed the model as a means of explaining historical trends by means of a representative-image or narrative (Frow, 2003). Part II discusses the research design for the thesis and the methods used: discourse analysis. It also outlines how the case study relates to the themes developed in the earlier chapters on risk, recognition and legitimacy.

I

Part one of this chapter examines the beginning stages of an intellectual inquiry. It outlines issues concerning epistemology and reflexivity in relation to particular

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[88] The critique of reason was instigated by Kant as an investigation into the condition and limitation of human knowledge. Kant attempted to elucidate a third category of scientific knowledge that was differentiated from either empirical or analytical statements; the two categories of knowledge asserted by Hume as the basis of scientific judgement (Körner, 1955).

scientific traditions. Through this discussion of reflexivity the chapter introduces two meanings of critique, the first referring to the conditions of possible knowledge and the second referring to an investigation of a system of humanly produced *constraints*. The latter definition relates to the Hegelian approach which 'interprets' the individual person or institution, by viewing them as a manifestation or as a document of a developing social totality. 'Interpretation' within this tradition understands meaning as having historical and social presuppositions that are *beyond*, yet cannot be separated from, individual human interaction. Such an approach provides a socio-historical framework that acknowledges the embeddedness of subjectivity in social institutions and places institutional development within the particular historical settings from which they emerge. Part one introduces Critical Theory as a form of *immanent critique* and discusses the applicability of psychoanalysis as a model for such a critique.

Epistemological Beginnings

The central and formative question behind Edward Said's book *Beginnings: Intention and Method*, is, what is a beginning? In this work, Said (1995) draws together a wide range of theoretical and methodological problems which originate at the beginning of an intellectual project. These problems, questions and conditions that are often easily ignored or taken for granted at the start of a scholarly investigation or enquiry were felt by him to be of tremendous importance both practically and theoretically. They related to questions of epistemology and personal reflexivity and touched on complex issues of history, place, and the degrees of autonomy and constraint related to an intellectual endeavour. At the heart of Said's discussion of beginnings and the nature of individual reflexivity is the relation of an

author to a particular discipline and historical tradition. As individual subjects we never confront a body of work immediately and free from preconceptions. The works that embody any intellectual discipline exist within inherited institutional traditions and are therefore apprehended only through the accumulated layers of previous interpretations and methodological habits developed by these traditions. In relation to a work of social theory, the idea of embeddedness within an inherited tradition of thought would suggest an approach in which our object of study is less the world itself than the interpretations through which we attempt to engage with and understand it (Jameson, 1989: 9). It is this reflexive engagement with the concepts of our own understanding that the term meta-critique refers to.

The problem of beginning for Said was not only a matter of scientific method but also one of self-definition: where one begins will also mark a point of departure. The choice of where to begin therefore not only determines to some extent what will follow in a piece of work, but immediately establishes relationships − both of continuity or antagonism - with works already in existence. These relationships are not entirely related to the free or individual choice of the researcher. In this sense, the researcher's epistemological standpoint is produced by the tradition s/he works within rather than the result of individual reflexivity. It may be because of this that the relationships of antagonism, that make themselves felt as contradictions or antinomies within the research process are less theorised within the discipline than those aspects of continuity and tradition. This relates also to consideration of methods; the development of social scientific method is intimately bound up with specific epistemological understandings of the social world and reflects also these antagonisms and continuity of tradition. In terms of continuity, this chapter will deal

firstly with the methodological influence of Hegel and the Frankfurt School on the thesis and will outline its genealogy within social theory before going on to introduce psychoanalysis as a model for *immanent critique*.

Two Meanings of Critique

The distinction between the two meanings of critique was alluded to in chapter one in the discussion of Hegel's critique of empiricism and the problems in attempting to define social institutions from their empirical characteristics alone. Hegel opposed making an objectivised (non-historical) reality the starting point of scientific endeavour. Such an approach, Hegel argued, failed to teach us anything about the nature of institutions. His theory of social institutions began from the present tendencies of the social process itself. Although Kant was not included by Hegel as an empiricist, it is the work of both authors that provides social science with its two meanings of critique.

In 1787, Kant, in the *Critique of Pure Reason* attempted to set out the range of subjective conditions that made natural science possible and to trace the limitations of human knowledge. Two key aspects of Kant's project concerned the way concepts relate to objects and with the demonstration of 'objective validity'. Critique here refers then to the *conditions* of possible knowledge (Connerton, 1976). Rose (1981) argues that within sociology the thought of both Durkheim and Weber, in spite of their major differences, rests on this Kantian framework. In other words, both Durkheim and Weber's sociology[89] are based on a transcendental account that

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[89] Both Durkheim and Weber were educated and worked within neo-Kantian circles. Weber's connections with the Heidelberg neo-Kantians especially Rickert, are well known (Radkau, 2009). Durkheim was closely associated with the leading French representatives of German neo-Kantianism and was taught by Emile Boutriox at the *Ecole Normale Supérieure,* 1879-1882. Many of the

'presupposes the actuality or existence of its object and seeks to discover the conditions of its possibility' (Rose, 1981: 1). It is this framework, according to Rose, that allows the very notion of sociology as a science as well as reproduces sociology's central antinomy: the artificial distinction between the individual and society.

However the term 'critique' also has a second meaning; this second meaning has its root in Hegel and refers to an investigation of a system of humanly produced *constraints*. These constraints are distorting pressures which subjects submit to in the process of self-formation. Connerton (1976) refers to the first type of critique as 'reconstruction' and to the second type of critique as 'criticism'. He outlines three important differences between criticism and reconstruction:

Fig2: Critique and Reconstruction

Critique 1 (Reconstruction)	Critique 2 (Criticism)
Undertakes to understand anonymous systems of rules which can be followed by any subject, provided s/he has the requisite competences.	Critique focuses on the historically particular, it examines the shaping of an individual's identity or the identity of a group (entails the explicit reference to a subject).
Is based on data which are considered to be objective.	'Objectivity' is called into question; criticism supposes that there is a degree of inbuilt deformity in the social world which masquerades as reality.
Clarifies what is considered to be 'correct' knowledge; the knowledge we must acquire if we are to operate rules competently. Aims to broaden the range and sophistication of theoretical knowledge.	Criticism initiates a process of self reflection on the domination of past constraints. Aims to reveal false or distorted conscience. Critique entails a concept of emancipation.

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subsequent radical challenges to the sociology of Durkheim and Weber were motivated by the desire to break out of the constrictions of the neo- Kantian paradigm. Both Phenomenology and the work of the Frankfurt School can be viewed in this light (Rose, 1981).

Hegel's notion of 'Ethical life' portrays two important aspects of his conceptualisation of critique: the first is the historical aspect of knowledge; the second is an implicit theory of human inter-subjectivity. Hegel's critique of reason is a critique of Kant's sovereign rational subject and its relationship to its object - autonomous, disembodied and self-transparent. Hegel's epistemology did not presuppose the actuality of its object (society) and therefore of the autonomous subject. For Hegel subjectivity, as we saw in chapter one, was social as well as individual. Hegel therefore opposed the Kantian subject/object split and argued that scientific knowledge should not accept uncritically external appearances, instead it should derive its knowledge from the inner rationale and inherent relationships and contradictions which hold society together (Avineri, 1974). This does not mean, however, that society can only exist in thought; scientific knowledge is not divorced from the world but seeks reason in actuality. In other words, human rationality is external to the individual and its history is formed by the constraints imposed by each of its successive historical forms. Hegel countered the limitations of an empiricist approach by arguing that scientific knowledge is historical: rationality itself was a historical category. This 'impure' reason with its unavoidable entanglement in history, tradition, society and power is the opposite of Kant's framework, (Rose, 1981).

'Ethical Life' encapsulates this historical aspect of reason and relates it to human subjectivity by showing how it is produced through *institutionalised interaction.* Subjects of knowledge are embodied and practically engaged with the world yet their self-formation as subjects is constrained by their relationship to inherited institutional traditions and the interpretations of the world associated with them.

Critique, as Hegel understood it, aimed to uncover these false or distorted products of historical reason. Critique in this sense entails a concept of emancipation (Connerton, 1976). The uncovering of distorted products of historical reason requires an understanding of reflexivity which is historical. The remaining sections of part one will outline the various meanings of reflexivity in the social science and argue the case for psychoanalysis as a model for *immanent critique.*

Reflexivity and the Limitations of the Interpretative Act.

The most common definition of reflexivity[90] is drawn from interpretative and feminist sociology and refers to the ability of a researcher to be aware of his or her own contribution and that of the researched, to the construction of meanings within the research process; of how their values and beliefs influence and shape the research process (see Oakley, 1998; Hammersley, 1992). This definition was influenced by Weber, who, as we have seen, drew from the Kantian framework. The emphasis in this definition is on individual action as the basic unit of sociological interpretation.

> *Interpretative sociology considers the individual (Einzelindividuum) and his action as the basic unit…….. In this approach, the individual is also the upper limit and the sole carrier of meaningful conduct… In general, for sociology, such concepts as 'state,' 'association,' 'feudalism,' and the like, designate certain categories of human interaction. Hence it is the task of sociology to reduce these concepts to 'understandable' action, that is, without exception, to the actions of participating individual men. (Weber, in Gerth and Mills, 1948: 10)*

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[90] Despite an increasing reference to the term 'reflexivity' in the literature of contemporary social science, many social scientists argue that there is a problem concerning a general explanation of what 'reflexivity' actually means. As Wacquant has outlined with regards to competing claims to 'reflexivity', *'the label is vague to the point of near vacuity'* (Bourdieu & Wacquant, 1996:36).

However, the interpretative definition of reflexivity is problematic as such an approach does not acknowledge the influence of the broader social structure and tends to translate institutional structure into a collection of individualised actions oriented to subjectively-meaningful ends. In other words, social reality is produced by actors and no determining influence outside of that reality is recognized (Rose 1981).

The subjective emphasis of interpretative approaches is blind to the structural determinants of human behaviour and reproduces an illusion of free and unconstrained action. By making meaning their principal concern such approaches reproduce an illusion of individual subjectivity, an unconditioned ego which 'determines' its own boundaries and thereby denies its own relation to reality (Rose, 1981).

It is commonly assumed that experience of and familiarity with the area of research is beneficial when researching particular aspects of the social world (Terdiman, 1987) and that the problems and matters of relevance relating to a particular field should be more accessible the greater the level of awareness and empathy the researcher has of it. This point of view - still based on the separation of the observer from the object of enquiry - over-states the conscious agency of the researcher. Drawing from the second notion of critique, it could be argued that the closer proximity to the everyday culture and experiences of the object of study, the more opaque may be the real problems. Living or working so closely to the field might mean that the professional assumptions and the 'common sense' knowledge of the field remain unquestioned. In other words, it ignores the reflexive institutional

shaping of an individual researcher's identity within the research process[91]. The suppression of structure results in interpretations which not only affirm the dominant social representations and discourses but makes it impossible to recognize the actual relations which determine these representations (see Rose, 1981).

An opposite problem is found in structural approaches based on the Kantian framework. These approaches impose abstract principles on social reality and sanction the dominant by resolving social contradictions within their classificatory systems. The individual is presented within these systems, if at all, as merely the opposite pole of an abstract determining force. The categories of functionalism, systems theory and structuralism are presented as independent of and prior to subjective meanings and actions (see Bernstein, 1979).

The emphasis within sociology of a Kantian framework stands opposed to the role of philosophical understanding derived from the work of Hegel. This chapter argues that it is the latter approach that offers to rectify the one-sidedness of individualised reflexivity. This approach 'interprets' the individual person or institution, by viewing them as a manifestation or as a document of a developing social totality. 'Interpretation' within this tradition[92] means understanding the relationship of the comprehensive whole to its parts. In so doing, it attempts to include the historical and cultural contexts within its analysis by contending that the apprehension of meaning itself has historical and social presuppositions that are *beyond*, yet cannot be separated from, individual human interaction. As we have seen, individual

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[91] Reflexivity for Hegel as well as the Frankfurt school was regarded as an aspect of domination as well as a means to emancipation (see Hegel (1977) and Žižek (2000) .

[92] In sociology the most significant figures in this tradition include Georg Lukács and the Frankfurt school.

subjects in no way simply create or merely belong to history and culture; history and culture are processes in which individual subjects are irretrievably caught[93]. It is this latter approach that offers a promise of historical reflexivity[94], in that it provides a framework that acknowledges the embeddedness of subjectivity in social institutions and places institutional development within the particular historical settings from which they emerge.

Reflexivity, Language and Doxa

We saw in chapter one that Hegel's concept of 'Ethical Life' was based on an understanding of rationality being embodied in social institutions. He showed that subjects of knowledge were embodied and practically engaged with the world through *institutionalised interaction*. This aspect of Hegel's work was retained in the twentieth century when philosophy moved away from concerns with human consciousness to language. For Hegel, language was the medium of human subjectivity in the world. The symbolic world pre-exists us and because of this our conceptual horizons are determined by the habitual manners and consciousness of a second nature. Within the form of language itself there is a constraining pressure to frame thought within a dominant structure of meaning. The framing and communication of thought takes place within definite limits. In this way the Kantian model and its focus on 'correct' knowledge, the knowledge we must acquire if we are to operate rules competently, can also be critical in its focus on the limitations of language and can lead to a greater sophistication of our theoretical knowledge (Connerton, 1976). This critical Kantianism can be found in the work of both

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[93] See Rose (1998) for a discussion of Freud's similar perspective on the coercive aspects of culture.
[94] Hegel famous formulation of historical reflexivity was the recognition of 'reason as the rose in the cross of the present' (Hegel, 1976: 12).

Habermas[95] and Bourdieu. Bourdieu outlines the reflexive function of theory in exposing ideology or *'doxa'*. He warns of a double bind within which every sociologist is inescapably caught by the fact that the tools or methods bequeathed by sociology, 'the official trappings of scientific discourse' (Bourdieu, 1996:248), may lead the researcher in merely replacing lay common sense with sociological common sense.

> *'Thence the peculiar antinomy of the pedagogy of research: it must transmit both tested instruments of construction of reality (problematics, concepts, techniques, methods)* <u>*and*</u> *a formidable critical disposition, an inclination to question ruthlessly those instruments' (Bourdieu, 1996:249)*

For Bourdieu, to be reflexive is not only to guard against those forms of thought outside of science, the metaphysical questions which Kant wanted to delineate; but also to guard oneself against the dominant 'truths' laid down by science itself. Reflexivity is the critical reflection on what Bourdieu would designate as two forms of societal misrecognition; the naturalisation of arbitrariness (common sense) which he terms *doxa*, and those dominant scientific 'truths' that he terms *orthodoxy*[96]. This critical disposition to question both common sense and also the instruments of science itself is what Bourdieu regards as 'reflexivity'.

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[95] The importance of both Hegel and Kant to Habermas' discourse ethics and his intellectual project as a whole is outlined in the following passage: Hegel's 'concept of ethical life (*Sittlichkeit*) is an implicit criticism of two kinds of one-sidedness, one the mirror image of the other. Hegel opposes the abstract universality of justice manifesting itself in the individualist approaches of the modern age, in rational natural right theory and in Kantian moral philosophy. No less vigorous is his opposition to the concrete particularism of the common good that pervades Aristotle and Thomas Aquinas. The ethics of discourse picks up this basic Hegelian aspiration to redeem it with Kantian means' (Habermas, 1990: 201). In other words, Habermas seeks to reformulate Kantian ethics by 'grounding moral norms in communication' (Habermas, 1990: 195).

[96] *Orthodoxy* differs from *doxa* in that it implies the possibility of different or antagonistic points of view but suppresses them through the representation of scientific authority (Bourdieu, 1977).

Reflexivity and Immanent Critique

As shown above, Hegel's development of critique sought to oppose making reality into a criterion but rather to 'produce' a conceptual framework that allows us to grasp its complexity as a whole. This form of critique, where the rational potential of institutions was compared to distortions in actuality was developed further by the Frankfurt School. Horkheimer argued in his programme of research that the only means we have of grounding critique was *immanently*.

> *'relating social institutions and activities to the values they themselves set forth as their standards and ideals…. If subjected to such an analysis, the social agencies most representative of the present pattern of society will disclose a pervasive discrepancy between what they actually are and the values they accept'* (Horkheimer 1978: 265)

Horkheimer argued that traditional theory did not recognise its own historical context. It was cut off (pure) from the social processes of production. Like Bourdieu later, Horkheimer argued that modern science was unreflexive (unconscious of its own constitutive context). Horkheimer attempts to explain the self-misunderstanding of traditional theory in terms of an interpretative framework, derived from Hegel's critical philosophy. Critical theory, or *immanent critique,* views criticism as a reflective form of rationality that is inseparable from the historical process itself. However, as Honneth (1993) argued, there was a sociological deficit at the heart of Horkheimer's programme. Critical Theory 'formulated in this way, lacked a 'critique of everyday life'; a theory that can interpret social action. Although both Hegel's and Marx's critical theory incorporated an institutional framework of society and contained an implicit conception of symbolic interaction, they were still too narrowly defined to meet the

criterion of a critical social science[97]. To address this deficit the Frankfurt School turned to psycho-analysis[98].

Psychoanalysis as Method

The Hegelian interpretation of critique suggests that interpretation and explanation of historical constructs require concepts specifically developed for that purpose. The understanding of subjects of knowledge as embodied and constrained by their relationship to inherited or distorted products of historical reason was developed and further elaborated by concepts developed from a new procedure of critical reflection during the late nineteenth and early twentieth century: psychoanalysis. Critique is here grounded in the experience of a release from hidden sources of repression by means of critical insight in relation to past experience.

Habermas (1971) underlines these inherited constraints when, as discussed in chapter two, he shows how the definite and acceptable limits within which social communications are framed are internalised and established in the interior of subjects themselves. For Habermas the grammar of ordinary language governs not only the understanding and interpretation of symbols but also the knitting together of language and interaction. In most cases he argues, there is a 'fit', however imperfect, between linguistic elements and social interaction in the lifeworld. In some cases however, a language game can disintegrate to the point where there is no

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[97] A 'critical' social science was one that was both negative (see chapter one) and that relied on the 'possibility of viewing history with reason as its guiding thread' (Honneth, 2009: 20)

[98] As outlined in chapter one Hegel's influence on psycho-analysis was profound and as such the Frankfurt School's attempt to combine Freud with Marx is not so strange as it would first appear. For Hegel, who influenced both authors, there was an appreciation that at the most elementary forms of human life there is a non-reflexive absorption in a closed social order (see discussion in chapter one on second nature). In other words, human beings are not fully transparent to themselves.

agreement between the demands of these two elements. When this happens the ability of an individual to maintain mutual understanding with his or her role or community is not restricted directly, but indirectly, through the intrusion of *symptoms*; that is the appearance of a mutilation or distortion within 'the text of everyday habitual language games' (Habermas, 1971: 238).

These symptoms which appear within communication as distortions do not necessarily produce incomprehension. For Habermas (1976) incomprehensibility results from the incoherent organisation of speech itself. A clear example that he gives of this is the pathological speech disturbances recounted by Freud in his observation of psychotic patients. However, the more significant examples of *systematically distorted communication* are those which are found in speech which is not noticeably pathological. This is what we come across in the instance of pseudo-communication, where the speakers are not aware of any communicative disturbance. According to Habermas (1971:226) the *systematically distorted communication* that is inherent in habitual everyday language games are 'ignored and glossed over, rationalised through secondary elaboration' and on the whole, perceived as natural[99].

The problem that we are faced with then is how do we recognise or identify these distortions. As 'long as we communicate in a natural language there is a sense in which we can never be neutral observers, simply because we are always participants' (Habermas, 1976: 348). In other words, if communication can only

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[99] See Adorno (1973:262) 'What everybody takes to be intelligible is in fact not intelligible at all [...] the uncanny is uncanny only because it is secretly all too familiar, which is why it is repressed'

take place through language then how can we stand apart from that language and interpret it from outside the cultural constraints from which it develops?

The relationship an historian has to the past allows a certain detachment with regard to the understanding of the development of social practices. However, the problem we face in this work is: what method will allow a similar detachment with regards to the present? Habermas' answer was to look to psychoanalysis and to reinterpret its critical dimension as a means for uncovering *communicative distortion* in everyday language games. The resort to psychoanalysis as a means of interpreting the present, however, raises another set of problems and questions. How legitimate is it to apply the concepts developed from therapeutic work with individual subjects to society and its institutions? I will attempt to answer this by drawing on the concepts of 'second nature' and the 'embodied subject' outlined in chapter one, and explore the relationship of language to social structure and the applicability of psychoanalytic categories to social phenomena.

The Subject and Second Nature

In chapters one and two we saw that changes in intersubjectivity were related to underlying historical developments. We saw how the conception of 'ethical life' was based on Hegel's insight that subjectivity referred not only to an individual human mind, but also to its social character. This social character of thought was defined by Hegel, and later on by the Frankfurt School, as second nature, a mode of thinking that homogenised the social world and made what was different appear the same. Second nature was an important concept for both Hegel and the Frankfurt

school in understanding social pathology and indeterminacy in relation to the human subject.

The Frankfurt School, drawing from Hegel's critical philosophy, argued that the constraints of our thought were not related primarily to the internal limits or pathology of the individual but were determined by the limits of the self-understanding (reflection) of society and its institutions. The distortions reflected in language represent the unconscious processes of social forms (Habermas, 1971) not the pathologies of individuals. The concept of *second nature* as developed by the Frankfurt School is therefore a useful concept to explore both the relationship of language to social structure and the applicability of psychoanalytic categories to social phenomena.

Psychoanalysis as a Model for Interpretation

Originally the Frankfurt School developed the notion of second nature as a concept which attempted both to resolve the problem of biological determinism in Freudian psychoanalysis – in other words to argue that the unconscious was social as well as individual - and to defend Freud's original insights against the neo-Freudian revisionists.[100] It was conceived as a way to historicise the unconscious (Adorno, 1967/68, Marcuse, 1998) and to avoid what they considered as an overly simplistic confidence found in the work of Reich, Adler and Fromm, in the capacity of human beings to change.

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[100] For a detailed discussion see the Epilogue from Marcuse (1998)

Although Reich, Adler and Fromm attempted to historicise Freudian psychoanalysis by emphasising the influence of society on the individual, their emphasis on the 'total personality' and its unproblematic integration within that society was considered to be no more than ideology by the Frankfurt school. For the latter, the 'individual, before it can determine itself, is determined by the relations in which it is enmeshed' (Jacoby, 1977: 34).

> *'While they [the neo-Freudians] unceasingly talk of the influence of society on the individual, they forget that not only the individual, but the category of individuality is a product of society. Instead of first extracting the individual from the social process so as then to describe the influence which forms it, an analytic psychology is to reveal in the innermost mechanism of the individual the decisive social forces.'[101] (Adorno, cited in Jacoby, 1977: 34)*

So, in stark contrast to the neo-Freudians who saw society (history) as external to the individual, as something outside which influenced individual behaviour; the Frankfurt School saw the category of individuality as itself being a product of society. As argued earlier in the chapter: it is not possible to adopt an external viewpoint, i.e. a viewpoint outwith history or language. In second nature, history and nature are one: there can be no philosophical 'first' or fundamental ground, in mind or in nature, to which we can refer to for authority (Bernstein, 2004). Consequently, for the Frankfurt School, psychoanalysis was primarily a means of discovering the historical dynamics of society within the individual[102]. Although the Frankfurt school could not accept Freud's biological materialism as it stood, they argued that 'his apparent disregard of social values', that is his 'biologism', took his theories beyond ideology (Jacoby, 1977:29). That the factors that define the

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[101] Adorno drew also on Durkheim's notion of the constraining nature of social facts in his understanding of second nature. Society faces the individual as a coercive force (see Rose 1978).

[102] Foucault argues that we do not have access to the present or the immediate, except through what he terms *archaeology*, a mode of historical and epistemological inquiry concerned with the emergence and transformation of *discursive formations,* i.e. it is only through 'frozen' language that we can access the present.

individual may appear purely biological in origin (first/pure nature) represented an important critical insight.

> *Freud's basic 'biologistic' concepts reach beyond the ideology and its reflexes: his refusal to treat reified society as a 'developing network of interpersonal experiences and behaviour' and an alienated individual as a 'total personality' corresponds to the reality and contains its true notion. (Marcuse, 1998:254)*

The insight that the Frankfurt School drew from Freud's 'biologistic' concepts was that what appeared as 'biology' was in fact history congealed within the subject as second nature. 'It is a history so long unliberated – history so long monotonously oppressive – that it congeals. Second nature is not simply nature or history; but frozen history that surfaces as nature' (Jacoby, 1977: 31). Psychoanalysis, by viewing history as a narrative category – a 'charnel-house of long-dead interiorities' – allows a conceptualisation of the historically particular as it relates to the shaping of an individual's identity or the identity of a group. It provides an historical approach, based on a model of self-reflection, on the sedimented cultural and social forms of the present.

> *'History is what hurts, it is what refuses desire and sets inexorable limits to individual as well as collective praxis, which its 'ruses' turn into grisly and ironic reversals of their overt intention.' (Jameson, 1986).*

As mentioned above, the Frankfurt School drew on psychoanalysis as a means to overcome the sociological deficit at the heart of Horkheimer's original programme and to formulate a theory of intersubjectivity that would allow them to interpret social action in light of what they saw as the repressive constraints of modernity (see Marcuse, 2002). The Frankfurt school argued that psychoanalysis should not be

limited only to individual psychology and therapeutic treatment[103], but should be considered as an historicised mode of thought more tightly bound to the social than the critics of Freud had originally thought.[104] Žižek (1994) elaborates further: it is not only that the focus of psychoanalysis should reside in the social, it is that the field of socially held beliefs and social practices is something which the individual is forced to relate to yet experience as an objectified and external order. It is not a question of two separate levels, the individual and the social, but how the external and impersonal socio-symbolic order of institutional practices and beliefs are structured if the subject is to maintain their normal functioning. The model of psychoanalysis developed by the Frankfurt school therefore attempted to overcome what Rose (1981) called the artificial distinction between the individual and society.

So far, then, this section has argued that for the Frankfurt School psychoanalysis provides an historical model to understand the cultural and social forms of the present. The Frankfurt School were attracted to this model, in part, because its access to such cultural forms was through contradiction. A central idea at the heart of critical theory is that contradiction can be used as an index of theoretical truth. The importance of psychoanalysis for them was that it exposed such contradictions rather than repressed them. The following section provides an account of this interpretive focus on contradiction.

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[103] Both Adorno (1967) and Marcuse (1998) were critical of psycho-analysis as a therapeutic treatment as it sought to locate what were social pathologies within the individual psyche. It was this issue over psycho-analysis as a therapy that lead to their split with Fromm (see Jacoby, 1975)

[104] see LaCapra (1994) for a similar argument on the relationship between history and psychoanalysis

Contradiction as an Index of Theoretical Truth

> *'No concept in which a whole process is summarised semiotically can be defined; only that which has no history is definable'* Nietzsche (cited in Adorno, 2002: 29)

As mentioned above, at the heart of critical theory is the notion that contradiction can be used as an index of theoretical truth. Social theory should not aim at resolving or abolishing contradiction by way of conceptual clarification, but alternatively, be conceived as an immediate index of an antagonism that pertains to social reality itself. The importance of Freud for the Frankfurt school was that he exposed such contradictions and rejected a pretended harmony where the thing itself was contradictory.

In their arguments with the revisionists, the early Frankfurt School drew heavily on Freud's theory but considered psychoanalytic treatment itself to be no more than a technique of social adaptation. For Adorno and Marcuse, what the revisionists might consider as therapeutic 'success' meant no more than the normalisation of the patient and her adaptation to the 'normal' functioning of existing society. For them, the therapeutic role of psychoanalysis inhibited its potential as a critique of civilization.

The social hermeneutics developed from the Frankfurt School model of psychoanalysis, i.e. the interpretation of a social and historical unconscious, reveals the ideological deceptiveness of all hermeneutics that limits interpretation to the conscious intention of the original author/speaker and ignores the errors and distortions of the interpreted text or language game. 'What hermeneutics cannot

admit is that it is not sufficient to repair the mutilations and restore the 'original' text to its integrity, since mutilations have meaning as such' (Žižek, 1994: 23).

This section of the chapter has outlined the methodological aspects of the thesis that were influenced by Hegel, in particular the notion of meta-critique. It has discussed issues of epistemology and personal reflexivity in relationship to aspects of continuity and antagonism with existing institutional disciplines and historical tradition, and, in so doing, it has outlined two meanings of critique within social science, one drawn from Kant, concerned with the way concepts relate to objects and with the demonstration of 'objective validity', and the second, the historical critique drawn from Hegel. Via a discussion of the history of these two forms of critique the chapter has proposed a model of interpretation based on psychoanalysis. This model, originally intended by the Frankfurt School as a means to overcome the sociological deficit at the heart of their original programme, differs from the model developed by individual psychology and therapeutic treatment. This historicised model developed by the Frankfurt school attempted to overcome the distinction between the individual and society. What this model provides the thesis with is a metaphor that allows us to question not only policy responses that appears on the surface to be coherent and ordered, but also the theoretical or conceptual frameworks that facilitate such surface appearances and deny the possibility of a repressed history in the first place. In doing so, the Risk Management Authority is positioned as, to extend the psychoanalytical metaphor, a symptom of broader social and cultural shifts. Part two of this chapter, outlines the case study approach which will enable us to 'read' the emergence of the RMA in a way which recognises this

embedding in broader socio-historical context and, which will allow us bring to the surface its repressed history.

II

This chapter began with the problem of beginning a work of social inquiry. It related the notion of beginning to a range of theoretical and methodological problems which, in their turn, link to questions of epistemology and reflexivity. It raised issues of tradition, history, and the constraints of language and followed on from chapters one and two in the development of the idea of the embeddedness of human subjectivity in social institutions. It also attempted to outline an appropriate model, in this case the Frankfurt's school's particular understanding of psychoanalysis, which could address such an epistemological viewpoint in social research. In line with the themes of inherited traditions of thought outlined in the previous two chapters, it was argued that the object of this study was less the world itself, than the interpretations through which we comprehend it. It was this reflexive engagement with the concepts of our own understanding that the term meta-critique referred to. Part one of this chapter therefore was concerned with outlining the problem of meta-critique, part two, outlined below, is a discussion of the research design.

The Case Study

Bryman (2007) argues that a case study is not a method but a structure that guides the execution of a research method. It is a means for a researcher to explore a

specific case as the focus of interest in its own right. Yin (1994:13) provides a further definition of a case study as *'an empirical inquiry that:*

- *investigates a contemporary phenomenon within its real-life context, especially when*
- *the boundaries between phenomenon and context are not clearly evident'*

What is central here in the choice of a case study as a research design is its focus on contextual conditions. Yin (1994) also argues that a case study enquiry benefits from the prior development of theoretical propositions to guide data collection and analysis[105]. In this sense, the case study as developed within social scientific research is not merely a means of data collection but an all-embracing research strategy (Yin, 1994).

The case study approach was chosen in this case therefore because the empirical focus of the thesis is on the contextual conditions of the emergence of a specific institution where the boundaries between the institution and its social context are not clearly evident. This choice of research design therefore reflects the priority given in this research project to the following dimensions:

- Understanding the meaning of the emergence of a particular institutional form at a particular social and historical context.
- To elucidate the conditions for the possibility of this emergence

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[105] However as we will see later, this theoretical aspect of case studies relates more to the development and testing of middle range theories as opposed to broader social theoretical considerations.

Reliability and Validity:

Bryman (2007) and Yin (1994) both raise the issues of reliability and validity in relation to case study research. They ask how the case study addresses questions related to design criteria such as: construct validity, internal validity, external validity and reliability. These issues depend however on how far these are appropriate concepts for the evaluation of each particular case study research. The appropriateness of such concepts relates to the broader epistemological and ontological questions discussed earlier in this chapter.

construct validity – relates to subjective judgements in the selection of data. As a means of increasing construct validity Yin (1994) argues that multiple sources of evidence can be drawn from to encourage convergent lines of enquiry.

internal validity – this relates only to case studies that attempt to provide a causal explanation to a particular event.

external validity - standard criticisms of the case study is that findings deriving from it cannot be generalised. Therefore many discussions on case study design have focussed on concerns of external validity or generalizability of case study research. Bryman (2007) argues that it is not the purpose of a case study to generalise to other cases or to populations beyond the specific case in question.

reliability – case study research also has met criticism regarding reliability of the findings, again this is related to the specific or singular nature of the case in question. Questions of reliability however relate also to the case study's relation to theory. As mentioned above a case study enquiry benefits from the prior development of theoretical propositions to guide data collection and analysis,

however the above issues on reliability and validity depend on a particular naturalistic construction of sociological theory (see Bernstein 1976). Bryman (2007) argues that it is entirely legitimate to choose a case study design in order to generate a theoretical analysis. The critical question is not whether the research findings can be generalised but how well the findings generate theory[106].

Types of Case

Yin (2003) distinguishes five different types of case study:

- The *longitudinal case* – a case may be chosen because it affords the opportunity to be investigated at two or more junctures.

- The *revelatory case*. The basis for the revelatory case exists when an investigator has an opportunity to observe and analyse a phenomenon previously inaccessible to scientific investigation.

- The *critical case*-. Here the researcher has a well developed theory, and the case is chosen on the grounds that it will allow a better understanding of the circumstances in which the hypothesis will and will not hold.

- The *extreme* or *unique* case. Here the case holds an intrinsic interest that makes it essentially unique.

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[106] See also Giddens' (1984) critique of Merton

- The *representative* or *typical* case. Bryman (2007) calls this the *exemplifying* case. This form of case study attempts to capture the contextual background of an everyday or commonplace set of circumstances. This form of a case study may be chosen because it is seen to exemplify or be typical of a particular state of affairs and may provide a suitable vehicle for certain kinds of research questions to be answered.

A sixth type of case is what has been called, following André Jolles' (1930) definition of *casus*: the *case as form*. This is an Hegelian[107] approach that was developed by Jameson (1998) from Jolles (1930) and Lukács (1971). Here the casus is read as a 'structure of typicality, a crystallisation of historical trends' (Frow, 2003: 71). The historical typicality of the case involves the identification of a particular institutional or cultural set of circumstances (the case) in terms of a specific chronological code (a temporal '*field* of interpretation'). This gives rise to the 'historical situation'. The *casus* or case in this sense is a narrative or representative-image which can work to 'crystallize' and explain specific cultural, national or global states of affairs (Frow, 2003: 70).

This thesis adopts this sixth category of case study. This has similarities with the *critical* model and the *exemplifying* case, i.e. the *critical* model requirement on theory development would allow the research design to accommodate critical theory, and the *exemplifying* case study model would have situated the RMA as typifying or exemplifying an institution representative of contemporary shifts in the organisation of society. The sixth category, the case as form, however, allows a

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[107] The Hegelian influence is from Hegel's historico-philosophical approach to aesthetic forms. See Lukács (1971b).

structure for a form of immanent critique as outlined earlier by Horkheimer (1978: 265) where social institutions and activities are related to the 'values they themselves set forth as their standards and ideals'

Casus as a form of immanent critique is hinted at in Jolles' (1930) definition, where he sees the characteristic structure of the *casus* as the 'problematisation of the normative scheme it instantiates' (Frow, 2003: 69). *Casus* is not the same form of typicality as the *example,* in that its purpose is to give rise to a set of questions rather than supply confirmation or backing to a particular set of statements. As Jameson (1998: 120) notes:

> *'it seems clear that the problem of casus deploys and exacerbates a fundamental philosophical problem: the relationship between the universal and the particular: is this fact an instance of that larger classificatory concept, does this act fall under this particular category, what is the status of the existential uniqueness of a given action and its special claim to our sympathy, and so on?*

Casus thereby mediates between the contingency of its occasion and the generality of '*field* of interpretation'. As such, it is always a matter of both particularity and generality (Frow, 2003). However, it is the relationship between the universal and the particular that brings *casus* within the realm of critical theory. It was argued in chapter two that the function of power was to produce subjects in such a way that they perceived the social order as legitimate and that ideology fulfils such a task by masking the particular under abstract universals. In the case of Jolles' (1930) *casus* these abstractions are brought to the surface and made 'self-conscious' as it were:

> *'In the casus itself the form derives from a standard for the evaluations of various types of conduct, but in its fulfilment there is also immanent a*

question as to the value of the norm in question. The existence, validity and extension of various norms is to be weighed, but this very appraisal itself includes the question: according to what measurement or what norm is the evaluation to be performed? (Jolles, 1930, cited in Jameson, 1998: 121)

It is the examination of the contradictions between the particular and the universal; the social institutions and their values, standards and ideals, that allows this model of case study to be a frame work of meta-critique as it deals not directly with the world as such but with 'the interpretations through which we attempt to engage with and understand it' (Jameson, 1989: 9).

The definition of *casus* as a *form* of interpretation is emphasised by Jolles' (1930) retention of the Latin *casus.* The Latin form provides an etymological link to both its legal and medical origins,. In both, the 'case' involves the movement between two poles: in the first, legal 'case' there is a dialectic between the law - or the 'sedimented history' of precedent cases which have become law - and the exceptional circumstances of the particular subject before the law. The psycho-analytic case history narrates the complexity and partial impenetrability of the patient or client against the abstract scientific principles of the psyche (Frow, 2003, Jameson 1998). Both fields have their sedimented histories of which *the judgement,* in the first, and *the symptom*, in the second, are the by products.

The model of the case study adopted for this thesis juxtaposes two different levels of analysis. The first outlines the field of interpretation (in this case contemporary social science discourses around risk). By drawing on the argument developed in chapters one and two and drawing on the metaphor of psychoanalysis, chapter four aims to critique the above field of interpretation and uncover what has been

repressed in these discourses. The second level of analysis of the case study is a discourse analysis of the Risk Management Authority (RMA) and will form chapter five of the thesis. The aim of that chapter will be to trace the Risk Management Authority's emergence by investigating 'official discourse' (Burton & Carlen, 1979), i.e. the legislative and policy documents related to the criminal justice system in Scotland. In doing so, it seeks to give an empirical ground to the theory of modernity and social change developed in the earlier chapters of the thesis.

The historical typicality of the case involves the identification of a particular institutional or cultural set of circumstances (in this case the emergence of the RMA) in terms of the field of interpretation outlined earlier. The following section provides an account of discourse analysis, the method chosen for chapter five.

Research Method: Discourse Analysis

> *'what have to be analysed are paradigmatically rational practices, and they cannot be adequately understood in isolation from the socio-historical contexts in which they emerge and function' (McCarthy, 1991: 50).*

As mentioned earlier, the empirical focus of the thesis is on the conditions of emergence of a specific institution and its relationship to its social and historical context. In terms of method the question now arises as to how it is possible to reconcile a broad historical narrative on modernity with an empirical investigation of a local state of affairs (the Scottish penal system). What method will allow us to capture the rational practices of institutions and the transformations that they generate with a snapshot taken at a very specific moment and place?

The method chosen for the empirical component of the case study will be discourse analysis. Here the examination of documents was chosen over the traditional case study methods of observation or the conducting of interviews. Alvesson (2002) argues however that the term 'discourse analysis' has recently become too broad and diffuse to be meaningful. Many researchers use the term as though it has a clear and agreed meaning. It is therefore important to outline what it means in the context of this thesis.

> *'Discourse in discourse analysis means something partly different from discourse as the term used by Foucault, and many other popular uses of 'discourse' mean something different again [...]Discourse is a highly fashionable word that is used in a variety of ways. In DA the task is to study discourse as texts and talk in social practices. The focus is not on language as an abstract entity, such as a lexicon and set of grammatical rules (in linguistics), a system of differences (in structuralism) or a set of rules for transforming statements (in Foucauldian geneaologies). Instead it is on the medium of interaction: analysis of discourse becomes an analysis of what people do with language in specific social settings' Alvesson (2002: 68)*

Alvesson's account of what 'discourse' is in discourse analysis is then opposed to the type of discourse analysis traditionally associated with the work of Michel Foucault. Discourse analysis in this thesis relates to a study of language *use* in particular social settings. However, it is useful to consider the Foucauldian notion of discourse in more detail, as there are aspects of his understanding that are important to retain, particularly that aspect of discourse that is productive of institutional forms. It is still possible to study the use of language while retaining the productive notion. From chapters one to three of this case study, it has been clear that the productive and constraining power of language is not restricted to the work of Foucault.

Like Hegel and the Frankfurt School's understanding of language and second nature, Foucault's (2002) understanding of discourse refers to a group of statements which structure the way a thing is thought, and the way we act on the basis of that thinking. In other words discourse is a particular knowledge about the world which shapes how the world is understood and how things are done in it. For Foucault (2002) this makes discourse much more than language as such. It is possible to speak of forms of discourse, the forms of knowledge it produces and the professional institutions and social spaces which it occupies.

> *'the term discourse can be defined as the group of statements that belong to a single system of formation; thus I shall be able to speak of clinical discourse, economic discourse, the discourse of natural history, psychiatric discourse' (Foucault 2002: 121)*

For Foucault (2002), discourse also produces subjects; our sense of self is produced through discourse. In this Foucault differs from Hegel and the Frankfurt School's understanding of subjectivity. For Foucault, there is a sense that the subject does not exist prior to discourse. For Hegel and the Frankfurt school there exists an embryonic subject before its encounter with language. For both Foucault and the Frankfurt School however, discourse is a relation of power, and it is this relationship to power that makes discourse productive. Power produces knowledge; there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations (Foucault, 2002).

Both Foucault and the Frankfurt School were particularly concerned with the emergence of institutions and technologies that are structured through specific, even

if complex and contested discourses. The relationship of discourse, knowledge and power to the emergence of institutions, new modes of knowledge and the construction of individual subjectivity would make critical discourse analysis the obvious choice of method. However, as mentioned earlier, in order to historicise and make problematic the concepts and assumptions surrounding our understanding of contemporary accounts of modernity, the case study has adopted a more Hegelian framework for analysis; one that has focused not only on the contradictions of official discourse and the emergence of new modes of knowledge, but on the socio historical background of that emergence. For discourse analysis the important aspect of the case as *form*, outlined above, is the mediation between the two levels.

Mediation and Intertextuality

What connects Hegel with Critical Theory is the notion that 'no partial aspect of social life and no isolated phenomenon may be comprehended unless it is related to the historical whole, to the social structure conceived as a global entity' (Connerton, 1976:12). The concept which allows us to theorise and comprehend the relationship between the partial and the whole is mediation. This refers to the establishment of symbolic identities between various levels of the social structure and allows the possibility of adapting analysis and findings from one level to another. Mediation is the classical dialectical term for the establishment of relationships between the formal aspects of a cultural or scientific work and its social ground (Jameson, 1989).

Mediation in that way is close to intertextuality, a concept drawn from critical discourse analysis, which refers to the diversity of forms through which a discourse

can be articulated (Bryman, 2007). It draws attention to the notion of discourse as existing beyond the level of any particular discursive event on which the analysis is focused. Bryman (2007) argues that the notion of intertextuality enables a researcher to focus on the social and historical context in which discourse is embedded. However it is important also to note that each of these levels, has their own logic of development that cannot be reduced to the other (Habermas 1976). The details of how the texts were selected and the content of the analysis will be discussed in chapter five.

Concluding Thoughts

This chapter began with the problem of beginning. It dealt with a range of epistemological and methodological issues and outlined the historicised model of psychoanalysis developed by the Frankfurt school, as a metaphor that attempts to retrieve what has been repressed in the interpretations of modernity as well as endeavour to eliminate the distinction between the individual and society. While part one of this chapter was concerned with outlining the problem of meta-critique, part two was a discussion of the research design. It looked at issues of reliability and validity in relation to case study research and how the appropriateness of such concepts relate to the broader epistemological and ontological questions discussed earlier in the chapter. The rationale for choosing a case study design was that it was a model that allowed for the generation of theoretical analysis. It looked at the different types of case study and argued that the socio-historical *casus* of André Jolles (1930), who developed the model as a means of relating particular narratives to broader historical trends, was best suited to the aims of this thesis. It allows the research design to accommodate an *immanent* form of critique as a means of

understanding the meaning of the emergence of the RMA at a particular social and historical context and to elucidate the conditions for the possibility of this emergence. The case study, therefore, occurs on two levels and takes place across two chapters.

Critical discourse analysis was chosen as the most appropriate method to collect data for chapter five due to its focus on the contradictions of official discourse and the emergence of new modes of knowledge, the regulation of subjectivity and the development of legitimation strategies. The discourse analysis will be presented in chapter five. Before that the critique of new discourses of modernity will be carried out in the following chapter.

CHAPTER FOUR

NEW WINE IN OLD BOTTLES: RISK, MODERNITY AND THE CRIMINOLOGY OF THE 'OTHER'

'until [the twentieth century] mankind is divided in two - those who defended the status quo and those who sought to change it. Then the acceleration of History took effect: whereas in the past man had lived continuously in the same setting, in a society that changed only very slowly, now the moment arrived when he suddenly began to feel history moving beneath his feet, like a rolling sidewalk: the <u>status quo</u> was in motion! All at once, being comfortable with the <u>status quo</u> was the same thing as being comfortable with history on the move! Which meant that a person could be both progressive and conformist, conservative and rebel, at the same time!' (*Kundera, 2007: 55-56*)

Introduction

In chapter one the relevance of Hegel was highlighted in relation to recent developments in social theory. It was posited that while not explicitly drawing on Hegel, there appeared to be return to Hegelian themes in work dealing with the reflexivity of modernity (Beck 1992, Giddens, 1990), theories of the self and self-identity (Giddens, 1991 Taylor, 1992), as well as a return to the Lacanian Hegel in criminological work dealing with the 'imaginary' (Carlen, 2008, Taylor, 2004).

In the quotation at the beginning of chapter one Habermas (1987: 4) writes that 'Hegel was the first philosopher to develop a clear concept of modernity'. He argued that we had to return to his work if we wanted to understand the internal relationship between modernity and rationality. For Habermas, the Hegelian tradition was necessary to judge whether the claims of those who base their analysis of modernity on other premises are legitimate. As Critchely (2001: 68) points out

such an appeal to an earlier tradition is not necessarily a conservative return to the past[108]:

> *'the appeal to tradition need not at all be traditional, insofar as what the notion of tradition is attempting to recover is something that is missing, forgotten, or repressed in contemporary life. As such, the appeal to tradition need not be some conservative acquiescence in the face of the past, but can rather take the form of a <u>critical</u> confrontation with the history of philosophy and history as such.*

The following chapter will examine the conceptualisations of modernity in recent social theory and will seek to uncover what has been erased or repressed within the contemporary retranslation of the concepts of reflexivity, self identity and modernization.

As mentioned in the previous chapter, the reason that the thesis adopted the notion of ethical life was to emphasise the historical aspect of knowledge and that institutional change relates to broader social and historical change. The importance of the concept of modernity to this change is that it provides society with a temporal and spatial identity. In other words, it provides a narrative that allows people to understand the social world (Taylor, 2004). This chapter's importance to the case study then, is that it situates the *case*, the Risk Management Authority, within a particular historical conjuncture, through exploring recent sociological narratives of the risk society.

This chapter argues that the classical approach to modernity attempted to preserve an internal relationship between modernity, history and rationality and that this historical aspect of the concept of modernity is still important for our understanding

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[108] Critchely (2001) argues that this critical concept of tradition was what Heidegger called *Destruktion* (de-structuring) and Derrida, after him, *déconstruction*.

of social change. It will examine the conceptualisations of modernity in recent social theory and, building on the ideas of retrieval developed in chapter three, will seek to uncover what has been erased or repressed within the contemporary retranslation of the concepts of reflexivity, self-identity and modernization.

Part I examines the new theories and asks whether their retranslation has taken them beyond the eighteenth and early nineteenth century debates concerning the authority of reason. In Part II it is argued that Giddens' work has been central to the recent re-conceptualisations of modernity and one important aspect has been his reinterpretation of indeterminacy through the theme of unintended consequences. Through an analysis of structuration theory, and relatedly an exploration of how Giddens' critical theory relates to that of the Frankfurt school, the chapter makes clear that not only does Giddens' later work on modernity draw from this earlier work on modernity, but it also adapts terminology relating to the 'classical' understanding of modernity. Although Giddens rejects this earlier understanding of modernity and considers its legacy 'exhausted', he nevertheless is left in the situation of reinterpreting this tradition through his conceptualisations of reflexivity, modernisation and historical change. Part III will examine the preoccupation in the 'risk society' theses with maintaining security and eliminating ambiguity in relation to the 'other' as the figure of fear and the scapegoat. This section is important in providing the context of the Risk Management Authority. The chapter ends by examining how society's increasing concern with risk influenced the regulation of crime and punishment; particularly in relation to the new penology.

I

Modernity Old and New

Taylor (2004) writes that the central problem of modern social theory is the problem of modernity itself. The task of social theory for Taylor was an understanding of that historical combination of new practices and institutional forms, new ways of living and new forms of social pathology. He suggests that we can throw light on both the original and the contemporary issues about modernity if we can come to a clear definition of the self-understanding[109] that has been constitutive of it. Modernity in this way, Taylor argues, is inseparable from a certain kind of social imaginary[110].

> *'By social imaginary, I mean something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, rather, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations' (Taylor, 2004:23).*

Taylor (2004) argues that there are important differences between the social imaginary - the way people imagine their social surroundings - and social theory. The social imaginary is not expressed in theoretical terms, but is carried in the images and narratives people use to understand their world. What is particularly

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[109] Taylor (1992) in *Sources of the Self: The Making of Modern Identity*, describes the historical journey of the self and uses the terms self-knowledge and self-exploration to mean not only the development of the individual in society, but also in relation to the social and cultural self-understanding of modern subjects. Self-understanding relates to the reflexive experience of modernity in the development of that subject, and hence the importance of the social imaginary. See Taylor (1985) for an account of self-understanding in relation to the work of Foucault.

[110] Taylor's (2004) notion of the *imaginary* is closer to the more common understanding of imagination and should not be mistaken with the Lacanian imaginary, which relates to the misrecognition by the self of the world and its relation to others.

interesting about the social imaginary according to Taylor (2004) is that whereas social theory is often in the possession of a small minority, the social imaginary is shared by society as a whole. It is this common understanding which makes possible common practices as well as a widely shared sense of legitimacy.

This interpretation of the social imaginary is close to Giddens' (1984) understanding of how social actors reflexively 'constitute' social reality. However, for Giddens (1984), social theory does have a practical and historical relationship with this common understanding outlined by Taylor. For Giddens (1984) social theory contributes to the constitution of the social imaginary, through the adoption of its concepts and language by social actors in their day to day life. Giddens calls this process the 'double hermeneutic', and it is this adoption of social theory's concepts by the lifeworld that guarantees its relevance.

The ideological aspect of the imaginary however is not ignored by Giddens (1984), and he acknowledges that social science itself has an ideological effect that may reify social reality and shape the nature of social life itself. Importantly, as Giddens (1979, 1982) indicates in relation to the work of Marx, a socio-historical approach to social theory in itself does not necessarily avoid theory succumbing to ideology. This points to the dual nature of knowledge; on the one hand it is a scientific discourse that can ground social research, on the other it is ideology (Lemert, 1994).

The following section will examine the new theories of modernity in relation to reflexivity and compare them to Hegel's understanding of the origin of the problem of modernity, i.e. the crisis of the authority of reason.

From the early 1990's there has been a return to notions of modernity in an attempt to describe our relationship to the present, where the concept of reflexivity, identity and the social embeddedness of individuals in relation to institutions are central themes (Beck,1992;Giddens 1990, 1991). Giddens's work in particular has been concerned with the interrelationship of society, knowledge and individual identity. As Elliot (2003: 48) notes, Giddens's approach to modernity involves considerable terminological innovation: 'embedding and disembedding mechanisms,' 'symbolic tokens,' 'expert systems,' 'the dialectic of trust and risk,' and most importantly to our discussion here, 'reflexivity'. However, the form of reflexivity that these new theories of modernity identify is not based on an internal relationship between history and rationality - the themes of old modernity which were explored in chapter one - but on our relationship to modernity mediated via abstract systems[111] through notions of trust and risk. In this recent work risk technologies are seen as having a much broader impact on social life than that of a precautionary principle[112] of harm reduction; here risk is seen as a key concept for a reflexive understanding of society.

These new theories of modernity have appeared in a period of reappraisal in the West. They emerged at a time just after the fall of the Berlin wall, a time when modernity was again, after 40 years of the Cold War, opening up before Western society. Not only did these theories offer an analysis of a new set of circumstances

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[111] Abstract systems are institutional domains of technical and social knowledge, they include systems of expertise of all kinds, from local forms of knowledge to science, technology, and mass communications.

[112] See O' Malley (2004: 3) 'The precautionary principle involves governmental proscription of certain practices – such as genetic modification of foods – even though no conclusive scientific evidence yet corroborates the claim that the process is harmful'.

and their global significance, but claimed to counter what had been a dominant theoretical discourse at that time: postmodernism.

> *'Today, in the late twentieth century, it is argued by many, we stand at the opening of a new era, to which the social sciences must respond and which is taking us beyond modernity itself. A dazzling variety of terms has been suggested to refer to this transition, a few of which refer positively to the emergence of a new type of social system (such as the 'information society' or the 'consumer society') but most of which suggest rather that a preceding state of affairs is drawing to a close ('post-modernity,' 'post-modernism,' 'post-industrial society,' 'post-capitalism,' and so forth) (Giddens, 1990:1).*

Giddens (1990) argues that while many of these 'post' theories concentrate on institutional transformations – for example the shift from manufacture economies to information economies - the most common controversies relate to epistemology. Post-modernity in these debates is characterised by a rejection of attempts to ground epistemology and a critique of Enlightenment discourses of human progress ('grand narratives' of history)[113]. Giddens (1990: 2) traces the origin of the disorientation expressed in these theories to a sense of being 'caught up in a universe of events we do not fully understand' and which are beyond our control. In order to understand how this has come about he argues that it is not enough merely to invent new names such as post-modernity, but to investigate the nature of modernity itself.

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[113]Beiser (1999) argues that the crisis of modernity as the crisis of the authority of reason (knowledge as scientific, the legitimacy of science) was first posed by Freidrich Heinrich Jacobi's (1743-1819) critique of Spinoza and Kant. According to Beiser (1999), this work was is in fact the origin of the the 'postmodern' problematic. The 'post-modern predicament' then, really began in 1786. See also Beiser (1987: 9-10) on Jacobi: 'The faith in the autonomy of reason came under fire […] by F.H. Jacobi in his <u>Briefe über Spinoza</u>. While Hamann and Herder insisted that we cannot abstract reason from society and history, Jacobi stressed that we cannot separate it from desire and instinct […] Reason is not a disinterested power of contemplation, then, but an instrument of the will, which uses it to control and dominate the environment. Reason is under the influence of the will to such a degree […] that even its standards of truth and falsity are dictated by it. What is true or false becomes what is successful or unsuccessful in achieving the ends in life. Not shirking any relativistic implications, Jacobi then insinuated that these ends could differ from one culture to another'.

> *'Rather than entering a period of post-modernity, we are moving into one in which the consequences of modernity are becoming more radicalised and universalised than before. Beyond modernity, I shall claim, we can perceive the contours of a new and different order, which is 'post-modern'; but this is quite distinct from what is at the moment called by many 'post-modernity' (Giddens, 1990:2).*

This new discourse of modernity opposed the disorganisation and pessimism of post-modern theories with a theory of modernity based on a unified and more optimistic account of Western society, subjectivity[114] and reflexivity.

Modernity and Reflexivity

As we have seen, the re-emergence of modernity as a concept has also been accompanied by an increasing reliance by many social theorists on the notion of risk to explain our present relationship to the modern world. In fact, as noted above, risk has been put forward by many social theorists (Beck 1992; Giddens, 1990, 1991) as a principle concept for a reflexive understanding of society. It has been suggested that the reflexivity of risk calculations is related to modernity in the sense that these risk calculations are the result of increasing complexity within the social system and the distribution of resources in western society. In his book *Risk Society*, Beck (1992: 19) argued that 'in advanced modernity the social production of wealth is systematically accompanied by the social production of risks'. This process, or rather the shift in consciousness that has brought it about, is described by Beck as the process of 'reflexive modernisation'. Risk, therefore, is defined in Beck's work

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[114] Anderson (1998) argues that post-modernism first emerged from the distant periphery rather than in the cultural centre of Europe or the United States. See also Bernstein (2006: 80) on Derrida and his relation to Algerian war, 'Derrida came from a petit-bourgeois Jewish family which was partially assimilated. He was and was not a Jew. He was and was not an Algerian. As an Algerian Jew he was and was not a Frenchman. By his own testimony his primary experience was a 'feeling of non-belonging' – of 'otherness'. This periphery/centre aspect of modernity may also explain Giddens's much closer association of notions of identity to an individual self than appears in 'post-modern' writers such as Butler (see Lemert, 1994)

as a systematic way of dealing with the hazards and insecurities produced by modernism itself.[115]

> '*Modernization is becoming <u>reflexive</u>; it is becoming its own theme. Questions of development and employment of technologies (in the realms of nature, society and the personality) are being eclipsed by questions of the political and economic 'management' of the risks of actually or potentially utilized technologies – discovering, administering, acknowledging, avoiding or concealing such hazards with respect to specially defined horizons of reference. The promise of security grows with the risks and destruction and must be reaffirmed over and over again to an alert and critical public through cosmetic or real interventions in the techno-economic development.*'

In opposition to the 'classical' understanding of modernity, Beck (1996: 28) argues that we are between two modernities: simple modernization, what was previously referred to as industrial society and advanced modernity.

> '*In view of these two stages and their sequence, the concept of 'reflexive modernisation' may be introduced. This precisely does not mean reflection (as the adjective 'reflexive' seems to suggest), but above all self-confrontation. The transition from the industrial to the risk epoch of modernity occurs unintentionally, unseen, compulsively, in the course of a dynamic of modernisation which has made itself autonomous, on the pattern of latent side effects. One can almost say that the constellations of risk society are created because the self evident truths of industrial society (the consensus on progress, the abstraction from ecological consequences and hazards) dominate the thinking and behaviour of human beings and institutions. Risk society is not an option which could be chosen or rejected in the course of political debate. It arises through the automatic operation of autonomous modernization processes which are blind and deaf to consequences and dangers. In total, and latently, these produce hazards which call into question – indeed abolish – the basis of industrial society*'

This 'new' modernity brings with it a set of hazards and dangers that make the precautionary principle no longer valid. The second modernity involves living with

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[115] Beck's (1992) contends that we no longer only live within societies defined by conflicts over the scarcity of resources and the constraints associated with pre and early modernity. The problems that have come to the fore in recent times are those resulting from technology and economic development itself.

contingency; living in a more complex less controllable world. The notion of reflexive modernisation indicates that social change is accompanied not only by an increase in uncertainty, but in an increase in self-monitoring. Reflexivity, according to Giddens, should be conceived as a continuous process of individual and collective 'self-monitoring'.

> *'The reflexivity of modern social life consists in the fact that social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character [...] only in the era of modernity is the revision of convention radicalised to apply (in principle) to all aspects of human life, including technological intervention into the material world [...] What is characteristic of modernity is not an embracing of the new for its own sake, but the presumption of wholesale reflexivity – which of course includes reflection upon the nature of reflection itself.' (Giddens, 1990: 38-39).*

Although Beck and Giddens use the concept of reflexivity slightly differently, both argue that late modernity can be characterised by its being more *reflexive* than 'simple modernity'. This assertion about the nature of reflexivity in modernity raises a problem: in what ways does it make sense to speak of modernity versus reflexive modernity? Modernity by definition must be reflexive. 'Classical' theorists of modernity saw reflexivity in the context of an historical self-understanding of society; they therefore saw modern society as opposed to traditional societies. The citizens of modernity lived in historical time which had a past, present and future. As we have seen in chapter one the 'reflection upon the nature of reflection itself' is not new and is central to the critique of reason by Hegel. What has been repressed in the new theories of modernity is that modernity was *always* a reflexive concept. One of the key arguments of this thesis is that this is why Hegel is important, as he returns us to the origin of the problem. The recent crises of modernity, which can be traced through the debates on the limitation of knowledge, the status of scientific

knowledge, the legitimacy of science, etc, are the same themes as the eighteenth and early nineteenth century debates surrounding the crisis of the authority of reason (see Beiser, 1999).

Although Hegel is never cited in the works of both Giddens and Beck, many of their key concerns, and the concepts on which their theories rest, can be traced back to the 'classical' understanding of modernity: the distinction between modernity and tradition; the reflexive aspect of modernity in both the attempt at a socio-historical account of the present and the 'reflection on the nature of reflection itself.'

Another key area where the influence of Hegel is felt in the new theories of modernity is the inversion of his notion of the 'cunning of reason.'[116] In the new theories the 'cunning of reason' is reconceptualised as the 'unintended consequences' of human agency; a concept brought to prominence by Giddens (1984) through his critique of functionalism in the 1980's and developed by Beck (1992) in his discussion of the 'boomerang effect' in relation to the distribution and growth of risks. It is this conceptualisation which chimes with Hegel's notion of indeterminacy that was explored in chapter one. The concept of 'unintended consequences' first appeared at a central moment in the development of Giddens structuration theory. It will be useful to look at this theory in more depth as it allows us to see the continuity and relationship between Giddens' earlier work and his later writings on modernity as well as highlighting more clearly the similarities and differences between Giddens and the classical tradition.

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[116] What Hegel called the 'cunning of reason' (List der Vernunft), put simply, 'reason uses the self-interest of individuals to realize its ends' (Beiser, 2005: 267)

Giddens and Structuration Theory

In what follows it is argued that although Giddens (1984) is not unaware of the pathological aspects of unintended consequences, his general interpretation of the concept in his work is positive. This positive interpretation of unintended consequences takes us away not only from the negative conceptualisation of Hegel and the Frankfurt School, but from a concept of critique, in other words, of grounding social theory in an emancipatory or ethical interest. In this section, then, we look at both the theme of unintended consequences in Giddens' work on structuration and, related to this, his understanding of critique. In *The Constitution of Society,* Giddens (1984: 287) writes that 'structuration theory is intrinsically incomplete if not linked to a conception of social science as critical theory'. In this work he attempted to find a way to steer between the dualism of objectivism and subjectivism in social theory: 'structuration theory is based on the premise that this dualism has to be reconceptualised as a duality – the duality of structure' (Giddens, 1984: xx-xxi).

> '*Structure, as recursively organised sets of rules and resources, is out of time and space, save in its instantiations and co-ordination as memory traces, and is marked by an 'absence of subject'. The social systems in which structure is recursively implicated, on the contrary, comprise the situated activities of human agents, reproduced across time and space. Analysing the structuration of social systems means studying the modes in which such systems, grounded in the knowledgeable activities of situated actors who draw upon rules and resources in the diversity of action contexts, are produced and reproduced in interaction. Crucial to the idea of structuration is the theorem of the duality of structure [...] The constitution of agents and structures are not two independently given sets of phenomena, a dualism, but represents a duality. According to the notion of duality of structure, the structural properties of social systems are both medium and outcome of the practices they recursively organise. Structure is not external*

> *to individuals [...] Structure is not to be equated with constraint but it is always both constraining and enabling. This of course, does not prevent the structured properties of social systems from stretching away, in time and space, beyond the control of individual actors. Nor does it compromise the possibility that actors' own theories of the social systems which they help to constitute and reconstitute in their activities may reify those systems. The reification of social relations, or the discursive 'naturalisation' of the historically contingent circumstances and products of human action, is one of the main dimensions of ideology in social life.'* (Giddens, 1984: 25-26)

Social structures are sets of rules and resources, at once both constraining and enabling human actions and forming both the medium and the outcome of practices of a social system. Society is thus 'constituted' by actors reflexively monitoring their own conduct as they reproduce or transform the rules and resources available to them.

Although Giddens tends to emphasise agency over structure in his work, in terms of actors' ability to be knowledgeable and to control their lives, the last section of the above quotation indicates that he is not unaware that structures are not simply rules and resources for actors to employ – i.e. they may also be stretched away beyond the control of individual actors and become a reified force that shapes the nature and aims of actions themselves. This introduction of reification, unconscious action and ideology brings Giddens close to Critical Theory.

In 1982 just before the publication of *The Constitution of Society*, Giddens gave an interview to Josef Bleicher and Mike Featherstone (Bleicher and Featherstone, 1982) for *Historical Materialism Today*. In this interview Giddens gives an account of his relationship to the Frankfurt School and his position in relation to modernity as the project of Enlightenment. Here Giddens argues that in contrast to the instrumentalism of orthodox sociology, social science is inherently critical, it is not

an optional extra to be added on. Social science is critical because those working in

social science must adopt a critical relation to their subject matter. Social theory is

historical and has practical implications, whether potential or actual, for the society

it investigates. For Giddens it would appear that it is both its historical and its

practical dimension that makes theory inherently critical[117]. Social theory therefore

must be considered not only as part of a social scientific discourse but as a more

generalised form of discourse, a structure of meaning or 'existential truth'

(Alexander, 1995) beyond the 'internal critique' of the scientific community itself.

> *'We cannot be content with the 'technological' version of critique proposed by the orthodox consensus, a view deriving from a natural science model. The technological view of critique supposes that the 'internal critique' of social science – the critical assessment which those working in the social sciences make of each other's views – uncomplicatedly generates an 'external critique' of lay beliefs that can be the basis of practical social intervention. But, given the significance of the 'double hermeneutic', matters are much more complex. The formulation of critical theory is not an <u>option</u>; theories and findings in the social sciences are likely to have practical (and political) consequences regardless of whether or not the sociological observer or policy-maker decides that they can be 'applied' to a given practical issue.' (Giddens, 1984: xxxv)*

He argues that this is important in relation to claims by those theorists such as

Habermas and the Frankfurt School that Critical Theory must be grounded in

relation to a notion of an emancipatory interest. Giddens (Bleicher and

Featherstone, 1982: 65) opposes this notion of an emancipatory interest as outlined

by Habermas in his (1971) theory of knowledge-constitutive interests[118] and avoids

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[117] Giddens does not make clear why the practical consequences of a theory make it critical. See Bernstein (1986) on Giddens blurring between practical and critical in relation to the double hermeneutic

[118] See Habermas's Knowledge and Human Interests (cited in McCarthy, 1978:93) 'Compared with the technical and practical interests in knowledge, which are both grounded in deeply-rooted (invariant?) structures of action and experience – that is in the constituent elements of social systems – the emancipatory interest in knowledge has a derivative status. It guarantees the connection between theoretical knowledge and an 'object domain' of practical life which comes into existence as a result of systematically distorted communication and thinly legitimated repression.

what he sees as 'nebulous' and abstract discussions on what a 'good' or 'just' society should be. He claims that Habermas's notion has very little content if the term emancipatory is removed from it. Habermas's notion, according to Giddens, can be understood in relation to his continuing faith in the Enlightenment project of modernity, which in turn Giddens rejects as too generalised an approach to be of much help to social science today.

> *'I think that one of the main tasks of social analysis is to try to analyse this disjuncture in modern history: that is how it is that we live in a world which is just so extraordinarily different to the world anybody else has ever lived in before the last two hundred, three hundred or so years. That's part, I suppose, of what one might call the facts of modernity and I think that's still absolutely fundamental to social analysis. I'm not in favour of continuing the traditional analysis of such phenomena, for a lot of sociology and politics emerged out of the nineteenth century in which there was a particular series of changes going on in Western Europe: principally the change over from a rural to an urban society and from an agrarian to an industrialised one. The context of change is now very different in the twentieth century, different both sociologically and politically and therefore in this respect I think there is a sort of exhaustion of the ideas that came from the nineteenth century [...] I don't really hold out much hope of defending modernity if it means defending enlightenment in a classical sense. (Giddens in Bleicher and Featherstone, 1982:69)*

Giddens, then, argues that to move forward and understand the present we need new concepts to deal with changed circumstances. As we saw, Giddens' approach to modernity not only draws from his earlier work but also adapts terminology relating to the 'classical' understanding of modernity as the project of Enlightenment. If it was important to make such a clean break with the legacy of the past, then why rely on the conceptual forms of that past? Why provide the outward forms of older concepts with new content? Moretti (1996: 20) argues that evolution in the arts or sciences *'does not normally proceed by inventing new themes or new methods out of the blue, but precisely by discovering a new function for those that already exist'*. In

this sense both Beck (1992) and Giddens (1990; 1991) could be seen as following the evolutionary path of the social sciences where old forms are adapted to fit new conditions. Retranslating old forms to capture new social transformations is problematic, however, as it carries with it the danger of conceptual confusion and ideological contradiction, when faced with the original content of those forms. No more so, than when Giddens (1991) in *The Consequences of Modernity* while outlining his problematic of modernity, fails to note that the plurality of heterogeneous claims to knowledge, the status of scientific knowledge and the discontinuities of history are all central problems of the Enlightenment (see Beiser, 1999). Not only have these problems not been 'solved', but they originate in the eighteenth century. In other words they are even older than the explanations that Giddens earlier had claimed we could move beyond.

Giddens's preferred approach is to link the critical/practical momentum of social science to a more substantive analysis of contemporary societies. The critical edge in social theory comes from the dual practical functions of its products. Social theory can be 'used as an instrument of power to support existing states of affairs or it can be used in principle to change them' (Giddens in Bleicher and Featherstone, 1982:65). Theory, then, for Giddens, although inherently critical, is also 'interest free[119]' in relation to those who might apply it. The same theory can be adopted to justify the maintenance of the status quo or support radical change depending not on whose interests it is used but in relation to the 'facts'[120]. Giddens argues that the

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[119] Habermas (1971) outlines a theory of what he calls 'cognitive interests' (*Erkenntnisinteressen*), Habermas argues that every form of scientific enquiry is related to a particular 'cognitive interest'. The natural and social sciences have a technical cognitive interest. The critical sciences, such as psych-analysis and Critical Theory have an e*mancipatory* cognitive interest.
[120] It is important to stress here that Giddens is not advocating either an orthodox or a 'weaker' form of sociological positivism here. 'There are certain senses often attributed to 'theory' in the social

rationale for deciding the value of one theory over another is in how well it fits with the facts of the matter. A dialogue between theory and fact is the basis of the possibility of doing any kind of sociological or political analysis. There are neither a multiplicity of equally effective explanations of the world, nor is there only one central paradigm that everyone must accept. The problem with the Frankfurt School, according to Giddens, is that they rely on the mistaken belief that they must work from a more secure foundation than the above state of affairs will admit and that without this foundation it is impossible to do anything until you have achieved it. Giddens does not believe that this foundation exists, 'either in respect of the facts or in respect of moral critique on the part of the theorist or the analyst' (Giddens in Bleicher and Featherstone, 1982: 74).

> *'I reject the programme of grounding critical theory because I want to set up the idea of two houses, neither of which is a safe house, the factual house and the moral critical house, that you can move between. (Giddens in Bleicher and Featherstone, 1982:74)*

Giddens argues that in wanting to develop a critical theory in the terms of the Frankfurt School, social theorists ignore the critical motivation inherent in all social analysis due to the practical and historical relation in which it stands to its subject matter. However, although Giddens finds the idea of grounding critical theory both intellectually anachronistic, in terms of philosophically grounded theories of the

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sciences from which I want to maintain some considerable distance. One conception used to be popular among some of those associated with the orthodox consensus […] that the only sort of 'theory' worthy of the name is that expressible as a set of deductively related laws or generalisations […] there is [also] a weaker version of it which still commands a very large following […] This is the idea that the 'theory' in social theory must consist essentially of generalisations if it is to have explanatory content. According to such a standpoint, much of what passes for 'social theory' consists of conceptual schemes rather than (as should be the case) 'explanatory propositions' of a generalising type.' (Giddens, 1984: xviii)

'good' and 'justice', and unnecessary, he seems to avoid any discussion relating to the problems that such a project wishes to confront.

Giddens' idea of two houses, neither of which are safe, ignores rather than resolves the either/or which Bernstein (1986: 248) claims has marked out the conceptual space for our understanding of social science as a critique. Bernstein claims that social scientists 'must' *either* acknowledge that the norms to which we appeal in making critical social judgements cannot be rationally justified *or* acknowledge that they are based in rational 'foundations'. We do not have to endorse a vulgarised form of foundationalism to appreciate the importance and legitimacy of such questions. Giddens' refusal to ground critical theory and therefore not deal with human interest appears to leave open the question of *who* it is that are in the position of making use of social knowledge and for what reasons.

For Giddens the relation in which social theory stands to its subject matter is via structuration and the nature of human beings as agents. As outlined earlier he writes that structuration theory is incomplete if not applied to a conception of social science as critical theory. In this way it would appear to be the practical knowledgability of social agents and the relation of that knowledge via structures to unintended consequences in human history that is the critical key that allows Giddens the freedom to move between the factual house and the moral critical house.

> *'I want to develop an approach centred around the idea of structuration that allows adequate recognition of the fact that we are human agents and to be an agent is already to be a phenomenon that is not just something open to analysis, it already implies a certain position about what people are like. I*

want to recognise that without relapsing into what I see as the subjectification of traditional interpretive sociologies and I want to try and link this with an awareness of the persuasive significance of unintended consequences in human history via structures. (Giddens in Bleicher and Featherstone, 1982:75)

Giddens argues that social theory must allow the adequate recognition not only of the fact that we are human agents, but that to be an agent already implies an understanding about what people are like. We have seen that social systems are 'grounded in the knowledgeable activities of situated actors who draw upon rules and resources in the diversity of action contexts, [and] are produced and reproduced in interaction' (Giddens, 1984: 25). The pre-scientific primacy of knowledge produced and reproduced in interaction is drawn from phenomenology[121]. However Giddens while recognising the intersubjective dependency of human agents does not wish to relapse into what he sees as the subjectification of traditional interpretive sociologies. In order to do this he places the reproduction of social relations and practices at the level of social system rather than a conceptualisation of lifeword as such. Although in his work he attempted to find a way to steer between the dualism of objectivism and subjectivism in social theory, in his attempt to avoid relapsing into the subjectification of interpretive sociologies he appears to overstate the objectivism side of the dualism.

As we have seen, *structure* is understood by Giddens as organised sets of rules and resources outside of time and space. It is marked by the 'absence of subject'. Yet at

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[121] The notion of the pregiveness, or ontological primacy of the lifeworld (Lebenswelt) in relation to the activity of science is found in Husserl (1970:130) 'If we have made our contrast with all necessary care, then we have two different things: life-world and objective-scientific world, though of course [they are] related to each other. The knowledge of the objective-scientific world is 'grounded' in the self-evidence of the lifeworld. The latter is pregiven to the scientific worker, or the working community, as ground; yet, as they build on this, what is built is something new, something different. If we cease being immersed in our scientific thinking, we become aware that we scientists are, after all, human beings and as such are among the components of the life-world which always exists for us, ever pregiven'.

the same time although without subjectivity 'structure is not external to individuals'. If structure is without subject and beyond time and space, yet somehow internal to the individual agent, then an overly objectivist position towards society (society as system) is set up, recreating the subject object dualism his theory sought to overcome. At the same time as reducing the subjectivist element of his theory Giddens, in opposing the objectivism of both functionalism and structuralism[122], also places significant account on individual human agency (there can logically be no collective subject in Giddens' work) and reduces any significant determinism of structure (or at least a more enabling conception of social constraint). Where Weber granted the question of value priority over questions of validity and made values the basis of a theory of validity, and where Durkheim granted the question of validity priority over questions of value, and made validity the basis of a theory of morals (Rose, 1981), it may be argued that Giddens granted the question of structure priority over subjectivity and made structure the basis of a theory of human agency (see Lash, 1993, Rustin, 1999, Callinicos, 1999)

Giddens is dismissive of evolutionary theories in general and argues that the theme of unintended consequences is an important element in resisting the presumption that history develops in the line of a readily discernable pattern, or that it can be designed according to a programme of how society should be. The unintended consequences of human activities are a positive outcome of human activities in the sense that they disrupt any attempt to impose a rigid structure on society. As such, he counters both the work of Weber and the Frankfurt School in their analysis of the

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[122] See Giddens (1984: 207-221) on the opposition between structuralism and methodological individualism. Although Giddens argues that 'Structural sociology and methodological individualism are not alternatives, such that to reject one is to accept the other', his work often veers towards the latter in its focus on individual human agency.

increasing rationalisation and reification of society with a view of a multiplicity of spaces where there is a pull towards counter-moments of de-rationalisation as much as moments of rationalisation.

Giddens attempts to re-balance the original dualism between objectivism and subjectivism by acknowledging a certain indeterminacy within the structured properties of social systems that may at times stretch beyond the control of individual actors. It would seem for him that in order to compensate for both the removal of the subjectivist aspects of interpretative sociology from structuration theory and at the same time an over-emphasis on the agency of the knowledgeable actor,[123] he must provide a more coherent account of unintended consequences in human history than has previously been given in social theory.

History without a subject?

Social theories are historically situated; they do not develop in a social vacuum. Both Hegel's work and Critical Theory were born at specific historical conjunctures that had a profound influence on their themes and development. The founding texts of Critical Theory reflect a dark historical moment in the twentieth century dominated by both Stalinism and Fascism. The works' resistance to a totalising theoretical discourse was consistent with a refusal of a totalitarian social reality. The later work of Habermas was profoundly sensitive both to the social upheavals of the late 1960's and to the repressive and McCarthyist atmosphere of the Federal Republic in the early and mid 1970's[124] (Jameson, 1988). However, theory also

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[123] The concept of unintended consequences 'necessarily weakens the status he claims for the 'knowledgeable actor' (Anderson, 1990:54).
[124] See Cobler (1976) and Brauns and Kramer (1976) for accounts of the repression of intellectuals in West Germany and the *Berufsverbote* (professional proscription)

outlives its own time. Giddens, (1986) using the example of the continuing relevance of seventeenth-century theories of the state for understanding the concept and reality of state sovereignty, argues that the reason why social theories retain their relevance long after the conditions that helped produce them are gone is because these theories contributed to the making of the social world we live in today. This is what Giddens calls the double hermeneutic, the two way constituting relationship between theory (or lay concepts) and reality. Theory can also become reified into second nature and become ideology. What is important to highlight here in this discussion is the historically situated nature of theory, its dual nature as theory and ideology and its contribution as social imaginary in the constitution of the social world.

The emphasis on individual human agency and the minimisation of the determinism of structure is particularly significant when theorising historical change and in conceptualising modernity in the terms of structuration theory. In the interview with Bleicher and Featherstone (1982:69) Giddens, contrary to many classical theories of modernity, not surprisingly rejects any notion of a Hegelian subject of history or privileged agent of social change as found in orthodox Marxist accounts. He is also critical of any presumption that significant social change can only come about through collective social action. Although he does not wish to minimise the importance of social movements, he argues that it is necessary, and just as important, for social science to examine the various divisions and conflicts within dominant social groups, and seek to influence them in the matters of policy. For Giddens there is a plurality of contemporary 'cutting edges of change' from which it is possible to see positive social change developing.

'I have a lot of sympathy with the idea that history is still a fairly open project in the sense in which there are a multiplicity of unintended consequences of human activities that resist the possibility of a programmed society.' (Giddens in Bleicher and Featherstone, 1982:67).

New Wine in Old Bottles

As mentioned earlier from the early 1990's there has been a return to the concept of modernity as a means of describing our relationship to the present and that Giddens' work has been central to this re-conceptualisation. Part two of this chapter has sought to show, through Giddens's structuration theory, that the theme of unintended consequences links his theory of structuration and his later writings on modernity. It has also aimed to show how Giddens' notion of critique fails to address issues of power or ethics.

The chapter makes clear that Giddens' approach to modernity, not only draws from his earlier work but also adapts terminology relating to the 'classical' understanding of modernity as the project of Enlightenment. Although Giddens rejects this earlier understanding of modernity and considers its legacy 'exhausted' both sociologically and politically, he nevertheless is left in the situation of reinterpreting this tradition in his conceptualisations of reflexivity and historical change.

As we have seen, in his rejection of the classical understanding of modernity, Giddens dismisses the normative aspects of that conceptualisation; the debates concerning 'ethical life' and its relationship to social theory, and in particular, whether norms can or cannot be based in rational 'foundations' are seen as relics from different historical circumstances. However, this refusal to deal with questions

of *interest* has serious drawbacks when conceptualising issues of legitimacy and the liberal state, in particular the classical Weberian definition of the state as 'the monopoly of the means of legitimate violence' (Weber, 1954). This is a question at the forefront of contemporary debates on the modern state.[125] Lastly Giddens' refusal to deal with questions of *interest* is also problematic in relationship to his repudiation of all evolutionary theories of history. As Rustin (1999) notes:

> *'The rejection of a historical teleology, or of a commitment to a definite line of social development […] has its own consequences for ethical issues. When human progress, emancipation, or rationalization were, so to speak, 'built into' the sociological script, then relevance-for-values also appeared to be given. But if there is assumed to be no linear historical narrative, but, instead, a variety of possible evolutionary paths is to be studied, then by what criterion does one choose to investigate one of these pathways rather than another?' (Rustin, 1999: 116)*

What, in Giddens' framework provides the basis for judging whether the outcomes of unintended consequences are positive or negative?

Although Giddens would reject the notion of a Hegelian subject of history or Marx's secularised equivalent in the guise of the proletariat, as archaic concepts that are not relevant to the present, he tacitly reinstates a hidden subject in the shape of 'unintended consequences'. This hidden teleology, dressed up in the concepts of radicalised modernity, individualised choice and reflexivity, masks the specific political and moral agendas it generates[126] (Anderson, 1990, Rustin, 1999)

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[125] See Agamben (2005)

[126] See also Žižek (2000:339) 'although our acts can have unforeseen and unintended consequences, the notion still persists that they are co-ordinated by the infamous 'invisible hand of the market', the basic premises of free-market ideology: each of us pursues his/her particular interests, and the ultimate result of this clash and interaction of the multiplicity of individual acts and conflicting intentions is global welfare. In this notion of the 'cunning of Reason' the big Other survives as the social substance in which we all participate by our acts, as the mysterious spectral agency that somehow re-establishes the balance'.

This latent functionalism at the heart of structuration theory brings Giddens' work closer to Durkheim's than to that of Weber's or Marx, and can be subjected to the same criticisms.

Unger (1976) argued that there was a persistent tendency in Durkheim's thought to focus on the problems of moral consciousness at the expense of questions of power and the relative autonomy of the world of technical instrumental relations. According to Unger (1976), a theory of community that does not contain a theory of domination will mislead, just as a politics of community that are not oriented to the problem of domination will corrupt. Unger (1976) argued that Durkheim was notable for his vision of human fraternity, but that his vision was limited by his failure to deal adequately with power. The danger was a social theory that threatened to degenerate into an apologetic science. In Giddens' case, the over-emphasis on unintended consequences and the focus on a generalised individual agency and its mediation with the social structure pushes to the background questions of power and the relative autonomy of institutional structure. The same danger outlined by Unger (1976) in relation to Durkheim also applies to Giddens; that is, the danger of an apologetic social science. The following section will continue the comparison of Giddens with the Frankfurt School in relation to risk as a means of colonising the future.

Modernity and the Colonisation of the Future

Parts one and two of this chapter looked at the problem of modernity, what Taylor (2007) has called the central problem of modern social theory. They outlined that from the early 1990's there has been a return to notions of modernity in an attempt to describe our relationship to the present. While building on the classical themes of modernity, this new work opposes the intentions of the 'classical' understanding of modernity.

This work distances itself from the Frankfurt School and Foucault, who see reflexivity as domination, and instead understands contemporary modernity as a time where actors have gained greater control (reflexivity) over their selves and their environments, in the process becoming experts of the self. This is done in relation to those therapeutic techniques and modes of knowledge that Foucault had theorised as relating to the discipline of the soul. For the Frankfurt School and Foucault 'expert systems' are recognised as a series of discourses which govern, individualise and normalise subjects. What appears to be freedom of agency for the theory of reflexivity is just another means of control. For Foucault in particular the direct operation of power on the body has been displaced by its internalised operation on the body through the very processes of reflexivity that both Beck (1992) and Giddens (1991) celebrate (Lash, 1993). The history of the subject is understood in the new theories as a process of individualisation[127]. The pathologies

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[127] 'The thesis of the individualisation of social inequality has been developed by Ulrich Beck as characteristic of what he calls the 'risk society'. In this society, risks that were formerly absorbed by classes and by families are now borne by individuals, whose lives do not unfold within , and are not protected by, those traditional categories. As a sociological thesis, this is to offer a description of

and alienations of modernity are here translated into the positive affirmations about the power of the modern self and the emancipating contributions that new social movements make to the reconstruction of identity and society (Alexander 1996).

> *The collectivity and standardisation of the resulting 'individual' modes of living are of course difficult to grasp. Nevertheless, it is precisely the eruption and the growing awareness of these contradictions which can lead to new <u>socio-cultural commonalities</u>. It may be that social movements and citizens' groups are formed in relation to modernization risks and risk situations. It may be that in the course of individualisation expectations are aroused in the form of desire for a life of one's own (in material, temporal and spatial terms, and in structuring social relationships) – expectations which however face social and political resistance. In this way new social movements come into existence again and again. On the one hand, these react to the increasing risks and the growing risk consciousness and risk conflicts; on the other hand, they experiment with social relationships, personal life and one's own body in the numerous variants of the alternative and youth subcultures. Not least of all, therefore, communities are produced from the forms and experiences of the protest that is ignited by administrative and industrial interference in private 'personal life', and develop their aggressive stance in opposition to these encroachments. In this sense, on the one hand the new social movements (ecology, peace, feminism) are expressions of the new risk situations in the risk society. On the other, they result from the search for social and personal identities and commitments in detraditionalised culture' (Beck, 1992: 90).*

Giddens (1990) counterposes this new empowering modernity with tradition and, like Beck (1992), extends its authority well into the industrial period. It is within tradition that lurk the dark and hidden histories of the soul that were outlined by the earlier Critical Theory of Foucault and the Frankfurt School. Tradition for Giddens (1990) is ritualistic, irrational, dogmatic, repetitive, and elitist. It is only in reflexive

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political ideology as the explanation of social structural change. However, the social consequences of the political conceptualisation of individuals as tax-payers and consumers, and not as workers are critical….Libertarian ideology masks the concentration of the monopoly of legitimate violence in the centralised state, which, formerly, was effectively delegated and dispersed across the quasi-independent institutions of the middle. And it masks the unleashing of the non-legitimate violence of individualised civil society' (Rose, 1996, 59:60)

or radical modernity that there has been a radical departure from its domination. Social actors and institutions have now become 'disembedded' from tradition (Alexander, 1996). Today, Giddens (1990) asserts, tradition exercises influence through its return as *fortuna*; the opposite of risk and a concept outside of the new reflexive modernity.

> *A world structured mainly by humanly created risks has little place for divine influences, or indeed for the magical propitiation of cosmic forces or spirits. It is central to modernity that risks can in principle be assessed in terms of generalisable knowledge about potential dangers – an outlook in which notions of fortuna1 mostly survive as marginal forms of superstition. Where risk is known to be risk, it is experienced differently from circumstances in which notions of fortuna prevail. To recognise the existence of a risk or set of risks is to accept not just the possibility that things might go wrong, but that this possibility cannot be eliminated. The phenomenology of such a situation is part of the cultural experience of modernity in general […] Even where the hold of traditional religion becomes relaxed, however, conceptions of fate do not wholly disappear. Precisely where risks are greatest – either in terms of the perceived probability that an unwelcome happening will occur or in terms of the devastating consequences that ensue if a given event goes awry – fortuna tends to return.' Giddens (1990: 111)*

A world that lives after nature and tradition is a world where life is no longer lived as fate (see also Beck, 1992). It is a world of *manufactured risk.* Risk and danger are key elements of the cultural experience of modernity. However, when discussing the difference between what he terms as the 'risk society' and earlier forms of social order, Giddens makes an important distinction between risk and danger. Risk is not the same as danger, a 'risk society' is not more dangerous than earlier forms of social order - where dangers were generally experienced as given – but a society that lives 'after nature'.

Giddens' account of ontological security and the role of adaptive reactions performed to sustain it, tend to be discussed at the level of the individual i.e. how individuals develop strategies in order to maintain both a shared reality between

themselves and others and a sense of constancy in their surroundings. However, ontological insecurity is most strongly felt during periods marked by rapid change or transition leading to ruptures in the habitual continuities of everyday life. These changes are felt not only on an individual level but also collectively within larger organisations, including states - or what Giddens terms as the 'major domains of strategic action' (Giddens, 1990:135). 'The idea of risk is bound up with the aspiration to control and particularly with the idea of controlling the future' (Giddens, 1991: 3).

> *'In modern social conditions, the more the individual seeks reflexively to forge a self-identity, the more he or she will be aware that current practices shape future outcomes. In so far as conceptions of fortuna are completely abandoned, assessment of risk – or the balance of risk and opportunity- becomes the core element of the personal colonising of future domains.' (Giddens 1991:129)*

Giddens' understanding of risk assessment as a core aspect of the modern social condition is contrary then to the analysis of Adorno and Horkheimer (1979), outlined in chapter one, where the technical mastery of the future brought about greater existential insecurity. For them, a rationalised modern world only appeared to be demystified and had not managed to free itself from its mythical origins. Not only was external nature objectified but the modern subject was also. For Adorno and Horkheimer (1979), the suppression of *fortuna* through the technical domination of nature resulted in the fear of vengeful external powers. As Bauman (1998) notes, the return of such vengeful powers is the result of classificatory systems themselves.

> *'No binary classification deployed in the construction of order can fully overlap with essentially non-discrete, continuous experience of reality. The*

opposition, born of the horror of ambiguity, becomes the main source of ambivalence. The enforcement of any classification inevitably means the production of anomalies….Thus 'any given culture must confront events which seem to defy its assumptions. It cannot ignore the anomalies which its scheme produces, except at risk of forfeiting confidence.' (Bauman, 1998: 61)

As we saw in chapter one for the Frankfurt School that order can only be achieved through the 'ritual offering of symbolically enhanced substitutes' Habermas (1982: 15) which, in turn, according to Bauman (1998) can be traced through the social construction of 'the stranger'. The 'risk society' is therefore, not only a society with a fixation on the future, but one with a consequent preoccupation with maintaining security. We will return to this question later in the chapter when we investigate the link between risk and crime. Before that we look at risk in relationship to the control of the future, through drawing on the work of Luhmann as well as Giddens.

The Colonisation of the Future

Both Giddens and Luhmann conceptualise society as a social system, but whereas Giddens (1984) attempts to go beyond the structure/agency dualism to show how structure both mediates and is the outcome of individual agency, Luhmann prioritises structure. A key characteristic of modernity is our abstract relationship to time and both Luhmann and Giddens are interested in conceptualisations of space-time in relationship to modernity: Where Giddens focuses on individual agents in relation to the colonisation of the future, for example through the notion of self reflexivity or projects of the self, Lumann focuses on system colonisation as a whole. Luhmann hints that the secularisation - or 'disenchantment' even - of risk as a concept has come about through its relationship to the rationalisation of time. It is its relationship to time that gives the concept of risk its unique status and takes us to

the very heart of the current social and political controversies surrounding risk: in particular, the relations between claims to rationality and our modern conception of time.

As we have seen risk depends on time-span because its concept is entirely 'bound up with the aspiration to control and particularly with the idea of controlling the future' (Giddens, 1991: 3). [128] However, our understanding of time-span depends to a great extent on aspects of the social structure. Risk calculation is a question of decisions that serve to bind time.[129]

Risk therefore depends on time-span. In the passage of human life there is assumed to be a general abiding timeliness.[130] Confidence in the prediction of future events[131] has grown and is linked in part to the increased sophistication of the techniques and knowledge of the social sciences. This confidence is however tempered by the concept of risk. Risk guarantees that if events go awry or do not run as planned one can still have acted correctly (i.e. avoided error). In the face of an increasingly uncertain future, the secure basis for the making of decisions was required and was duly found in the securities of risk; risk 'immunizes decision making against failure' (Luhmann, 1993: 13). However, the societal shift towards

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[128] Douglas argues, against Giddens and Luhmann, that 'we cannot gain sufficient knowledge of the future; indeed, not even of the future we generate by means of our own decisions (Douglas 1992:14).

[129] In systems theory the concept of time binding refers to the way time generates structures within a system that allows that system to continuously self-renew. See Luhmann, (1993: 52) 'although time itself cannot be bound, it can bind by giving events structural value'.

[130] '…the concept of risk indicates a form for confronting the problem represented by the future, i.e. it is a form for dealing with time (Luhmann, 1993: 51).

[131] It is important to mention here that there were periods when society followed Cardinal Richelieu's maxim that 'A misfortune that cannot occur but rarely ought to be presumed never to occur. Principally if, in order to avoid it, one exposes oneself to many others that are inevitable and of greater import.' (Quoted from Luhmann 1993: 12). The period of the welfare state was one such moment. Keynes rejected the possibility of using statistical methods to forecast significant future events. On matters subject to 'uncertain knowledge' there is no scientific basis on which to form any calculable probability whatsoever. We simply do not know (O'Malley, 2004).

technologies of risk has significant cultural and psychological costs. Luhmann (1993) traces these costs in the relationship of risk to the shifting meanings of *securitas*[132]. In Latin the term originally referred to a subjective frame of mind characterised by a freedom from care. The later concept *sécurité* in the French, and *security*[133] in English, take on the objective meanings that they retain today[134]. The following section examines some of these costs, outlined by Luhmann above, in relation to the risk society and crime.

Crime and the Risk Society

> *'There is currently a bewildering array of developments occurring in penal policy and practice, many of which appear mutually incoherent or contradictory [...]But while diversity of sanctioning has been characteristic of penal modernism for some time, even a brief survey of developments suggests a state of penological inconsistency that probably has few precedents in the history of modern criminal justice' (O'Malley, 1999: 175-176)*

O'Malley (1999) highlights an increased emphasis within criminological literature on the incoherent and contradictory nature of much penal policy and practice. This 'volatility', which for many, reflects a crisis in the institutions of punishment, has been explained by criminologists in different ways: as evidence of the limits of the sovereign state (Garland, 1996); as the result of the emergence of neo-liberalism and 'new right' politics (O'Malley, 1999, 2004); and as a sign of a postmodern

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[132] The discussion on Hegel and the recognition of property rights relates also to security of property. Loader and Walker (2007) in their work on civilising security make a similar connection with security and recognition. In this context it is the recognition of security as a human right.

[133] Bentham in The Civil Code writes that 'Among the objects of the law, security is the only one which embraces the future; subsistence, abundance, equality, may be regarded for a moment only; but security implies extension in point of time with respect to all the benefits to which it is applied. Security is therefore the principle object.' (cited in Burchell et al, 1991:19)

[134] For a contemporary definition of security see Zedner (2003: 158) 'security is used to connote the objective state of being without, or protected from, threat; it is used to describe the subjective condition of freedom of anxiety; and is used to refer also to the means or pursuit of these two end states.'

disintegration of penal modernity[135] and the rehabilitative ideal (Pratt, 2000). A common theme in many of these explanations has been the emergence from the late 70's of a set of new penologies influenced by neo-liberal ideas relating to individual responsibility and discourses on risk (Garland, 2001).[136] However, as O'Malley (2004: 135) points out:

> *'Retrospectively, actuarial justice and penology have not emerged as the sole alternatives to modernist crime control and corrections […] only one trend among several others […] and it is clear that these alternative trends have become very influential in the succeeding decades. Yet there can be no doubt that in most jurisdictions, and in diverse areas of practice, risk-based justice has become a presence (O'Malley, 2004: 135).*

The following section will outline the characteristics of this new penology and how it links to the preceding chapters. It has been argued that the new penology reflects a shift in society from the modernist/welfare project distinguished by commitment to rehabilitation towards one characterised by a focus on managerial efficiency and the identification and classification of risk (Feely and Simon, 1994, 1996, 2003).

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[135] Penal Modernism, also referred to as the age of penal welfarism, or, more nostalgically as the golden age of the rehabilitative ideal (1945 – early 1970's), was underpinned by the long-term tendencies towards 'rationalisation' outlined in chapter two and penal reform. However as Garland (1995: 188-189) notes, the 'politics of penal modernism are deeply ambivalent. They depend upon the ideological orientation of those who staff the institutions, and upon the political and legal context in which they operate. They can range from the Fabian reformism that has dominated British Criminology and the British social work establishment to the crude authoritarianism of many fascist and communist regimes. Moreover, one cannot read off the effects of these programs from the declared objectives of the reformers' programs, as critical analyses sometimes do, since these aims have frequently been undermined or transformed in the process of implementation'.

[136] Although diversity and change has been characteristic of penal institutions throughout their history, and the term 'crisis' has for some time been used in both media and academic accounts of the penal system (Cavadino and Dignan, 1997), O'Malley distinguishes between the superficial conflicts that are a feature of all institutions at all times and historically specific structural crisis that are unique to their times. Reflecting on this latter form of crisis, O'Malley (1999) argues that within the present period these contradictions appear more prevalent and keenly felt than they were in the past.

The rise in actuarial justice has been outlined by Feeley and Simon (1994, 1996, 2003) in their designation of the new penology. Its key characteristic was the employment of risk calculation in relation to populations of offenders.

> *'A central feature of the new discourse is the replacement of a moral or clinical description of the individual with an actuarial language of probabalistic calculations and statistical distributions applied to populations' (Feeley and Simon, 1996: 367)*

This new penology was not about punishment or rehabilitation but about identifying and managing unruly groups. This new discourse emerged in the late 1970's and was politically attached to the rise of neo-liberalism and its reconfiguration of the relationship between the individual and the state. As with the 'right realism'[137] of criminologists such as Murray (1996) and Wilson (1996), the new penology does not aim to eliminate crime but to make crime levels tolerable. However, its emphasis on risk calculation and system goals as opposed to social goals separate the two perspectives[138].

The continuity of the new penology with the rehabilitative approaches of penal modernism is based on its close association with criminological positivism, that is, it has a reliance on expert knowledge and 'knowledge professionals'. Its divergences from penal welfarism however, are more significant, and can be seen in the shift away from the treatment model towards the management of offenders

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[137] Right realism also emerged with the rise of neo-liberalism and argued for a common sense view of crime. It accepts crime as 'real' and as a normal part of life which can be contained but not eliminated. Right realists are also uncritical of the Criminal Law and are unconcerned with due process or the extension of police power (see Jones, 2001)

[138] The emphasis is on 'system' goals as opposed to social goals can be seen in the changed significance of recidivism. In the new penology parolees returning to prison indicates system success rather than the failure it would have been perceived at under more rehabilitative regimes (Feely and Simon, 1996).

(Feeley and Simon, 1996). This move away from treatment means that individual classification, assessment and treatment has, in the new penology, become replaced by the classification of aggregate categories of offenders and a focus on preventive measures and an emphasis on social segregation (Feeley and Simon, 1996).

The new penology and its reliance on actuarialism has altered not only the methods of social regulation, as outlined above, but perceptions of representations of the criminal as well (see Melossi, 2000). Discourses of risk have changed the way society views crime and who is a criminal. As van Swaaningen (1999) notes, the actuarial language of risk and probabilistic calculations alter representations of the criminal from an individual to a category, or, in other words from accountable citizen to an object of control.

O'Malley (2004) writes, that although aspects of actuarial justice have impacted on the majority of western penal systems[139], that is through its concern with aggregate categories of offenders and its prioritisation of system goals over social goals, its influence as a dominant model has been confined mainly to the United States. However, risk awareness within criminal justice institutions is also concerned with the calculation of individual risk, and this has had a wider impact in Scotland than the aggregate categories of the new penology. The area where individualised risk has been seen as important is in the containment of serious and violent crime. The considerable investment by criminal justice institutions in risk assessment has partly

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[139] In Scotland the influence can be seen in the emphasis on 'system' goals as opposed to social goals and in system innovation and expansion e.g. drugs testing and treatment orders and electronic tagging.

been the result of the increase in violent and sexual crime (Cosgrove 2001), and also as a response to a perceived increase in the fear of crime[140].

Much of the critical debate on risk has focused on the fear of crime: are fear of crime and perceptions of likely risk quite separate from the actual risk of crime itself? Fear and concern about crime may be metaphors for other types of urban unease or a displacement of other fears (Young 1999). Many argue (Garland, 2001, Hudson, 2001a/2001b, Lianos and Douglas, 2000) that this high level of fear and risk awareness directed at the potential dangerousness of other people has pushed legislation in the direction of social defence (i.e. we should defend ourselves against these dangerous enemies rather than concern ourselves with their welfare and prospects for rehabilitation).

Alongside the increasing public fear of violent crime this new legislation is also informed by what David Garland has called 'the criminology of the dangerous other'[141]. This criminology's central themes are the upholding of individual responsibility, the assertion of absolute moral standards (see Murray, 1996) and the affirmation of tradition and common sense in the administration of punishment (see Wilson, 1996). It typically depicts crime in dramatic and moralising terms and frames its analysis in the language of war and 'zero tolerance'. The relationship of

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[140] Since the first publication of victim surveys (in the United Sates in the 1970s and in the United Kingdom in the 1980s), 'fear of crime' has become the most popular representation for conceptualising vulnerability and for gauging the levels of anxiety over the likelihood of experiencing violence (Stanko, 2000).

[141] Garland (2001:183) argues that alongside the moralising and excluding discourse of this criminology runs a second amoral and technological approach to social control. These so called 'criminologies of everyday life', e.g. situational crime prevention, routine activity theory etc, 'approach social order as a problem of system integration. It isn't people who most need to be integrated, but the social processes and arrangements that they inhabit'.

this criminology of the 'other' to risk and the new penology outlined above is in the broadening of the strategy and techniques of what O'Malley calls 'categorically-exclusionary risk' to persistent violent and sexual offenders. These offenders, writes O'Malley (2004: 47) are not 'inert' – as Feeley and Simon characterise the subjects of actuarial justice - they are the 'other'.

Fears of unprovoked, randomised, sexual and/or violent crime have fuelled a new set of dangerous offender legislation that allow for enhanced measures of surveillance and detention. 'Management' in this instance may include extended periods of incarceration for those individuals considered as high risk. These new measures also include proposals for the quantification and prediction of risk posed by this new category, now generally known as, the 'dangerous and violent offender'. As we have seen in chapter two criminologists such as Simon (1998: 456) have argued that such crimes, at one time 'the most obvious example of crime as disease,' have been retranslated in recent criminal justice discourses from having an underlying psychopathological basis to one where it is treated as a crime of 'moral depravity' or 'evil'; categories absent from legal or medical discourses. In this aspect of risk awareness the 'veneer of technical "neutrality" of actuarial justice is transformed […] into a politics of vengeance' (O'Malley, 2004: 47). These risk categories are aimed at a category of offender who are politically and governmentally demonised and excluded.

Chapter two explored the relationship between legality and legitimacy and argued that the problem of legitimacy and the structuring of subjectivity extended beyond the reaches of law and of the economy to scientific knowledge. The acceptance of

an authority or social order is based as much on technical rationalisation and expertise as it is on the legality of its system of law. Hudson (2001, 2003) argues that these new systems of risk control violate some of the fundamental tenets of due process: no punishment without conviction; proportionality of punishment to harm done; equality – treating like offences alike; blurring the boundaries from 'beyond reasonable doubt' to 'balance of probability'; increased advantage to prosecution; erosion of double jeopardy and 'Habeas Corpus'; the right to trial by jury and the right to silence. Justice in the risk society becomes synonymous with retribution (Hudson, 2003).

> *'Justice is now very much less important than 'risk' as a preoccupation of criminal justice/law and order policy; the politics of safety have overwhelmed attachment to justice in the institutions of late-modern democratic polities. If someone, or some category of persons, is categorised as a risk to public safety, there seems to remain scarcely any sense that they are nonetheless owed justice. The vocabulary of justice is almost entirely absent from current debates about sexual offending (in particular); about safety in public spaces; and about penal treatment of those deemed at risk of re-offending.' (Hudson, 2001:144)*

Conclusions

This chapter argued that the concept of modernity was important to contextualise this case study. It sought to situate the Risk Management Authority as an institution which is representative of a particular contemporary discourse: the risk society. The chapter examined the conceptualisations of modernity in recent social theory and looked at what had been erased or repressed within these contemporary translations. What had been jettisoned in these new theories was the link between modernity and rationality, illustrated by the rejection of an emancipatory interest for social theory. What has been repressed is the historical contingency of modernity.

The chapter argued that Hegel's original understanding of modernity as reflexive was important as he returns us to the origin of the problem, i.e. the limitation and status of scientific knowledge and the legitimacy of science. The theories of Beck (1992) and Giddens (1990, 1991) while outlining the problematic of modernity, fail to note that their key themes of reflexivity, the discontinuities of history and the plurality and status of scientific knowledge were all central problems of the Enlightenment. The abstraction of these concepts from their base serves to reify social theory into ideology. It is therefore important to recover these themes in order to reinstate the historical specificity of modernity as a particular grounded and developing narrative, i.e. as related to particular geographical and cultural traditions. It is only by doing this that we can critically confront the history of social theory and history as such (Critchley, 2001).

Both Beck (1992) and Giddens (1990) reverse the positions of the Frankfurt School in relationship to reflexivity, fate (*fortuna*) and the production of subjectivity. The Frankfurt School's darker vision of reflexivity as domination brings us back to the theme of legitimacy in relation to legality and scientific knowledge. The chapter concluded by arguing that in the risk society, through the ways the rationalities of risk have influenced the regulation of crime and punishment, justice as a virtue has been diminished. In chapter five these themes will be returned to again, in the part of the case study which looks at the Risk Management Authority.

CHAPTER FIVE

THE EMERGENCE OF THE RISK MANAGEMENT AUTHORITY

> *'The diffusion of sexual psychopath laws has followed this course: a community is thrown into panic by a few serious sex crimes, which are given nation-wide publicity; the community acts in an agitated manner, and all sorts of proposals are made; a committee is then appointed to study the facts and to make recommendations. The committee recommends a sexual psychopath law as the scientific procedure for control of sex crime. This recommendation is consistent with the trend towards treatment policies in criminal justice in preference to policies of punishment' (Sutherland, 1950: 142)*

Introduction

On Thursday 17 July 1997 Stephen Leisk, 34, a former soldier with a 13-year history of convictions for sexual assault, strangled 9 year old Scott Simpson hours after picking him up from a park near his home in Aberdeen. Leisk, had been under the supervision of Aberdeen City Council's social work department at the time of Scott Simpson's abduction (McManus, 1998).

On the 10th November 1997 at the High Court in Aberdeen, the Crown recommended that Stephen Leisk should spend at least 25 years in prison. He was also sentenced to 10 years to be served concurrently for two separate charges of indecent assault on 14-year-old boys earlier in that year. Colin Boyd, QC, the Solicitor General, highlighted concerns over the handling of the investigation and instigated an official enquiry[142] into the case. Scott Simpson's murder and the

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[142] The official inquiry was carried out by Dr James McManus. The recommendations from the inquiry outlined in McManus, (1998) were influential on the Cosgrove Committee and provided the impetus for the MacLean Committee

subsequent enquiry sparked a major review of the way sex offenders are supervised in Scotland (McManus, 1998).

In the year that Scott Simpson was murdered the Social Work Services Inspectorate for Scotland had already published *A Commitment to Protect - Supervising Sex Offenders: Proposals for More Effective Practice.* (The Scottish Office, 1997) The main purpose of this report was to review the current arrangements for the supervision, treatment and monitoring of sex offenders in the community and to assess the efficacy of the arrangements and protocols in place for the discharge of sex offenders from prisons and other institutions.

One of the recommendations of the report was to establish the Expert Panel on sex offenders in 1998 under the Chairmanship of the Honourable Lady Cosgrove. This committee overlapped also with the MacLean Committee established in 1999 and the Millan Committee also established in 1999 with a remit to investigate the management of mentally disordered offenders. In 2000 the Committee on Serious Violent and Sexual Offenders, chaired by Lord MacLean, made proposals for the sentencing and treatment of offenders who were perceived as presenting a continual danger to the public. As a way of containing such offenders the MacLean Committee recommended legislation which provided for a new sentence called the 'Order for Lifelong Restriction' (OLR) (Scottish Executive, 2000). As part of its recommendations the MacLean Committee also proposed the establishment of an independent body whose role would be to ensure that those working with allegedly high risk and dangerous offenders - whether within the statutory, voluntary or private sector - systematically addressed and managed the risk posed by them. This

body, subsequently named the Risk Management Authority (RMA), was established by Section 3 of the Criminal Justice (Scotland) Act 2003, as an executive non – departmental public body (NDPB)[143].

What the above provides is a surface narrative of cause and effect, a description of institutional responses to particular forms of rare but extremely serious types of offending. Although this story, which is told through a range of policy documents from the mid 1990's to 2000s has clarity, it does obscure the broader social and cultural forces that contributed to the emergence of the RMA. The above narrative does not explain the nature of the reconceptualisation taking place around dangerous offenders at that time - a conceptualisation based on the management of risk and the calculus of probability. To help provide an outline of these broader social and cultural forces we need to ask why the re-emergence of the 'dangerous offender' in both public debate and policy formation has taken the form that it has.

This chapter offers a socio-historical account of the Risk Management Authority and a discourse analysis of the official documents that authorised and legitimated it. It also attempts to provide a broader narrative that allows us to grasp the complexity of the RMA by studying it within a socio-historical framework. As outlined in chapter three, this case study adopts an approach developed by Jameson (1998) from Jolles (1930) and Lukács (1971b) that interprets case as a 'structure of typicality'. In other words, the chapter draws on the broader socio-historical

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[143] The term 'non-departmental public body' (NDPB) was fashioned by Pliatsky (1980, cited in Hunt, 1995: 194) to describe: '*A body which has a role in the processes of national government, but is not a government department, or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers'*.

framework and concepts outlined in earlier chapters as a means of situating the emergence of the particular institution of the RMA.

The chapter falls into four parts: Part I provides a historical background to the notion of the dangerous offender and the legislation that relates to that category of offender. In particular, it focuses on the developments in the USA and Canada which have been particularly relevant to recent Scottish developments; Part II is an account of the Risk Management Authority via the official documents related to its emergence; Part III looks at the evidence drawn on by those responsible for setting up the RMA; and Part IV looks at the Risk Management Authority as it currently exists.

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I

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Exceptional Individuals Require Exceptional Sentences

> *'The term risk is preferred to 'dangerousness', because the term dangerousness implies a dispositional trait, inherent in an individual, that compels him/her to engage in a range of violent behaviour across a range of settings. That approach fails to take into account the complex interaction of psychological characteristics and situational factors in the production of violent acts. Violent individuals (including those who may have certain personality characteristics) are more likely to be violent in certain contexts. The response to risks presented by individuals should, therefore, not be restricted to an attempt to modify those characteristics in order to make the individuals less of a risk, but also seek to reduce the opportunities or triggers for violence.' (Scottish Executive 2000: 7)*

The MacLean Committee's contrast between risk and dangerousness is a relatively recent distinction (Castel, 1991) yet has had a long incubation in debates within western penal institutions. The concept of dangerousness has also long been used in

mental health legislation to refer to persons considered to be at high risk of harming themselves or others, either physically or psychologically (Petrunik, 1994). As the quotation above from the McLean Report points out, the concept of dangerousness refers not to violent or harmful acts themselves but to the individuals who carry them out, dangerousness '*implies a dispositional trait*' - a state of being. The concept of 'risk' attempts to capture the relationship between these dispositional traits and their interaction with situational factors i.e. risk deals with the contextual aspects of forms of behaviour.

The McLean committee's concerns were however with the *exceptional* category of offender and the means necessary for public protection.

> '*while for many such offenders the present range is satisfactory, for a small number of others the current sentencing provisions are deficient since they do not* **require** *the courts to impose on exceptional individuals an exceptional sentence which both marks the gravity of what they have done and provides an appropriate level of public protection, having regard to the risk that such individuals pose. For this latter group of offenders we believe that new and separate provision requires to be made so that so that they are subject to the control of the State for the remainder of their lives*'. (Scottish Executive 2000: 34).

Although the distinction between risk and dangerousness is relatively recent the context of the debate draws on 'dangerousness' as a historical theme in criminal law jurisdictions. That is, it is concerned with legislation relating to preventive detention or parole restrictions.

Before going on to deal with the official narrative of the Risk Management Authority - a narrative that is based on the necessity for new legislation and new requirements to address a new set of problems - the following section will situate

the MacLean and Cosgrove committees within socio-historical background of dangerous offender legislation. As the reports of both committees emphasise the significance of expert knowledge and the importance of clinical judgments in risk assessment, this section highlights the history of psychiatry - both in terms of its role in the definition of dangerousness and to its relationship to the courts. The key importance of psychiatry and the influence of North American and Canadian approaches on Scottish developments, also relate to the indeterminacy of the concept of psychopathy.

In chapter one it was argued that it was not reason that guided social action but *indeterminacy*. Indeterminacy was the concept Hegel (1976: 80) used to describe how external forces would attach themselves to an original action or concept and drive it into 'alien and distant consequences'. In the following section, indeterminacy offers analytical purchase in understanding psychopathy, exactly because a range of different behavioural characteristics are often attached to this concept, blurring notions of moral insanity, evil, sickness and sexual deviancy. The section shows how psychopathy has permeated both legal discourses on the dangerous offender, and the public imaginary, where it shapes the public view of the dangerous other. Hegel's (1967) concept of history was underpinned by the notion that institutional change related to broader social and historical change, and that this change cannot be separated from the history of the subject. The history of the subject constructed in this chapter is the history of the dangerous other.

In the following account it is shown that both the MacLean and the Cosgrove committees are end points in a much longer history of dangerous offender

legislation within western jurisdictions. The section concludes with a brief account of the 1972 Scottish Council on Crime, which represents an early and unsuccessful predecessor to the later MacLean Committee.

The History of Dangerousness in Western Jurisdictions

Throughout the nineteenth century and the early twentieth century 'dangerousness' was a concept that referred mainly to habitual criminals; more specifically, those criminals judged to be 'incorrigible', those who were resistant to reform. In the nineteenth century, in particular, the reference to dangerousness was often in relation to the 'dangerous classes' (Pratt, 1997). It was therefore to the 'incorrigible' and habitual criminal that legislation on preventive detention was directed. However, as we have seen in chapter two, the new discipline of psychiatry that had begun to emerge in the nineteenth century, began to challenge classicism's authority in criminal courts, and that new conceptualisations of legal responsibility were focussed on that small number of offenders considered dangerous to society due to insanity. We saw how Pinel (1745 – 1826) formulated a science of mental illness - reproducing the classificatory methods of general medicine - that conflicted not only with the existing physiological approaches to mental illness but with the law as well (Castel, 1988).

Foucault (2000: 194) outlines the influence of Garofalo[144] and Italy's Positivist School of Criminal Anthropology in the shift from juridical to clinical notions of criminal responsibility:

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[144] See Garofalo's Law of the Third Element 'Criminal law knew only of two terms, the offence and the penalty. The new criminology recognises three, the crime the criminal and the means of repression' (Garofalo, cited in Foucault, 2001:178)

'Neither the 'criminality' of an individual nor the index of his dangerousness, neither his potential or future behaviour nor the protection of society at large from these possible perils – none of these are or can be juridical notions in the classical sense of the term. They can be made to function in a rational way only within a technical knowledge-system, a knowledge-system capable of characterising a criminal individual in himself and, in a sense, beneath his acts; a knowledge-system able to measure the index of danger present in an individual; a knowledge that might establish the protection necessary in the face of such danger. Hence the idea that crime ought to be the responsibility not of judges but of experts in psychiatry, criminology, psychology, and so on.

A second source of the clinical model to which Foucault (1975) refers is the concept of 'homicidal monomania' which was used by the nineteenth century psychiatrist Jean Etienne Esquirol to explain crimes of a violent nature which were inexplicable according to the legislative provisions or criteria of insanity in France at that time. Esquirol made the first attempt to delineate the difference between insanity and mental deficiency. He wrote:

'The character of mania is a general delirium whose principle lies in the disorder of the understanding, a disorder which entails also that of the moral feelings…for partial delirium we keep the term 'monomania' [...] whereas with mania the phenomenon proceeds from a disorder of the understanding to one of the passions, in monomania delirium derives its source from disorder of the moral sentiments, which react on the understanding.' (Esquirol, 1838, cited in Castel, 1988: 145)

Esquirol, in an attempt to classify individuals with mental retardation, used language capability as a criterion rather than physiognomy. In 1835 when Esquirol intervened in the Pierre Rivière[145] case (Foucault, 1975); lawyers, judges and the

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[145] The Case was first reported in the Annales d'hygiène publique et de médicine légale in 1838. This report comprised a summary of the facts and the medico-legal experts' reports. Pierre Rivière own account was only published in part. Foucault and his research team came upon the manuscripts as part of a study into the relationship between psychiatry and criminal justice. Foucault argued that: 'Documents like those in the Rivière case should provide material for a thorough examination of the way in which a particular kind of knowledge (e.g. medicine, psychiatry, psychology) is formed and acts in relation to institutions and the roles prescribed in them (e.g. the law with respect to the expert, the accused, the criminally insane, and so on)' Foucault (1975: xi).

courts at that time were resisting his concept of 'monomania'. A large number of magistrates saw it as a skilful stratagem for categorising the criminal act itself as homicidal monomania, a means of making it guilt-free[146] (Castel, 1988). In 1838 Esquirol wrote *Des maladies mentales*. This was the first work to adopt a scientific view of mental disorder. In it he developed Pinel's statistical classification of inmates by age, disorder, and other characteristics, as well as outlining both environmental and age factors as precipitants of mental disorder (Castel, 1988). As such *Des maladies mentales* laid the foundation for the development of classificatory schemes and explanations of criminal behaviour as being determined by individual pathology.

According to Foucault (2000) the acceptance of psychiatric medicine in the penal system was to do with the double concern to introduce more rationality into penal practice and to adjust the general provisions of laws and legal codes more closely to social reality. This notion of the dangerous offender was used to advocate that social control should be proportionate, not to the seriousness of the offence, but to the offender's 'dangerousness', his capacity for doing harm; acceptance of 'dangerousness' as the basic grounds for social control meant a change in the conception of the relationship between an individual's responsibility for an offence and the sanction appropriate for an offence. Psychiatrists were able to justify their right to intervene in the case of 'mentally abnormal' (but legally sane) dangerous offenders on the basis of a clinical model that stressed not just individual treatment but public hygiene (see Foucault, 1975). The psychiatrist as a diagnostician and

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[146] Elis Regnault, a lawyer and contemporary of Esquirol wrote: 'Let us repulse these courtiers of humanity who claim to do honour to it by making out a crime to be an illness, and a murderer a madman' (Regnault, E. 1828, cited in Castel, 1988: 145).

caretaker of the dangerous individual took on the role of public protector just as practitioners of physical medicine diagnosed and quarantined individuals who were actual or potential carriers of contagious disease.

Legislation and the penal and medical practices associated with conceptualisations of 'dangerousness' have occupied a shadowy existence within western jurisdictions. Intended to meet the protective objectives of 'social defence',[147] dangerous offender legislation has historically drawn from a continually shifting configuration of ideas to justify its implementation. Prominent within this configuration were the notions of anti-social behaviour and pathology. Concerns about social hygiene and pathology meant that medical and clinical expertise - discourses related to the assessment, diagnosis and treatment of individual pathology – outweighed the broader concerns of punishment: guilt, retribution, deterrence, the communication of wrong etc. Recognising 'dangerousness' as a basis for social control challenged classical legal conceptions on the relationship between criminal responsibility and punishment; those offenders who traditionally would have been outside the scope of the criminal law, were, under these new laws, subject to penal sanctions on the basis of the risk that they posed. Depending on the nature of an offender's mental disorder and the seriousness of the threat that such a disorder might pose, confinement for an indeterminate period may be viewed as necessary, not only to facilitate treatment, but to protect both the offender and the public from harm.

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[147] The term 'social defence' was first used by Adolphe Prins in 1910 to characterise social prevention policies, i.e. policies that would 'reduce socioeconomic misery and establish the positive social reintegration of offenders into society' (van Swaaningen, 1997: 41). The term was associated with criminological positivism and its focus was on treatment as opposed to punishment. After the Second World War the aim of 'social defence' was to reintegrate 'anti-social aberrations' into society. During the 1980's, social defence extended its focus on anti-social behaviour to include the threat from dangerous and sexual offenders while at the same time adopting a managerial discourse of risk management and economic rationality (see van Swaaningen 1997, and Simon, 1998). The term, which in more recent debates has lost its socio-economic elements, has been re-conceptualised under the banner of community safety and community protection.

(Petrunik, 1994). Not only does the concern over such offenders lie mainly in their propensity to commit future offences, but this representation of dangerousness - often blurring such notions of sickness, moral evil, madness and badness - has permeated the public consciousness and often help form the public view of who or what is dangerous (Petrunik, 1994).

The notion of dangerousness to indicate an individual's predisposition to criminal or anti-social activity began to appear in nineteenth century writings in criminology and psychiatry which refer to the 'born criminal' and to the 'criminal psychopath', offenders who are afflicted with a form of 'moral insanity'. As Lombroso writes in the third edition of *Criminal Man* in (1884):

> *'For too many generations jurists have deemed the criminal's responsibility to be proportional to his crime and the public's need for revenge. Fearing to let the criminal go free, we saw no alternative but prison or death for evildoers. In short, the sentiments of revenge and fear, along with the tyranny of habit, closed off all other roads to expiation.*
>
> *Earlier, I emphasised the differences rather than the similarities between the two wretched psychological pathologies of criminality and insanity. In many ways, born criminals seem to hark back more to savages than do the insane. Unlike insanity, criminal behaviour is congenital or begins at a young age [...]Moreover, I instinctively feared that the two categories might be confused in terms of social dangerousness. And so [...] I resisted making the connections.*
>
> *But recent discoveries have changed my opinion completely. It is impossible to differentiate between insanity and crime now that researchers are uniting in support of criminal insane asylums and discovering cases, such as those of Verzeni, Guiteau, and Sbro[148]...that prove the similarity between the two conditions. (Lombroso, 2006 :212-213)*

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[148] Verzeni, Guiteau, and Sbro were topical cases at the time Lombroso was writing. Vincenz Verzeni, was imprisoned in 1872, accused of attempted murder and suspected in several actual ones. He was included in Richard von Krafft-Ebing's book *Psychopathia Sexualis with Especial Reference to the Antipathic Sexual Instinct: A Medico-Forensic Study* (1879). Charles Julius Guiteau was an American Lawyer who assassinated U.S. President James Garfield in 1881. Guiteau claimed that God had commanded him to kill President Garfield. At his trial he insisted that while he had been legally insane at the time of the shooting, he was not really medically insane, which was one of the

As Gibson and Rafter write in their notes to the third edition (Lombroso, 2006) the above section is interesting with regards to the slippage in Lombroso's usage of the terms insanity and moral insanity. This confusion, Gibson and Rafter argue, arose due to Lombroso's need to recast his earlier theory, that the insane and the criminal were separate and distinct categories, into a new understanding that incorporated moral insanity into the broader concept of born criminality. In the first edition published in 1876, Lombroso hardly mentions moral insanity.

The concept of *moral insanity*, one of the key psychiatric concepts of the nineteenth century, was closely related to Pinel's designation of a condition he called *mania sans délire* and Esquirol's notion of *mono-mania* (Castel, 1988). The *moral insanity* that Lombroso highlights in his book was coined by James Cowles Prichard (1786-1848). Prichard invented the term to label criminal behaviour that appeared insane but those who committed the crimes did not suffer from either delusions or hallucinations. Toward the end of the nineteenth century, moral insanity, under the influence of Lombroso, came to be understood as genetically conditioned. It has become known in more recent times as psychopathy (see Lombroso, 2006 note 33).

Psychopathy, derived from *psyche* the Greek word for 'soul' or 'mind' and *pathos* the Greek for 'suffering' or 'ill', was coined around 1845 in an Austrian psychiatric textbook, and was developed as a psychiatric concept by German psychiatry. Two influential figures in its development were Richard von Krafft-Ebing (1840-1902),

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major causes of the rift between him and his defense lawyers and probably also a reason the jury assumed Guiteau was merely trying to deny responsibility.Antonio Sbro was born in 1863. In 1883 he poisoned his father and killed his brother for no apparent reason. He was confined in the asylum of Regio Emilia till the end of his life (Lombroso, 2006).

and Emil Kraepelin (1856-1926). Both were significant influences on early American conceptualizations of psychopathy (Rafter, 1997). Both subscribed to a view close to Lombroso's *moral insanity*, that the psychopath was biologically degenerate, a deviant with hereditary physical and mental stigmata. Both Krafft-Ebing and Kraepelin associated psychopathy with sexual and gender deviancy, providing the foundation for later American work in the area (Rafter, 1997).

Krafft-Ebing developed his ideas and helped to popularize the term 'psychopathy' in his textbook, *Psychopathia Sexualis: With Especial Reference to the Antipathetic Sexual Instinct,* (Krafft-Ebing, 1965) originally published in 1879. It was translated into English and published in the USA around 1893. Krafft-Ebing (1965) argues in this work that *moral insanity* or *ethic degeneration*, a category close conceptually to American psychiatrists understanding of psychopathy, was organic in cause and incurable.

Rafter (1997) argues that Krafft-Ebing and Kraepelin developed psychopathy as a distinct psychiatric category and forged a vocabulary with which it could be discussed. The concept of psychopathy, an *alleged* disorder relating to a lack of capacity for empathy and moral judgment, was important in developing a representation of a category of offender, who presented a serious threat to society on the basis of an inherent tendency toward predatory acts of sexual aggression. However, as Rafter (1997: 249) comments:

> *We can now see why the authors of these first US texts on psychopathy often seem simultaneously authoritative and uncertain about the nature of the phenomenon they are describing: they do not completely understand the degenerationist foundations of German psychiatry. They are attracted by the*

work of Kraepelin and Krafft-Ebing but do not fully grasp its key concepts. And the further the temporal and intellectual distance between them and the Germans, the weaker that grasp becomes.

Rafter (1997) argues that the meanings given to 'psychopathy' and 'psychopath' varied significantly in the first American attempts to define these terms; when American psychiatrists did use the terms with a common meaning, that meaning lay in the term's undefinability. For early American writers, a psychopath was one whose difference was obvious but impossible to pin down. Significantly Rafter (1997: 250) argues that had the term 'psychopath been defined more precisely, it would have been less effective metaphorically'.

It was in the legal realm that metaphorical quality of the term was effective in American society. One of the most significant influences of Krafft-Ebing's book, and of particular relevance to this thesis, was the claims he made in reference to pathological sexuality in its legal aspects:

> *'A judge who considers only the crime, and not its perpetrator, is always in danger of injuring not only important interests of society (general morality and safety), but also those of the individual (honour). In no domain of criminal law is co-operation of judge and medical expert so much to be desired as in that of sexual delinquencies; and here only anthropological and clinical investigation can afford light and knowledge' (Krafft-Ebing, 1965: 335.)*

Further on he adds:

> *'The practical importance of the subject makes it necessary that the sexual acts threatened with punishment as sexual crimes be considered by jurists from the standpoint of the medico-legal expert. Thus there is advantage gained, in that the psycho-pathological acts, according to circumstances, are placed in the right light by comparison with analogous acts that fall within the domain of physiological psychology' (Krafft-Ebing, 1965: 337)*

As Rafter (1997) argues, the work of Krafft-Ebing and Kraepelin were significant influences on early American conceptualizations of psychopathy and the development of the clinical model of dangerousness. Central to their understandings of psychopathy was the belief that it was organic in cause, incurable, and associated with sexual and gender deviancy. Both psychiatrists developed psychopathy as a distinct psychiatric category and developed a vocabulary with which it could be discussed. However, while the concept of psychopathy gave authority to clinical judgements its meaning was difficult to define. Nevertheless, the authority that the concept did possess was due to this very difficulty. Earlier in this section, the concept of *indeterminacy* was used to describe how external forces would attach themselves to an original action or concept and compel it towards contrary or unintended consequences. With regards to the concept of psychopathy, its productive power lay in its indeterminacy of meaning. As we have seen in the above account, psychopathy can be read as representing a range of different behavioural characteristics including moral insanity, evil, sickness and sexual deviancy. What was significant in the North American situation was the authority that the concept had legally, to the extent that certain crimes could only be considered by jurors, via the perspective of the medico-legal expert. It was this migration of a poorly translated concept from Europe to North America in the late nineteenth and early twentieth century that has had such a significant effect on the conceptualisation of dangerousness in modern western jurisdictions. However, it was not only in the legal realm that the power of psychopathy made itself felt in the attempt to close of the indeterminacy of the dangerous offender, it also permeated the public imaginary, and as a result, influenced and shaped the public view of the dangerous other (see Jenkins 1994, Petrunik, 1994,). The intersection of the legal and public imaginary

emerged in the United States in the Sexual Psychopath, Sexually Dangerous Persons, and Defective Delinquency statutes enacted between the 1930's and 1960's. The following section is an account of this intersection and its influence on the North American legal system.

Psychiatry and the Clinical Model of Dangerousness

In North America, the clinical model of dangerousness was exemplified in the Sexual Psychopath, Sexually Dangerous Persons, and Defective Delinquency statutes enacted between the 1930's and 1960's[149]. In 1938, Illinois was the first American state to successfully enact special civil commitment legislation for sexual psychopaths to complement sex offender legislation in the State's Criminal Code and Civil involuntary commitment legislation for mentally ill persons. Twenty-five other states followed the lead of Illinois by enacting similar legislation. Canada enacted a criminal sexual psychopath statute as part of its Criminal Code in 1948 (Petrunik, 1994).

In response to this proliferation of Sexual Psychopath Laws, Edwin Sutherland (1950a, 1950b) carried out research on the enactment of dangerous offender legislation and argued that in many instances where such legislation had been passed, it was in response to a single incident which had incensed the community and resulted in the mobilization of special interest groups who in turn placed pressure on the legislature to enact laws in relation to such offenders. Sutherland argued that dangerous offender legislation can be better understood as a symbolic attempt to appease an angry and fearful populace and to serve special interests

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[149] Although it is important to note that sexual psychopath laws were never used in some states and seldom used in others (Pratt, 1997).

rather than a means to reduce the threat of serious harm to the public. Anticipating Foucault's later work, Sutherland argued that key groups that benefited from such legislation were criminal justice and mental health professionals, in particular psychiatrists.

> *'Not only has there been a trend toward individualization in treatment of offenders, but there has been a trend also toward psychiatric policies. Treatment tends to be organized on the assumption that the criminal is a socially sick person; deviant traits of personality, regarded as relatively permanent and generic, are regarded as the causes of crime'......The sexual psychopath laws are consistent with this general social movement toward treatment of criminals as patients. Some laws define sexual psychopaths as 'patients'; they provide for institutional care similar to that already provided for psychotic and feeble-minded criminals; they substitute the criterion of 'irresistible impulse' for the criterion of 'knowledge of right and wrong'; and they reflect the belief that sex criminals are psychopathic. The consistency with a general social movement provides a part of the explanation of the diffusion of sexual psychopath laws' (Sutherland 1950a: 147-148).*

Sutherland argued that a number of key assumptions lay behind the sexual psychopath statutes. Most importantly, that sex offenders were typically predatory individuals whose victims were strangers rather than family members or acquaintances. The tendency to commit sex offences stems from a personality disorder or mental abnormality (sexual psychopathy) which predisposes those afflicted to continue to re-offend despite penal sanctions. That psychiatrists and other mental health experts can reliably diagnose sexual psychopaths and predict which individuals are most likely to re-offend. That sexual psychopathy is not amenable to control through punishment but rather requires indeterminate confinement and treatment until the disorder is cured or the offender, by virtue of increased age and maturity, is no longer deemed to be dangerous. All of these assumptions (all of which Sutherland argued were challenged by counter-evidence)

led to the proposition that the rise in sex offences by predatory strangers is a serious menace to society requiring urgent action by the community and its elected representatives.

A consequence of the application of the clinical model to sex offenders was the depiction of dangerousness as a problem of individual pathology. Dangerousness was conceptualized in the clinical rhetoric of the diagnosis and treatment of disease and psychiatrists and other clinicians became the authorized experts pronouncing on the dangerousness of individuals and recommending to the courts and to corrections and mental health officials who should be confined and who should be released.

It is important to note, as Bottoms, (1977) pointed out, that these laws were unique to the American and Canadian penal system, and not part of the penal language of Britain at that time: although in both Britain and Europe during the 1940s the grounds for preventive detention also changed from habitual crime to the protection of the public, its focus was more limited than in North America, and the laws regarding indeterminate detention were rarely used (Pratt, 1997).

During the 1960's and 70's in both the United States and Europe, the public focus on dangerousness and sexual deviance began to wane and the previous certainties about what constituted dangerousness became more fragmented (Pratt, 1997). However, it is important to note that from the 1970s onward in both the United States and Europe, the classification of dangerousness referred almost exclusively to violent/sexual offending, particularly when the victims had been children. Those involved in legislating for such offenders have tended to make their primary focus

the perpetration of sexual and violent offences by predatory strangers; justifying such legislation by arguing that the risk from such offenders if realised would be intolerable (Castel, 1991).

It was not until the 1980's that a resurgence of dangerousness, this time under a new guise of community protection, began to emerge in the United States, Australia and Canada. A major concern of this model is the perceived threat that predatory violent sexual offenders pose to vulnerable members of the community, particularly women and children. Early precursors of this 'renaissance' of dangerousness were the Report of the Scottish Council on Crime (1975) (Bottoms, 1977), and the Canadian *Dangerous Offender Act* 1977.

According to Petrunik, (1994: 55) the community protection model is based on the following claims:

1. *Predatory sexual and violent offenders pose a serious and pervasive danger to women and children. Even if the number of such offenders is not very large the amount of damage - physical and psychological - they do can be very great.*
2. *Politicians and bureaucrats have given insufficient attention to victims of violent and sexual offences and their families and too much attention to the rights of offenders. Too little has been done to address issues of public safety from violent crime.*
3. *Attempts to rehabilitate or treat sexual and violent offenders have had little success with the result that such individuals are being released from a prison are still a great risk to the public. Violent and sexual offenders should be kept locked up until it is clear that they no longer pose a serious threat to the public.*
4. *The justice and mental health systems have failed to adequately monitor dangerous individuals who have been released from custody. In addition, these two systems provide inadequate information about such individuals to communities with the result that community members neglect to take or are unable to take measures to protect themselves.*

The first two claims mirror the assumptions outlined in Sutherland (1950a, 1950b), the key difference between the clinical and the new community protection models are claims 3 and 4:the assumption that attempts at rehabilitation or treatment of sexual and violent offenders don't work and therefore such offenders should be detained until they are no longer a threat; and that the criminal justice system inadequately monitor dangerous individuals once they have been released from custody and fail to provide information to the community.

In the United States, Australia and Canada, these claims had been made against a background of intensive media coverage of high profile murder cases where the victim was commonly a child. Simon (1998) highlights the 'renaissance' of the dangerous offender under these new social conditions with reference to North American legislation and the reconfiguration of the sex offender as an incurable sexual predator; from 'the most obvious example of crime as disease back to an earlier example of crime as monstrosity' (Simon, 1998:456)

> *'Sex offenders were once taken to be exemplary of the underlying psychopathological basis of crime. Today their significance is very different. Rather than occasions for testing our modernist faith in scientific rationality, they have become a lesson in the intransigence of evil' (Simon, 1998: 452).*

Key among this reconfiguration were two new style sex offender laws; the *Kansas Sexually Violent Predator Act*, and *Megan's Law,* upheld by the respective decisions of the U.S. Supreme Court and the Supreme Court of New Jersey. In the first case, *Kansas v. Hendricks* (1996)[150] the Supreme Court upheld a law permitting

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[150] KAN.STAT.ANN. § 59-29(a) (01) December 10, 1996, Decided: June 23, 1997. (http://www.law.cornell.edu/supct/html/95-1649.ZS.html) As the time neared for Leroy Hendricks' release from prison, having served for child sexual molestation, the State of Kansas sought his

the civil commitment of 'violent sexual predators' including those who have already served the complete prison sentence for their respective crimes. In the second, *Doe v. Poritz*[151] the Supreme Court of New Jersey upheld a statute mandating a system of registration and selective community notification of convicted sex offenders.

In Canada however, the assumptions behind what Simon (1998) has described as part of a new penology of warehousing dangerous offenders - that attempts at rehabilitation or treatment of sexual and violent offenders do not work and that the justice and mental health systems inadequately monitor dangerous individuals once they have been released from custody - have been challenged by the research community and the Government. These distinctions between the Canadian and the US model are explored in more detail below as Scotland differs from the US approach in similar ways.

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commitment under its Sexually Violent Predator Act. After testifying that he agreed with the diagnosis that he still suffered from pedophilia and is likely to molest children again, Hendricks became a candidate for civil commitment under the Act which provided for the institutionalization of persons likely to engage in 'predatory acts of sexual violence' brought on by 'mental abnormality' or 'personality disorder[s]'. The Supreme Court invalidated the Act as unconstitutional. However, the Supreme Court granted Kansas judicial review. The question posed was did the Act's civil commitment provisions, based on its definition of what constitutes a 'mental abnormality,' violate substantive due process and double jeopardy requirements? Despite Hendricks' claim that a certification of 'mental illness' alone was too arbitrary to sustain a civil commitment order, the Court held that the Act met substantive due process standards by requiring considerable evidence of past violent sexual behavior and a *present mental inclination* to repeat such offenses. Furthermore, the Act did not violate double jeopardy guarantees since it merely authorized 'civil' rather than 'criminal' commitments.

[151] First enacted in New Jersey in 1994 in response to the rape and murder of 7 year old Megan Kanka. The man charged with her death was Jesse Timmendequas, was twice convicted of sex offences against young female children. Megan was killed 6 years after Timmendequas was released from prison on his second offence. At the time of Megan's death he was living in a house across the street from Megan's home with two other convicted sex offenders. The registration and notification mechanism was adopted by more than a dozen states in 1995 under the name of 'Megan's Law' (Simon, 1998).

> *'High risk violent offenders and the danger they pose to public safety are ongoing public concerns. Governments have used many different methods to minimize the risk posed by such offenders. One approach has been to apply indeterminate sentences. Historically, Canada used Criminal Sexual Psychopath legislation (1948), then the Dangerous Sexual Offender (1960) law and in 1977, the Dangerous Offender provisions under Part XXIV of the Criminal Code of Canada. The earlier laws focused exclusively on sexual offenders and although they were criticized on a number of grounds, one of the more serious was the failure to target nonsexual violent offenders (Canadian Committee on Corrections; Ouimet Report, 1969). Thus, one goal of the Dangerous Offender (DO) provisions was to extend the Dangerous Sexual Offender (DSO) law to include nonsexual offenders who pose a serious risk to society'. (Bonta, et al 1996)*

Dangerousness legislation and practice in Canada has had a long history and follows closely the direction taken by the U.S. in relation to both the earlier clinical approach and the later community prevention approach. However, as mentioned above, the Canadian developments have challenged key assumptions behind the US model on the effectiveness of treatment. As such it could be said that Canada follows a hybrid model combining elements of both community and the clinical models.

The first special preventive detention measures for dangerous offenders were enacted in Canada in the form of the 1947 *Habitual Offender Act* and the 1948 *Criminal Sexual Psychopath Act*. The Act required mental health experts to identify and treat dangerous sexual offenders. The Crown could apply for designation of an accused as a criminal sexual psychopath if he or she was convicted of one of the sexual offences enumerated in the Act. *The Criminal Sexual Psychopath Act*, however, was part of the same movement that led to the enactment of the Sexual Psychopath Statutes in the United States and shared the same assumptions of the

Clinical Model including the need to protect the public through the diagnosis, confinement, and treatment of dangerous sexual offenders (Canadian Howard League, 1999)

In response to criticisms of the measure, including criticism of the use of the term 'criminal sexual psychopath' on the grounds that it was vague and unscientific, a Royal Commission was appointed in 1958 which resulted in a number of amendments in 1960. This led to a change in definition within the Act's criteria and the *Dangerous Sexual Offender Act* replaced the Criminal Sexual Psychopath Act (Petrunik, 1994). As a result the term 'criminal sexual psychopath' was dropped and replaced with the term 'dangerous sexual offender' (DSO). Dangerousness was now based on the offender's criminal record and the circumstances of the current offence. These offenders could be subject to an indeterminate sentence to be reviewed every three years.

In 1975, measures to reform the dangerous sexual offender legislation were again proposed to ease public concern due to the abolition of capital punishment and the potential increased risk posed by violent offenders. Although there were strong criticisms of the dangerous offender proposals made both from within and outside government, they were largely ignored[152]. '*A person found to be a dangerous offender may be sentenced by the Court to an indeterminate period in a penitentiary*

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[152] Since its enactment, the Dangerous Offender legislation has withstood a number of challenges in the courts. A notable case was R.v. Lyons, (1987, 37), in which the court ruled that the legislation did not (despite the false positive problem in clinical prediction) provide unfairly for indeterminate detention. The Court in the Lyons case also ruled that the legislation did not violate the unfair deprivation of liberty (section 7), arbitrary detention (section 9), and cruel and unusual punishment (section 12), provisions of the Charter of Rights and Freedoms (Solicitor General of Canada, 1993: 36)

in lieu of any other sentence that might be imposed for the offence for which he has been convicted'. (Solicitor General of Canada, 1993: 36)

Despite criticism from the The Law Reform Commission of Canada, new legislation was enacted again in 1977 as an amendment to the Criminal Code of Canada. This new law rescinded the Habitual Offender Act and the Dangerous Sexual Offender Acts, and was formulated such that it would apply to both sex offenders and those who had committed acts of a non-sexual violent nature. Since the passage of the 1977 legislation and following a highly publicized sexual assault and murder in 1987, there have been further measures undertaken in response to post-release crimes in 1988 that allows the Parole Board to detain inmates to the end of their sentence if there are reasonable grounds to believe that an offender would cause death or harm to another upon release while under statutory release.

As in Scotland a few years later, the early 1990's in Canada were times of growing public concern about 'high risk offenders.' Similarly to Scotland, drops in the national crime rate during that period did not dispel the public anxiety over dangerous offenders. This anxiety was, in part, fuelled by the sensationalist media attention to several high-profile cases. In response to public concerns, the Federal and Territorial Ministers responsible for Justice established a Task Force on High-Risk Violent Offenders in February 1993. Only three years before the MacLean Committee sat, this Task Force presented its report on High-Risk Offenders in 1994. Based upon the findings of the Task Force, the Government enacted a comprehensive package of reforms to improve public safety. These reforms were

tailored to address specific gaps within the Canadian criminal justice system.
(Solicitor General, 2001: 70)

> *'To provide a mechanism that allows dangerous convicted offenders to be removed from society for an indeterminate period. Should the offender continue to pose an undue risk to society they will remain in federal custody for life. This legislation also allows for periodic review of that offender's status and for their gradual and supervised return to society should they meet parole criteria in the future. However, even if released to the community with supervision and conditions on their behaviour, these offenders are supervised for the rest of their lives.'*

As with the Scottish Recommendations put forward a few years later the justification for such changes focussed on expert knowledge concerning the risk of sexual offender recidivism.

> *'Knowledge concerning sexual offender recidivism risk has advanced considerably during the past 10 years. Prior to the 1990s, evaluators had little empirical guidance concerning the factors that were, or were not, related to recidivism risk. There is now a general consensus that sexual recidivism is associated with at least two broad factors: a) deviant sexual interests, and b) antisocial orientation/lifestyle instability (Hanson et al 2004: 1)'*

Before moving on to part two of the chapter, it is useful to look at a precursor to the recent emergence of dangerous offender legislation in Scotland. The following section looks at the Scottish Council on Crime set up in 1972. The themes outlined by the council on multi-agency working illustrate that preventative detention and the category of dangerous and violent offender were 'residual' (Williams, 1977) discourses in penal debates in Scotland at the time, and were overshadowed by the dominant welfare focused policies of the 1970's (see McAra, 2000)

Earlier Precursor to the MacLean Committee

In 1972 the Secretary of State for Scotland[153] set up the Scottish Council on Crime in order to carry out a review of offender management and crime prevention in Scotland. Over its three year lifespan the Council examined the specific issues within its remit and reported on various measures in relation to crime and the treatment of offenders. Although abandoned in 1975, after a change of Government, many of the themes of the Council's work, including that of multi-agency working[154] and concerns over anti-social behaviour have permeated thinking about crime in Scotland. The establishment of the Scottish Council on Crime was however controversial on a number of accounts. Firstly, authorized by the central Conservative government at the time, it was a large and cumbersome body with representation from criminal justice agencies, academics, civil servants, a number of businessmen and a newspaper editor (Monaghan, 1997). Secondly, in 1975 it presented proposals for preventive detention for offenders who were perceived to present a significant danger to the community. At that time the legal distinction of dangerousness, as with many jurisdictions, referred to those with a mental disorder. The Scottish Council on Crime however broadened the definition of dangerousness to encompass all those convicted of serious violent crime and who posed a threat of re-offending. In other words dangerousness was defined as the probability that an

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[153] The constitutional settlement of the Act of Union in 1707 allowed the existence of a separate legal system in Scotland. Before the passage of the Scotland Act 1998, domestic policy making was the responsibility of The Scottish Office, under the guidance of the Secretary of State for Scotland. The Scottish Office consisted of five separate departments including the Home Department which was responsible for overseeing the development and implementation of Scottish criminal Justice and penal policy (McAra, 2005).
[154] Crime prevention policies and the development of multi-agency criminal justice initiatives in Scotland had until 1998 taken place within a political climate characterized by tensions between central and local government (Monaghan, 1997). Multi agency working was organized in a similar way as in England and Wales with no single criminal justice agency having overall responsibility for it. Responsibility was shared rather across the separate institutions, including criminal justice social work, the Scottish Prison Service and the police with a number of voluntary organizations involved on the periphery.

offender would inflict serious and irremediable personal harm in the future. The Scottish Council on Crime not only advocated preventive detention for such offenders but argued for greater involvement of the scientific expert in Criminal Justice decision-making in Scotland (Bottoms, 1977). As with similar proposals in England and Wales at that time recommended by the Butler Committee[155], these recommendations were met with a great deal of surprise by many commentators. In 1977 Anthony Bottoms in his inaugural lecture as Professor of Criminology in the University of Sheffield wrote:

> *'Had I known two years ago that I would today be obliged to deliver this Inaugural Lecture, it would certainly not have occurred to me that its central subject would be the concept of 'dangerousness'. At that time, this concept would have seemed to me, as to most others concerned with penal policy in this country, to evoke overtones of the positivist school of criminology of the Continent, and the various aspects of American penal practice, such as its sexual psychopath laws. But it would have seemed very remote from the language of debate typically used in discussion of British penal matters' (Bottoms, 1977:70-71)*

Bottoms went on to criticise the proposals of both the Butler Committee and of the Scottish Council on two fronts; one at an empirical level and the second on a theoretical one. The first criticism concerned the problem of 'false positives' and drew from a recent U.S. Supreme Court case regarding the constitutional status of preventive detention (Baxstrom v. Herold, 383 U.S. 107)[156]. The second, theoretical

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[155] The Butler Committee was set up following the conviction in 1972 of Graham Young for two murders, two attempted murders, and two offences of grievous bodily harm. Graham Young was on conditional release from Broadmoor at the time that all the offences were committed. (Bottoms, 1977)

[156] 'Petitioner, while a prisoner, was certified as insane by a prison physician and transferred to Dannemora State Hospital, an institution under the jurisdiction of the New York Department of Correction and used for prisoners declared mentally ill while serving sentence. Dannemora's director filed a petition in the Surrogate's Court stating that petitioner's sentence was expiring and requesting that he be civilly committed under § 384 of the N.Y. Correction Law. At the proceeding, the State submitted medical evidence that petitioner was still mentally ill and in need of hospital care. The Surrogate stated that he had no objection to petitioner's transfer to a civil hospital under the jurisdiction of the Department of Mental Hygiene, but that, under § 384, that decision was up to the

criticism argued that the proposals both from the Scottish Council and the Butler Committee were heavily dependent on the conceptual framework of positivism, a perspective on the retreat during that time within academic criminology and sociology. Bottoms highlighted three problems with this framework. Firstly, positivism ignores the world of meaning and its relation to the interpretation of human action. Secondly, it avoids consideration of the role of the State and treats crime as a 'natural' category. Thirdly, the positivist endorsement of the scientific is problematic:

> *'Believing as he usually does that crime is a naturalistic category and that the meaning content of action can be ignored, the positivist naturally believes in the application of the natural science paradigm to the phenomenon in question, and that behavioural science experts can materially assist with the prediction and treatment of deviant behaviour'* (Bottoms, 1977: 82)

Questions arise as to why, only twenty years later, there was such a shift in the language of debate within British penal matters, to make unproblematic identical proposals as those found in the earlier Scottish Council Report, and to why recommendations by a discredited penal philosophy in the 1970's should make a resurgence in the 1990's. One answer to these questions may be found in the Canadian influence on Scottish policy makers and practitioners. As mentioned earlier in this chapter, the anti-rehabilitation and treatment rhetoric of 'nothing works', prominent in North American criminal Justice debates, were challenged by the research community and the Government in Canada. However it was not only

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latter Department. That Department had determined *ex parte* that petitioner was not suitable for care in a civil hospital. When petitioner's sentence expired, his custody shifted to the Department of Mental Hygiene, but he has since remained at Dannemora. Writs of habeas corpus in state courts were dismissed, and petitioner's request that he be transferred to a civil hospital was denied as beyond the court's power' (Baxstrom v. Herold, 383 U.S. 107 Argued December 9, 1965 Decided February 23, 1966) http://supreme.justia.com/us/383/107/case.html.

the 'nothing works' approaches of prominent realist criminologies that were challenged with the resurgence of positivism in Canada, the critical and sociological criminology that had challenged positivism in the 1960's and 70's had also come under attack. Two of the foremost Canadian criminologists in the development of risk assessment and treatment models were D.A. Andrews and James Bonta. Their influential work, *The Psychology of Criminal Conduct,* began with an attack on critical and sociological criminology.

> *'With regard to mainstream sociological criminology, we quickly learned from our students who were exposed to sociology of deviance/crime courses that major portions of their learning involved the denial of individual differences in criminality and denial of correlates of that variation [...] The problem for us (and some of our students) was that actual research findings regarding variation in criminal activity and its processing contrasted dramatically with what mainstream criminology was teaching' (Andrews and Bonta, 1998: iv).*

They go on to write:

> *'The psychology underlying the bold outlines of class-based theories reveals contempt for the diversity and complexity of human behaviour. The social locationists were only minimally interested in the criminal behaviour of individuals. They were primarily interested in promoting their visions and building an ideologically and professionally acceptable social theory'(Andrews and Bonta, 1998:131).*

The absence of sociological perspectives in both official government documents and the practice literature related to risk based work with offenders, should be understood in the context of the individualised and psychological framework which underlies risk based approaches.

In summary, part 1 of this chapter situated the MacLean and Cosgrove committees within a socio-historical background of dangerous offender legislation. The section began with the early history of psychiatry and examined the influence of Pinel and Esquirol - who first formulated a science of mental illness – and of Lombroso and Garofalo on an understanding of dangerousness defined by the propensity of an individual to commit crime, rather than on the act itself.

This first section highlighted the importance of Krafft-Ebing and Kraepelin in the development of the clinical model of dangerousness through their early conceptualisations of psychopathy. The section described the migration of the concept to North America, where it gained authority within the criminal courts via the intervention of the medico-legal or forensic expert. It was argued that such authority that the concept did possess, however, was due to its indeterminacy. In other words, it could be read as representing a range of different behavioural characteristics and it was this which enabled it to permeate the public imaginary and shape the public view of the dangerous other.

The intersection of the legal and public imaginary emerged in the United States in the Sexual Psychopath, Sexually Dangerous Persons, and Defective Delinquency statutes enacted between the 1930's and 1960's; where Sutherland (1950a, 1950b) argued that dangerous offender legislation could be better understood as a symbolic attempt to appease an angry and fearful populace and to serve special interests rather than a means to reduce the threat of serious harm to the public.

The consequence of the application of the clinical model to sex offenders was the depiction of dangerousness as a problem of individual pathology, reflected in the language of diagnosis and the treatment of a disease in relation to sexual offending. The section concluded after noting the resurgence of dangerousness, under a new guise of community protection in the 1980's with a short introduction to the Scottish Council on Crime, an early predecessor of the MacLean and Cosgrove committees. The following section brings this history up to the 1990's in the Scottish context with an account of the Risk Management Authority, told through the official documents related to its emergence.

II

The Strengthening of Public Protection in Scotland: The Emergence of the Risk Management Authority

As we have seen, part one of this chapter argued that there is a need to locate the emergence of the Risk Management Authority as part of a longer history of legislative responses to dangerousness. The public account of the policy context which led to the Risk Management Authority however, focuses instead on the events surrounding the murder of Scott Simpson and with the setting up of the three committees: events occurring at a time when there was growing policy preoccupation with public protection and community safety in Scotland. The concern with high-risk offenders, defined as 'serious violent and sexual offenders' in the MacLean Committee report (2000) was combined with a universal acceptance

within the committees that special measures were not only needed for such offenders, but could also be justified. This in turn gave rise to legislative change, the key aim of which has been to propose selective incapacitation, more rigorous release arrangements and intensive risk management measures for those in prison and the community. These changes have produced a 'blurring of the boundaries' in terms of control between prison and the community (MacLean Committee report, 2000).

In the Scottish context the MacLean Committee report (2000) and its proposals for a Risk Management Authority and the Order for Lifelong Restriction (OLR) in the Criminal Justice (Scotland) Bill (introduced in March 2002) have been the most significant developments in relation to the RMA. These proposals have been supported by the Cosgrove committee (2001) on the supervision of sex offenders and the Millan Committee (2001) on the provision for mentally disordered offenders. For this reason the MacLean Committee report will be the main focus of part two; however I will begin by briefly outlining its roots in an earlier key report - *A Commitment to Protect.*

Beginnings: A Commitment to Protect (1997)
As mentioned above, in 1996 the Secretary of State for Scotland requested a review of arrangements for the supervision of sex offenders in the community. This led to *A Commitment to Protect - Supervising Sex Offenders: Proposals for More Effective Practice.* (The Scottish Office, 1997). This report gave an overview of existing arrangements for supervising this group of offenders and provided recommendations for further improvement. In particular the report considered the

new arrangements for monitoring sex offenders introduced by the Sex Offenders Act 1997[157].

The report emphasised the complexity and difficulties surrounding the problem of sex offending. Key among these difficulties was the problem of definition. Official statistics categorise all offences related to sexual activity under the heading 'crimes of indecency' which included a broad range of offences. The offences of concern to the report were those offences that involved exploitation or assault and which required those convicted to supply their names and addresses to the sex offender register. Such offences include rape, sexual assault, lewd, indecent or libidinous behaviour, indecency, and the possession of pornographic images of children under the age of 16. The arrangements for supervision of sex offenders in the community relate primarily to those convicted of such crimes.

Other difficulties highlighted were the difficulties involved in the detection of sex offences relating to low levels of reporting; to the small proportion of those offences that are reported proceeding to prosecution due to lack of evidence. Lastly there are the difficulties involved in the treatment of sex offenders' behaviour and in supervising sex offenders after sentence completion. These later ones were also related to public anxiety over sex offenders in the community.

The report recognised that perceptions of sex offenders have changed over time and

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[157] The Sex Offenders Act 1997 imposes a requirement on certain categories of sex offenders who were convicted on or after the date on which the Act came into effect, or who were serving sentences, or were under post-release supervision at that date, to notify the police of their names and addresses. This requirement lasts for periods of time that vary according to the seriousness of the offence. The Act also makes it an offence by such a person to fail to register, or to fail to update the information in the light of any subsequent change. These provisions set the framework for the legally enforceable monitoring of sex offenders in the community. (see Cosgrove, 2001)

that most recent theories suggest that sex offenders have cognitive and behavioural dysfunctions that are associated with their offending. It was noted that in Europe sex offenders were treated in the same way as other offenders and that those countries that were seeking new ways of monitoring and treating sex offenders were looking to the USA and Canada for models of registration and treatment programmes. However, a significant aspect of *The Commitment to Protect* report was not only the influence of thinking from the USA and Canada on treatment programmes, but the treatment of such offenders as a *distinct legal and clinical category*. This unacknowledged shift in the sex offender as a distinct category is a constant thread throughout the committee, policy and practice literature in Scotland.

The report also argued for strategic and operational collaboration, at both national and local levels, between all of the agencies involved in working with sex offenders. These included: local authorities, the prison service, police, health and voluntary organisations. Key to this collaboration was an emphasis on the importance of systematic risk assessment.

Reducing the Risk

In order to take forward the recommendations of *A Commitment to Protect* the Expert Panel on Sex Offending was established in 1998 under the Chairmanship of the Honourable Lady Cosgrove. The Panel's final report *'Reducing the Risk: Improving the Response to Sex Offending' (2001)*, was divided into six thematic areas:

1. Community and personal safety and prevention
2. Risk assessment

3. Access to personal change programmes (for both children and adults)
4. Monitoring sex offenders
5. Housing provision for sex offenders
6. Information management

Although the Panel argued that their work was about building on good practice rather than recommending something which was either new, or for that matter costly; it was recognised that some of their proposals may give rise to legal disquiet in relation to the European Commission on Human Rights (ECHR), particularly in relation to issues concerning disclosure of information and the monitoring of suspected sex offenders where no charges have been proven.

Approaches to Risk Assessment

The influence on the Cosgrove panel of developments in the USA and Canada can be seen in the panel's support of structured clinical risk assessments.

> *'Structured clinical judgement requires consideration of risk factors that have received empirical support in the literature. The structured clinical approach is based on assessment by trained people with appropriate expertise. It supports a multi-disciplinary approach, rather than the more traditional model of investing a particular professional with an assumed unique insight into the danger presented by an individual. At its basic level, it requires due consideration to be given in risk assessment to a wide range of factors which have been shown empirically to have a bearing on risk. These include both historical factors (such as a history of previous violence) and those which may be subject to change (such as active symptoms of mental illness). It also has regard to questions relevant in risk management, such as the extent to which the individual would be exposed to destabilising factors' (Scottish Executive 2000: 11)*

At that time these were being adopted by social workers, psychologists and psychiatrists working within health, forensic and criminal justice settings in North America. This approach was recommended as it was shown by research to offer more accurate assessments of risk than other techniques, and, importantly, it was

based on the use of validated risk assessment tools.

The recommendations on improving the application of risk assessment techniques also related to the notion that risk assessment should be underpinned by improved information exchange across and between all of the agencies involved.

> *'To achieve the consistency which we advocate, the structured clinical approach to risk assessment should be used at each of the key stages in the progress of an offender through the criminal justice system. It should also be used in circumstances where an individual who gives cause for concern has come to the attention of the authorities but has not been prosecuted for an offence' (The Scottish Government 2001: 27).*

The Committee on Serious Violent and Sexual Offenders, chaired by Lord MacLean, reported during the lifetime of the Cosgrove Committee. The MacLean Committee, as noted at the beginning of this chapter, dealt with the sentencing, management and treatment of a very small group of high-risk offenders, including high-risk sex offenders. The scope of the MacLean Committee was therefore different from that of the Cosgrove panel, which was concerned with sex offending in general. However, there were areas of common concern in the area of risk assessment. In particular:

> *"the role of risk assessment in sentencing, management and release needs to be more clearly acknowledged, and the different types of risk assessment and management need to be better integrated."(Scottish Executive, 2000)*

Lady Cosgrove's Report recommended that if the Risk Management Authority proposed by the MacLean Committee was established with a wider remit, it could provide the mechanism for delivering a national protocol for risk assessment as part of its regulatory and advisory function.

> *'The proposed Risk Management Authority might also issue guidance on best practice and other advice to assist local agencies in the management of high profile cases or high risk cases, although operational responsibility for the management of individual cases should continue to rest with the appropriate authorities at a local level'(The Scottish Government 2001: 31).*

The following is an outline of the MacLean report on serious and violent sexual offenders.

A New Regime for High Risk Offenders

The MacLean Committee on serious violent and sexual offenders was established in March 1999 by the then Scottish Office Minister of State, Henry McLeish MP. It was chaired by Lord MacLean, a High Court judge, and its members included representatives from law, health services, the police, social work, and prison service. Its remit was:

- *'To consider experience in Scotland and elsewhere and to make proposals for the sentencing disposals for, and the future management and treatment of serious sexual and violent offenders who may present a continuing danger to the public, in particular:*

- *To consider whether the current legislative framework matches the present level of knowledge of the subject, provides the courts with an appropriate range of options and affords the general public adequate protection from these offenders;*

- *To compare practice, diagnosis and treatment with that elsewhere, to build on current expertise and research to inform the development of a medical protocol to respond to the needs of personality disordered offenders;*

- *To specify the services required by this group of offenders and the means of delivery;*

- *To consider the question of release/discharge into the community and service needs in the community for supervising those offenders.'(Scottish Executive, 2000:16-25)*

The MacLean Committee report stated that there was considerable public concern about the danger posed by high risk offenders. The concern tended to be focussed on those offenders who, following release from custody for a serious violent or sexual crime, go on to commit another offence of a similar kind. The report highlighted several problems relating to what was the current system of sentencing and managing high-risk offenders. It argued that there was uncertainty about the numbers of offenders that should be considered a high risk. This uncertainty was due partly to there being no universally accepted method of risk assessment in Scotland. The methods used by the different agencies were often not compatible and those risk management techniques that were being developing were not based on the best available international research evidence (The Scottish Executive, 2000).

These problems meant that Judges did not have the kind of systematic risk assessment information that they needed to assist them when sentencing offenders who may pose a high risk; particularly in the case of offenders with mental disorders, who were not necessarily being given a sentence that reflected their underlying risk to the public.

The Committee proposed three key recommendations

- *The creation of a new authority to have a general responsibility for gathering and promulgating best practice in risk assessment and risk management.*

- *A new lifelong sentence imposed on the basis of risk.*

- *More appropriate disposals for mentally disordered offenders.*

In making these recommendations the Committee emphasised that it was concerned only with those who had offended but had *'yet to be sentenced or otherwise*

disposed of by the court. These offenders are those who have committed serious

violent and sexual crimes'. The report argued that the focus of the committee should

be on the offender and not on the offence[158]; and such a focus was consciously

reflected in the language adopted in the terms of reference throughout the report.

The focus should be on the offender who presents a 'continuing danger to the

public[159]'. The significance of this distinction is in the fact that while many

individuals who commit serious violent or sexual offences will fall within this

group, not all will. For example, many may only pose a risk to specific individuals

related to that offender. Moreover, many individuals appearing for sentencing

before the court may be considered as posing a serious threat to the public, although

they have not yet been convicted of a serious act of violence or a serious sexual

offence.

Like the Cosgrove Committee, the MacLean Committee recommended the use of

structured clinical risk assessments. The rationale for this again was evidence from

research literature (particularly from Canada and the USA); that structured clinical

assessment can only be carried out by trained staff with appropriate skills and

expertise, and that it supported a multi-disciplinary[160] approach to assessment. The

committee noted that at the time of the report a clinical approach[161] was currently

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[158] See reference to Garofalo's 'Law of the Third Element' earlier in the chapter (Foucault, 2001).

[159] In Canada, the Supreme Court has held that where the predicate offence consisted of minor acts of sexual assault, the offender's overall past conduct, including more serious offences, justified the designation of 'dangerous offender' (see MacLean, 2000).

[160] It was emphasised that although risk assessment should be carried out in a multi-disciplinary setting uniformity may neither be desirable nor possible as different agencies make risk assessments for different purposes. Although there should be compatibility between different approaches, it was emphasised that it was the quality of assessment that should be standardised (see MacLean, 2000).

[161] Bonta (1996: 19-21) argues that there are three generations of risk assessment, the clinical approach is considered a first generation risk assessment. First generation assessments are subjective assessment, professional judgement, intuition and gut-level feelings. Second generation risk assessments are empirically developed actuarial risk assessment tools. Third generation assessment tools are, what Bonta (1996) describes as risk-needs assessment, that link assessment processes to

most widespread in Scotland - both in clinical settings and in the nonclinical

settings of parole and probation. Actuarial approaches - particularly favoured in the

USA – were also criticised as having a number of weaknesses in relation to their

predictive accuracy in relation to a Scottish offender population[162]. The following

section deals with the role of the Risk Management Authority and its remit in

relation to the accreditation of risk assessment and management methods and

processes.

The Risk Management Authority

> *'A new authority, to be called the Risk Management Authority, should be created with a view to securing the protection of the public from seriously violent and sexual offenders while restricting their freedoms no more than is necessary in the public interest (Scottish Executive, 2000: 17).*

In *A Commitment to Protect (The Scottish Office, 1996)* it was noted that countries

that were seeking new ways of monitoring and treating sex offenders were looking

to the USA and Canada for models of registration and treatment programmes. The

findings of the MacLean Committee found evidence, particularly in Canada, of

rapidly developing expertise in the assessment of risks presented by violent

offenders. The committee was particularly interested in the operation of Canada's

Correctional Service in which the responsibility for both prisons and supervision in

the community is combined. Yet the recommendation of a Risk Management

Authority came about because the Committee was not persuaded that there was any

benefit to be gained in Scotland by investing responsibility for high risk offenders in

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rehabilitation. Structured clinical approaches are a combination of first and second generation tools, i.e. they combine clinical judgement with actuarial assessment.
[162] Actuarial tools are based on analysis of re-offending amongst a specific, and often highly selected, population.

a single unified criminal justice service. The Committee argued that such a unified service would merely alter the boundaries between organisations and the remit of the Committee would be best achieved by investing responsibility for the management of such offenders in an independent authority that would commission appropriate services from existing agencies.

> *'We recognise that our proposal will have consequences for the existing agencies that operate in this area. It would compete with them for resources. It would have authority to require approaches it considers the most effective to be developed. By advancing or withholding financial support, by recognising or not the validity of treatment interventions, its authority would supersede, in this area, that of the service providers' (The Scottish Office, 1996: 24).*

The proposals put forward by the MacLean Committee in relation to the Risk Management Authority and its invested responsibility therefore can be read as accepting the authority of scientific expertise over that of statutory institutions in the sphere of criminal justice.

Although the Risk Management Authority was devised counter to the Canadian experience in terms of organisational responsibility, the committee was impressed by the level of communication between researchers in the field of corrections and policymakers. In particular the Correctional Service of Canada provided a model for the independent accreditation of programmes in addressing offending behaviour; not only for serious, violent and sexual offenders but for offenders in general. The protection of the public can be improved only if

> *'we better inform our approach to risk management by research evidence, the accreditation of methods used and the assessment of the competence of*

all those working in the field to work with the methods that are demonstrably the most effective' (MacLean 2000).

Although the remit of the committee was to make recommendations on the assessment and sentencing of serious, violent and sexual offenders, the MacLean Committee argued that the standard of rigour that it was proposing for the management of that group could be appropriate to other categories of offender. Therefore it was suggested that the Executive may wish to widen the scope of the Risk Management Authority to include other groups of offender. This coincides with the recommendations from the Cosgrove report, discussed earlier, on widening the remit of the Risk Management Authority.

> *'We see further potential benefit in the approach we are recommending in that the model of an authority supervising the contributions of each of the service delivery agencies may well come to be seen as appropriate not just for the small but particularly threatening group of offenders with which we are concerned, but for serious offenders in general. In particular the approach may be expected to be appropriate for the management of all life-sentence prisoners and for prisoners in general who are serving extended sentences. It is also relevant to the management of persons under restriction orders imposed under mental health legislation' (Scottish Executive, 2000:25).*

The Operational Role of the Risk Management Authority

> *'The Authority will have to be demonstrably expert in the field of risk management. To achieve that, it will have to derive its expertise from a wide range of disciplines. As much of its work will be in influencing and co-ordinating the work of existing agencies, its authority will derive not only from its relationship to the Scottish Executive but from its credibility with those agencies'(Scottish Executive,2000: 20).*

The role of the Risk Management Authority was not restricted to the influencing and the co-ordinating of work of existing agencies. It was recommended, in its designation as a non-governmental body, that it should have executive authority in a number of areas including:

> • *commissioning research;*
> • *accrediting risk assessment and management methods and processes;*
> • *setting the standards by which the competence of practitioners to work in the area will be assessed;*
> • *commissioning services from agencies working with offenders subject to the new order and deploying a budget for that purpose;[163]*
> • *reviewing and developing the risk management plan for an offender within any specific licence requirements that have been set by the Parole Board.*

To carry out these functions it was proposed that the Risk Management Authority should command a budget to ensure the continuing development of services to serious, violent and sexual offenders and for commissioning specific services that are required for the management of such offenders, including the development of new processes and technologies.

> *'We are aware that the approach we are proposing is premised on an emergent knowledge base. What is convincing about the knowledge that we have is the rigour with which it has been developed. That is sufficient for us to propose new procedures based on it. In doing so, however, we are conscious that those working in the field are going to be working in an area where knowledge can be expected to develop rapidly. This part of our recommendations therefore focuses on the role of the new Authority in keeping abreast of, and promoting, the best practice that is available internationally'. (Scottish Executive, 2000: 19)*

The operational role of the Risk Management Authority is therefore to:

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[163] It was not proposed that the RMA will commission individual services from statutory agencies. However, it was recommended that it financially support developments, research and pilot schemes, and may make recommendations to the Scottish Executive, if it wishes, about funding for specific projects (see White Paper Making Scotland Safer 2001).

> *'manage the risks presented by serious violent and sexual offenders, by agreeing a risk management plan for each and by commissioning appropriate risk management services from the agencies it considers give best value for money in protecting the public' (Scottish Executive, 2000: 25).*

It was proposed that the Risk Management Authority should accredit the assessment methods used by those supervising offenders on the extent and nature of the risk posed. The accreditation process will extend to the assessment tools, procedures, the circumstances in which they are employed and the agencies and practitioners who could use them. Importantly the Risk Management Authority should also provide guidance on the interpretation of evidence generated by any given risk assessment tool. All official reports submitted to the courts and to the Parole Board will eventually have been prepared by trained assessors using accredited methods. The Risk Management Authority would also have responsibility for the management of a new sentence called 'An Order for Lifelong Restriction (OLR)'. This new sentence is designed for the lifetime control of serious violent and sexual offenders who are assessed as presenting a 'high and continuing risk to the public'.

> *'We have already reviewed in the context of imprisonment the law and practice in relation to the imposition of a mandatory life sentence for murder and a discretionary life sentence for other crimes. Of its very nature, the latter species of life sentence need not be passed in any particular case, depending on the overall view taken by the sentencing judge. We believe there is a need for a lifelong sentence for certain individuals who commit crimes other than murder, which sentence would be passed only if strict legal criteria were met. We suggest that the new sentence should be called: 'An Order for Lifelong Restriction (OLR)' in order to distinguish it from (1) a sentence of life imprisonment, whether mandatory or discretionary[164]; and (2) an extended sentence' (Scottish Executive, 2000: 34)*

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[164] In Scotland, life imprisonment is the maximum penalty for all common law and certain statutory crimes. In cases of murder following the Murder (Abolition of Death Penalty) Act 1965 the sentence of life imprisonment is mandatory. Life sentences are either 'mandatory', that is, fixed by law, or 'discretionary, the latter being the statutory term introduced under the Prisoners and Criminal

Part one of this chapter provided a historical background to the notion of the dangerous offender and the legislation that related to that category of offender. It focused on the developments in the USA and Canada which have been particularly relevant to recent developments in this area in Scotland. Part Two provided the official account of the emergence of the Risk Management Authority. It was highlighted in particular in this section that the Cosgrove and Maclean Committees were swayed by the authority of scientific expertise over that of statutory institutions in the sphere of criminal justice. The following section is a discourse analysis of the documents addressed in Part Two. As such, it is a study of language *use* in the particular context of the *Commitment to Protect* report and the MacLean Committee. This section will deal with the language of the reports, how the problem of dangerous offenders has been constructed and the blurring of science as an ideal and science in practice. For this last topic I will come out of the ideal notion of science constructed by the texts themselves and address the issue of validity in relation to risk assessment tools separately.

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III

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Legitimacy and the Neutrality of Language

In chapter one we saw how subjects were elements of a linguistically disclosed world and that their understanding of that world was determined by the habitual manners and consciousness of a community of interests. Chapter Two argued that the role of language in erasing particularity and establishing such a community of

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Proceedings (Scotland) Act 1993 to distinguish life prisoners sentenced by the court to life (Machin, et al, 1999).

shared interests was essential for the legitimation of a social order. The erasing of particularity and the establishing of a consensus between agents or groups of differing interests occurs via the neutralisation of language and is particularly evident within the language of governmental reports. In Chapter Three the concept of mediation was presented as a means of establishing links between various levels of text to the broader historical context, and allowing the possibility of adapting analysis and findings from one level to another. Mediation is the classical dialectical term for the establishment of relationships between the formal aspects of a cultural or scientific work and its social ground (Jameson, 1989). The following section attempts to establish the mediatory links between the texts and the broader governmental legitimation strategies. These latter strategies will be outlined more clearly in part four of this chapter.

> *'official language is bound up with the state, both in its genesis and its official uses. It is in the process of state formation that the conditions are created for the constitution of a unified linguistic market, dominated by the official language'. (Bourdieu 1991: 45)*

In the discussion on epistemological beginnings in chapter three it was argued that in the social sciences the object of study is less the world itself than the interpretations through which we attempt to engage with and understand it (Jameson, 1989: 9). The approach adopted here is both historical and critical and is concerned with tracing the conditions of possibility[165] of an emergent institution. The approach is negative in the terms outlined in chapter one as it does not attempt to propose or advance an alternative model of offender management in relation to sex offending to the one outlined. Instead it offers a socio historical study that sets out to contextualise the history of the Risk Management Authority and its functions

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[165] See discussion of critique in chapter one

within the variety of discourses surrounding it. The focus of this section is therefore on what language does, how it relates to particular practices and how it is located within the particular network of discourses that produce a particular institution. The following is an analysis of the language by which the 'official' account of the RMA is constructed.

In chapter one, we saw that language was what we are born into. The symbolic world pre-exists us and because of this our understanding of the world is determined by the habitual manners and consciousness of a community of interests (Williams, 1997). In chapter two, we also saw that in relation to the state, the liberal subject has been constructed as fully autonomous, transparent in their motives and in full possession of their rights. This form of recognition places the individual in the form of universality, in other words the subject is founded on the minimum commonalities of people and not on the properties that make them unique individuals. It was argued that this form of reasoning was a powerful mechanism of ideological legitimation from the eighteenth century onwards, for the very reason that it erased *particularity.*

Not only does the state create its own subjects through the abstraction of recognition, but the state itself becomes a collective subject. As Burton and Carlen (1979: 46) argue:

> *'State discourse uses the language of administrative rationality, normative redeemability and consensual values to indicate itself as functioning within a democratic mode of argument. The state's image as the embodiment of popular sovereignty appears because state discourse reproduces notions of the free choosing discriminating subjects and claims itself as their agency.*

Within this imaginary form the state becomes the predicate of the collective subject'.

The usefulness in this distinction is that we may treat all texts of official discourse (those related to the official discourse of the state) as being composed by a single subject; the state.

Bourdieu (1991: 40) emphasises the importance of language in erasing particularity. He writes that whenever it is a matter of establishing a consensus between agents or groups of differing interests, 'the recourse to a neutralised language is obligatory'. This neutralisation of language is particularly noticeable within the language of governmental reports; whether in the reports of expert committees such as those under discussion or research reports commissioned by government departments. Objectivity, or the apparent objectivity of such documents, is provided by the conventions of language rather than by the application of method[166]. It is important therefore at this point to recognise here a difference between the content of a text and the conventions on which it is constructed; the difference between the content of a text (its *statement*) and what in linguistics is called its mode of *enunciation*. If we focus only on the content of a text we draw attention to its sense and reference. If we focus on its *enunciation*, we are interested in how something is being said, and in who is saying it. *Enunciation* is concerned with the conventions of language and in what language does; it is concerned also with the productive aspect of discourse, and in particular, with the authority of the author. In structuralist approaches to linguistics the author of a given text is constituted as a subject via language rather

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[166] The relation between method and convention is more complex in research reports.

than existing as an autonomous individual, or group of individuals in the conventional sense[167] (Barthes, 1982).

In relation to the text chosen, devices used to neutralise official language include the situation of problems within a universal present. Official language avoids social scientific or historical concepts of time, e.g. episodic, structural or cyclical notions of time[168]. Official reports also avoid academic systems of referencing or citation; emphasis tends towards the conventions of 'ordinary language.'[169] Neutralisation is also achieved by the avoidance or minimisation of any reference to cultural contexts or differences. For example, when the MacLean Committee outlined the RMA's areas of authority,[170] which include the accreditation of risk assessment and management methods and processes developed within a cultural, social and legal context different from that of Scotland, the issue of neutralisation related to the content of the text as there was little space being given to a discussion on the possible problematic aspects of the migration of risk management tools and systems from one cultural context to another. But the techniques also related to the universalisation of certain assumptions; assumptions which are actually historical determined and relate to the broader themes of modernisation, best practice etc. These assumptions are connected not only to the constraints of form itself – for example the limitations designated via a particular report's remit– but to the habitual mode of address of official reports. An example of this habitual mode of

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[167] 'Linguistically, the author is never more than the instance writing, just as I is nothing other than the instance saying I: language knows a 'subject' not a 'person', and this subject, empty outside of the very enunciation which defines it, suffices to make language 'hold together', suffices, that is to say, to exhaust it' (Barthes, 1982: 145)

[168] See Wallerstein (1997) for a discussion on 'TimeSpace' conceptions within the social sciences

[169] See Williams (1980) on the limitations and ideological constraints of 'ordinary language.'

[170] 'We would anticipate that the new Authority would monitor international developments in each of these areas, would evaluate their effectiveness and application to the Scottish context and, where appropriate, would accredit programmes, technologies and best practice for use by the service-providing agencies in managing the offenders'.

address – what Barthes[171] (2000: 44) in another context termed the 'universalisation of an intermediate myth' used by official institutions – is the assumed transparency and universality of language. This assumption relates specifically to a text's projected audience, the addressee to whom the 'we' of the report communicates. The assumptions of education, social class, shared values and beliefs are reflected in a text's manner of *enunciation*, the choices of words, points of reference, and the tone and rhythm of its communication; assumptions which in the end reflects the particular consciousness of the group of which the panel or committee is composed. The result of this mode of address is a framing of ideas within 'reasonable'[172] and well defined limits. An example can be found below:

> 'More generally, risk assessment is an example of David Hume's famous dictum, that one cannot derive an 'ought' from an 'is[173]'. Decisions about what level of risk justifies some form of special measure are, ultimately, matters of social policy, not scientific measurement. Where thresholds are set, those who are just above the threshold may not differ markedly from those just below the threshold. Therefore, a graded and flexible set of responses is needed, not simply an attempt to 'catch' the individuals presenting the highest risk'.(Scottish Executive, 2000: 9)

The above passage is unusual in that it directly makes a point of reference to a scientific authority by name, in this case the philosopher David Hume. It is unusual in the sense that whenever science is mentioned in the reports it is always referred to

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[171] See discussion in chapter two on the liberal subject.

[172] Official discourse represents what Rawls would characterise 'public reason' a concept very different from a Habermas' notion of public reason. Rawls (2005) distinguishes public from non public reason. Public reason is related to governmental functions administrative acts and venues.

[173] 'In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, that expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.' Hume (1956)

in the abstract i.e. as a reference to a distinct body of knowledge. '*David Hume's famous dictum, that one cannot derive an 'ought' from an 'is'* assumes that the reader not only knows who David Hume is (there is no reference provided for the reader to find out if they do not) but also that they know the context of the dictum that *one cannot derive an 'ought' from an 'is'* (again there is no explanation given of Hume's argument). The statement not only assumes a particular level of education but also that the reader shares particular values and beliefs in relation to what scientific enquiry should be. In this case: statements of value should not be derived from statements of fact. It is therefore not only, in this case, the constraints of form, i.e. the remit of the panel that justify their recommendations – referred to in the line '*Decisions about what level of risk justifies some form of special measure are, ultimately, matters of social policy'* – but that their justification is based also on the support a very particular, although barely hinted at, conception of the role of science in relation to policy. That is, that decisions relating to morality or ethics are a matter of politics; decisions regarding, or drawn from science, are value free and neutral. The strict separation of policy decisions and scientific measurement is less clear than the statement infers. This last part of the statement, '*Therefore, a graded and flexible set of responses is needed, not simply an attempt to 'catch' the individuals presenting the highest risk',* with its emphasis on 'catch' in parenthesis, is another means of emphasising the distance of the committee from any hint of a baser intent. The statement makes clear that there is no populist or punitive motivation for their provisions, the committee's point of reference drawn from Hume, in the tone and rhythm of equitable reason, is the desire for '*a graded and flexible set of responses'.*

What this mode of *enunciation* conceals however, is the fact that the Committee was set up on the very basis of an 'ought' derived from an 'is', i.e. there *is* a category of offender that presents a serious threat to the public and there *ought* to be a number of provisions available to prevent the harm that such an offender might pose.

The point at issue here is the use of an idealised account of reason that is presented as the basis of decision making that is not only fraught with difficulty, but also can mask prejudice. One objection that has been raised against the logic of classification is that it entails negative labelling which results in stigmatising (Bauman, 1993)[174]. However, as Blackburn (1995) argues, classifying people or events is an inherent feature of language. Stigmatisation therefore does not occur within the classificatory systems themselves but when judgemental or informal stereotyping informs such schemes. It is not then the rigour or systematic quality of assessment that eliminates prejudice, as such schemes will reproduce or amplify the informal cultural and social prejudices of an institution.

Risk assessment offers, along with its 'emergent knowledge base', a scientific means of justifying this special measure of incarceration. A graded and flexible set of responses based on accredited risk assessment tools, in this reading, provides a rational and reasonable cover to a measure historically associated with more populist and punitive impulses. The arm's length guaranteed by systematic assessment is reflected also in the arm's length distance between the Risk Management Authority and Government.

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[174] See chapter one.

> *'The RMA will be an executive Non-Departmental Public Body (NDPB), funded by the Scottish Executive but working at arm's length from it. It will have three functions:*
>
> *– Policy and research.*
> *– Standards setting.*
> *– Operational.*

The Scottish Government drew from MacLean's recommendations on the Risk Management Authority, that it would *'be operationally independent but carrying out functions on behalf of the Scottish Ministers'* and therefore its appropriate status would be to function as a Non-Departmental Public Body. A feature of such a public body would be an expert Board supported by a standing staff complement.

If the Risk Management Authority was to play a key role in the Executive's *Programme for Government*, it was argued that the arm's length distance between the Risk Management Authority and Government was necessary in the carrying out of the Executive's work in the area of public protection. It was not possible for the Risk Management Authority to carry out its three functions if it were to be positioned within the private sector; nor could any existing body or organisation in the public sector carry out its functions as, it was claimed, no existing body had the necessary combination of expertise, influence and cross-Scotland mandate that such a body would require. *'The functions of the RMA are better undertaken at arms-length from Ministers than by an agency under their control'.* As the Risk Management Authority would be involved in the setting of standards for and monitoring the work of agencies it was required that it should maintain an appropriate distance from them.

The Nature of the Problem

> *'Some commentators suggest that the concern about sex offending over recent years and months reflects a form of 'moral panic', a preoccupying worry about a particular issue which sweeps across society and then abates. At times it has, for some, seemed as if the problems are beyond reasoned response, and this has sometimes ended in tragedy for innocent casualties.*
>
> *We do not think that the continuing expression of concern about sex offenders is a moral panic. Rather it reflects a determination that we should find more effective ways of dealing with sex offending to protect communities better. This report makes recommendations to achieve that.'* (The Scottish Office, 1997: i)

The above statement is striking in that it opens with a reference outside the context of the report: '*Some commentators suggest that the concern about sex offending over recent years and months reflects a form of 'moral panic'*. There is no citation regarding who these commentators are and no explanation of the arguments or evidence supporting this view[175]. The argument is presented merely to be dismissed as not worthy of consideration. It is dismissed outright in the first sentence of the second paragraph; '*We do not think that the continuing expression of concern about sex offenders is a moral panic*' – the 'we' here indicating the view of the Government. However it is dismissed implicitly in the second sentence of the first paragraph; '*At times it has, for some, seemed as if the problems are beyond reasoned response, and this has sometimes ended in tragedy for innocent casualties*'.

There is no causal relation between the two sentences in the sense that the second sentence does not follow from the first. Yet a relation is made in the phrase '*At times it has, for some…*', the *'for some'* given particular emphasis as a counter to

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[175] From Sutherland's (1950a and 1950 b) work in the 50's there has been a number of works providing evidence on the background and nature of moral panics surrounding sex offenders (see Jenkins (1994) for the American experience and Silverman and Wilson (2002) for the British)

'*Some commentators*'. It is clear from the passage that the 'some' of the first sentence is not the same group as the 'some' of the second sentence. The inference to be drawn from the first paragraph is not only that the second group does not have reason on its side (those caught up in the moral panic), but that neither does the first group, as their concerns or evidence for their views are not dealt with by the report. There is also an implication that the consequences of both views – not only the second, but the first view that the recent concern about sex offending is a form of 'moral panic', and therefore leads to no action – may end '*in tragedy for innocent casualties*'[176]. The above statement appears to mirror Luhmann's (1993) argument that the rationalist tradition can produce good reasons to adopt risk technologies; to reject them, particularly under today's conditions, would mean to abandon rationality.

If the problem of sex offending can seem to be beyond reasoned response, what would a reasoned response look like? There *is* a category of offender that presents a serious threat to the public and there *ought* to be a number of provisions available to prevent the harm that such an offender might pose. However the statement does not go as far as saying that *we know* that the concern about sex offenders is not a moral panic, merely that '*We do not think*' that the recent concern about sex offenders is a moral panic. As a means of giving evidence to support the recommendations of the report it is argued that crimes of sex and of violence have not diminished in recent years.

> '*The number of recorded crimes of violence rose by 75% between 1981 and 1991 and has remained at an unacceptably high level since then. The*

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[176] As Soothill et al (2000) writes, it would be inappropriate to deny that there is a problem in relation to sex offending, there are also dangers in exaggerating the dangers related to sex offending.

number of recorded crimes of sexual assault fluctuated in the 1980s, but has increased by over 35% since 1991' (The Scottish Office, 1997:5)

What is noticeable in the way that the evidence is presented is the lack of any context which would allow anything meaningful to be drawn from the two sets of statistics.

We are told that the number of recorded crimes of violence rose by 75% between 1981 and 1991; we are also informed that this has remained at an unacceptably high level since. Does this mean that it has remained at that level since then, and is unacceptable, or that it has dropped recently but is still unacceptable?

The report gives the figures between 1991 and 1995 for crimes of sexual assault yet we are not presented with figures for violent crime. As we are not given the base rate for violent crime, we, therefore, cannot judge what 75% means in relation to the crime figures. In relation to recorded crimes of sexual assault, unlike violent crime these figures fluctuated over the ten year period between 1981 and 1991, but have increased by over 35% since 1991. Again we are not given the base rate for crimes of sexual assault so therefore cannot judge what 35% means in this context.

Most importantly for both these categories of crime we do not know whether there has been a rise in actual crime or a rise in the number of people reporting crimes within those categories. Obviously this does not provide a counter argument to the problem outlined; namely that we should not do something about the increased concern over sexual offending or find more effective ways of protecting the communities. It just means that such figures do not provide clear evidence as to

what the scale of the problem is.

Not all crimes of violence are serious crimes; a distinction that is important if part of the intention of a reasoned response to sexual offending is to provide a clear definition of serious crime. The latter issue is a reflection on the problematic nature of defining violent or sexual crime from offence categories. This aspect is highlighted in the report.

> *'Sex offending is difficult to define, as well as being complex to deal with. Criminal justice statistics categorise all offences related to sexual activity under the heading 'crimes of indecency'. This category includes a wide range of offences but our concern is with offences involving exploitation or assault. These include rape, sexual assault, homosexual assault, lewd, indecent or libidinous behaviour or practices, shameless indecency, and the possession of pornographic images of children under the age of 16. These offences require convicted sex offenders to register their names and addresses with the police in the area where they live. This report is about the arrangements for supervision in the community of sex offenders - primarily those convicted of these crimes'. (The Scottish Office, 1997:4)*

Noticeable again in this statement is a split between two statements with no causal connection between them. The first statement tells us that '*Sex offending is difficult to define, as well as being complex to deal with'.* It raises the issue outlined above on the problematic nature of defining violent or sexual crime from offence categories. The proceeding five sentences of the statement appears to tell us the exact opposite; namely that definitions are not only unproblematic but are clearly defined – rape, sexual assault, homosexual assault, lewd, indecent or libidinous behaviour or practices, shameless indecency, and the possession of pornographic images of children under the age of 16 - and can be used to categorise a specific group.

What the paragraph shows is the complexity of the problem, both in terms of its definitions and the measuring of its extent, thus the need for a 'reasoned response.' Yet we are still not presented with evidence that supports clearly the belief, so unambiguously outlined in the previous paragraph, that *[w]e do not think that the continuing expression of concern about sex offenders is a moral panic'*.

It is in search of such a reasoned response that the report looks to the '*graded and flexible set of responses'* of expert opinion and the promises of risk assessment. Earlier in the chapter we discussed the reference in the Maclean Report to Hume's dictum, *'that one cannot derive an 'ought' from an 'is''* and how it assumed a shared understanding on the part of the reader of what a reasoned approach to scientific enquiry might be. Central to this understanding was that statements of value should not be derived from statements of fact. This was further elaborated by reference to a more specific assumption that scientific statements are value free and neutral and that decisions relating to morality or ethics should be left to the political realm. The reasoning behind that statement was to use science, in particular the form of scientific measurement found in risk assessment, to provide a means of cancelling the perceived category error of Hume's dictum, and therefore perhaps remove the ambivalences found earlier in the report. If decisions on what level of risk should justify a special measure of security or incarceration are a policy matter - in other words the definition and degree of possible harms a particular offender may pose - science's hands are clean. The leap from fact to value is avoided by replacing values with probabilities. As Sparks, (2001) notes the question of risk arises wherever institutions attempt to scale negative outcomes and attach

probabilities to their future occurrence[177]. Wherever the avoidance of harm or an unwanted future event is articulated a moral judgement has been made (see also Douglas, 1994). The question for the MacLean Committee is a clear demarcation between those who make the moral judgments on levels of danger posed and those who carry out the assessment of risk. Another question however, is whether the scientific measurement of risk is as free from such moral judgement as the committee suggest. Although there is an assumption that such a notion of scientific impartiality is shared by the reader, it can only be maintained with reference to a very narrow conception of science.

Throughout the MacLean Report there are references to new bodies of knowledge developing that, it is claimed, allow for the better management of particular categories of offender. In particular it is argued that there is greater expertise within criminal justice agencies in techniques for assessing risk. It is also argued that it is this 'emergent knowledge base', developed, we are told, with such scientific rigour, and that it is sufficient in itself to justify new approaches to offender management. Central to these new approaches based on this knowledge is the creation of the Risk Management Authority itself.

> *'We are aware that the approach we are proposing is premised on an emergent knowledge base. What is convincing about the knowledge that we have is the rigour with which it has been developed. That is sufficient for us to propose new procedures based on it. In doing so, however, we are conscious that those working in the field are going to be working in an area where knowledge can be expected to develop rapidly. This part of our recommendations therefore focuses on the role of the new Authority in keeping abreast of, and promoting, the best practice that is available internationally' (Scottish Executive, 2000: 19).*

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[177] See also O'Malley 'a future that may never happen but that must be guarded against' (O'Malley, 2004:8)

The role of language in official reports in establishing the habitual consciousness of a community of interests can be illustrated by the use of the first person plural in the quotation above. In the first and fourth sentence it is clear that the 'we' refers to the committee, *'we are aware that the approach we are proposing...', 'we are conscious that those working in the field are going to be working in an area where knowledge can be expected to develop rapidly'.*

However it is not clear who the 'we' in the second sentence relates to. Is it the committee that possess the knowledge, or those agencies that work with or supervise offenders? Does it refer to all of us who in the end will be the beneficiaries of such knowledge? Whoever the 'we' might refer to, its use establishes again a consensus between those on the committee and the reader, as well as conceals whatever differing theories, perspectives and interests there might be in relation to the knowledge discussed.

This consensus is emphasised by the assurance that the knowledge is scientific, i.e. it is valid on account of its rigour, and it is the 'best' available. The consensus is also maintained by the breadth of expertise promised by the Risk Management Authority. In order for the Risk Management Authority to demonstrate expertise within the different areas of its remit it is argued that it must draw from a wide range of disciplines.

> *'The Authority will have to be demonstrably expert in the field of risk management. To achieve that, it will have to derive its expertise from a wide range of disciplines. As much of its work will be in influencing and co-ordinating the work of existing agencies, its authority will derive not only*

from its relationship to the Scottish Executive but from its credibility with those agencies'(Scottish Executive, 2000: 19).

The concealment of differing scientific theories, perspectives and interests mentioned above is furthered not only by the rhetorical use of the concept of 'rigour' and 'systematic' knowledge (both words are synecdoches[178] that stand in for science in general) but by the concept of 'expertise' and the new roles of the expert. Both rigour and systematic knowledge are essential for science; whether or not it is 'good' science or 'best' possible knowledge is itself a judgement of value. However rigour and the unreflexive application of systematic method can also lead to scholasticism and forms of knowledge that have little explanatory power.

The difference between forms of knowledge which help provide explanations of states of affairs and those which attempt to predict future events are very different and will be returned to later.

The difference however is not between good and bad science. The language of best possible knowledge, or best practice does not come from the objective and rational scientific method, but from discourses of modernisation (an explicitly politicised form of discourse) and quality control; discourses that also use notions of rigour, systematic knowledge and expertise. The following statement draws on the idea of expertise firstly in relation to risk assessment and then slips unnoticed into its second frame of reference; that of quality control.

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[178] A synecdoche is a linguistic device where a particular case stands in for the whole or a general case stands in for the specific.

The Panel found evidence of a growing expertise in criminal justice services in relation to their dealings with sex offenders. This is in large part due to the changes which followed the implementation of the Sex Offenders Act in 1998. Agencies have responded quickly to the requirements placed upon them by the Act and there are now stronger systems and better working practices in place to manage sex offenders. An increasing awareness of techniques for assessing risk and the use of these has been an important development. All of this has taken place against a background of growing public concern for positive action to protect communities from harm (Scottish Executive, 2000: 19).

Both forms of expertise are linked in this statement to public safety. As with earlier sections of the report there is again no causal link between expertise and safety, instead the association has been made implicitly in the phrase – '*All of this has taken place against a background of growing public concern for positive action to protect communities from harm*'.

The idea that science can '*protect communities from harm*' is nowhere more pronounced than in the faith in rigorous and systematic risk assessment. The rationale for the setting up of the risk management authority is based on this faith.

The authority will be a centre of expertise for the assessment and management of risk. It will thus provide a valuable contribution to the Scottish Executive's objective of protecting the public from the risk posed by offenders, particularly serious violent and sexual offenders, whilst restricting an offender's liberty no more than is required for this purpose.

In order to undertake its work effectively, the RMA will need to be an expert body, acknowledged as a leader in its field. The Board of the RMA will be appointed by the Scottish Ministers. It will comprise experienced representatives of a variety of disciplines which assess and manage risk, such as psychiatry, psychology, nursing, the law, the police, prisons and social work.

The RMA will be expert in risk assessment and risk management. It will: Become a national centre of excellence in the field; Examine what works in risk assessment and risk management in a Scottish context; Promulgate best practice guidance; Set standards for risk assessment and risk management

of high risk offenders; and Ensure that the management of high risk offenders is based on those standards;

The Maclean committee not only recommended the establishment of the Risk Management Authority but recommended particular approaches to risk assessment.

> *All agencies involved in work with sex offenders should adopt the structured clinical approach to risk assessment and should use recognised structured tools as part of this approach. Each agency should undertake a regular audit of the use of such tools by its staff.*
>
> *Current research evidence suggests that the structured clinical approach to risk assessment provides a more accurate assessment than either the actuarial or clinical approach. Assessment frameworks which use actuarial information in a structured way to enhance professional judgements based on knowledge of the offender's personality, habits and lifestyle and analysis of the circumstances of the offence offer the best prospects both for risk assessment and for the management of identified risks. It is essential that best practice is disseminated throughout the relevant professions and agencies, and that staff adopt a consistent approach to this task based on research evidence. Regular audit by agencies of the structured clinical approach and associated tools used by their workers will help ensure that best practice is maintained throughout each organisation*

The fact that *research evidence* favours a structured clinical approach to risk assessment over other approaches does not necessarily mean that the predictive power of structured clinical assessments is compelling, merely that it is slightly better than the other two approaches, clinical and actuarial.

> *Structured risk scales have sufficient accuracy in predicting sex offence recidivism to be useful in applied contexts. The predictive accuracy is far from perfect, but it is clearly superior to other methods commonly used to assess risk with sex offenders (e.g. unstructured clinical judgement) (Hanson & Thornton, 1999).*

The 'sufficient accuracy' of structured clinical approaches must be understood in the context of the doubtful validity of unstructured clinical assessments. The latter

of which, in relation to the prediction of sex offence recidivism, is not much better than chance.

> *'Although many decisions require risk assessments, the procedures used for making such assessments often have limited validity. In general, the average predictive accuracy of professional judgement to predict sex offence recidivism is only slightly better than chance (Hanson & Bussière, 1998). Some have even argued that the accuracy of prediction is sufficiently low that it threatens the very basis of risk-based legal sanctions for sex offenders' (Hanson 1997).*

The reference to 'rigour' and 'systematic knowledge' in relation to risk assessment while appropriate is also problematic. While risk assessment may draw on 'systematic knowledge' and be rigorously pursued, neither of these attributes guarantees validity.

The Blurring between Science as Ideal and Science in Practice

The following section will take a step back from direct textual analysis of the Maclean report to look at non-structured (clinical), actuarial and structured clinical approaches in relation to the question of validity as assumptions about such approaches lie at the heart of the report.

Unstructured Clinical Risk Assessments

Blackburn (1995) argues that the traditional model of classification in the natural sciences is the Linnaean classification of plants. In this system particular attributes are divided into classes on the basis of a common principle, such as variation in form or function. Such classes are assumed to be both homogeneous and mutually exclusive. However, as Blackburn (1995) points out, the everyday categorical

thinking of psychiatry or criminology rarely meet such scientific requirements and frequently imposes artificial boundaries between normality and abnormality.

Psychiatric classification falls into four types, the last being actuarial which we will return to later. The first is formed from subjective impressions of an *ideal type*. This system represents exemplary features shared by group members. An example of this classificatory system is the 'Cleckley checklist for psychopathy'[179](Andrews and Bonta, 1998: 99). The second system is one where members are distinguished by attributes drawn from a particular theory. An example of this is the classifications from the Freudian theory of neurosis. In the third, the members are grouped pragmatically by combining variables of immediate interest. Examples of these are forms of risk assessment that have drawn from a range of classificatory schemes to serve a range of purposes. Many early and contemporary structured clinical approaches fit this scheme. The fourth is generated actuarially using multivariate statistical methods.

Blackburn (1995: 61-62) argues that whatever the system of classification, its adequacy depends on the reliability of the criteria, how consistently it is applied and its theoretical relevance to explanation and prediction.

> *'Many systems fail to meet these requirements because they do not apply a common principle of classification. For example, psychiatric classification*

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[179] Characteristics of the Cleckley checklist for psychopathy are: 'superficial charm; good intelligence (not retarded); absence of delusions and other signs of irrational thinking (not psychotic); absence of nervousness (not neurotic); unreliability; untruthfulness and insincerity; lack of remorse or shame; inadequately motivated antisocial behaviour; poor judgement and failure to learn from experience; pathological egocentricity and incapability for love; general poverty in major affective relations; specific loss of insight; unresponsiveness in general interpersonal relations; fantastic and uninviting behaviour with drink (and sometimes without); impersonal, trivial and poorly integrated sex life; and failure to follow any life plan (Andrews and Bonta, 1998: 99).

continues to identify some categories by observed dysfunctions (e.g. depressive disorder), others by aetiology (organic personality disorder), and others by theory (conversion hysteria). This creates classes which are not mutually exclusive, and although the reliability of psychiatric classification has recently been improved, validity of many classes remains to be established[180].

Actuarial Risk Assessments

As we have seen earlier the MacLean Committee recommended the use of structured clinical risk assessments; the rationale for this being based on research evidence from Canada and the USA. The committee noted that at the time of the report a clinical approach was currently most widespread in Scotland. Actuarial approaches were criticised as having a number of weaknesses in relation to their predictive accuracy in relation to a Scottish offender population. Although this is certainly the case, the key problem with actuarial approaches is one of false positives. This question was not addressed in the reports, presumably because purely actuarial tools were not being considered. However, structured clinical approaches do involve an actuarial element, and the false positive problem is still relevant. The following section will deal with the limitations of actuarial tools and outline the problem of false positives.

The aim of actuarial risk assessment tools, while based on scientific method (inferential statistics), is at the same time a distortion/inversion of the principles of inferential statistics. Inferential statistics infers to a general population the

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[180] The psychological classification of offenders has developed separately from psychiatric classification. Offender classification is concerned more with behaviour patterns than with the diagnosis of disorder. However, shared characteristics can be found in criminal and clinical samples. One such overlap is in the shared use of the Diagnostic and Statistical Manual (DSM-III-R; American Psychiatric Association, 1987) DSM-III sought to improve the reliability of psychiatric diagnosis by introducing operational criteria for each disorder to define specific categories. However, despite this innovation the reliability of clinical judgements of personality disorders remain low. This low level of reliability seriously restricts the usefulness of the classification (Blackburn, 1995).

characteristics of a sample population. For example from a sample population it will be possible to infer the probability of what characteristics correlating to offending behaviour may be prevalent in the community at large. What actuarial risk assessment tools aim to do is the opposite of this. Actuarial risk assessment tools attempt to calculate the probability of the person being assessed committing an offence within the next six to twelve months based on knowledge we have of offender characteristics of the population at large. In other words it infers from the general population to the sample (the person being assessed). While unusual, there is no doubt that this inversion has methodological arguments in its favour (see Andrews and Bonta, 1998). Actuarial approaches are both rigorous and systematic; however being rigorous and systematic does not necessarily mean we can have the same confidence in the results as we might with the results of statistical analysis as it is conventionally understood. It is important also to point out that the outcome of actuarial assessments are measures of probability, i.e. a value between 1 and 0. Whether, for example, a 0.45 likelihood of reoffending in six months presents a low, medium or high risk is a matter of judgement (i.e. value) and not one of fact. Even in attempts to predict general criminal recidivism there is agreement that this is achieved only with moderate accuracy (Andrews & Bonta, 1998). It is these weaknesses of actuarial tools which makes structured clinical approaches attractive. This structured clinical approach is a combination of clinical and actuarial approaches i.e. the approach has the probability scores of actuarial tools combined with the judgment of a professional based on professional opinion; although, as we have seen above, the validity of the latter has been severely questioned.

Structured Clinical Approaches

The purpose in saying all this is not to dismiss risk assessment as a process, as Steadman & Monahan et al (1996: 297) argue *'Risk must be treated as a probability estimate that changes over time and context'*, risk assessment must be a continuous process rather than a one off assessment. The aim here, however, is to show that the rigorous and systematic aspects highlighted in the literature do not reside in the tools themselves but must be brought to the tools by the practitioner. The tools do not provide an answer to whether or not an individual poses a risk, but help to structure the thinking of those who have to make that decision. In relation to this it is interesting to note that although research has suggested that it is possible to predict sexual recidivism - in this case The Violence Risk Appraisal Guide (VRAG) which uses a different set of factors than those that predict general recidivism - the resource requirements are considerable.

> *'it is unlikely that assessors concerned with cost and efficiency would be interested in using the VRAG as a measure of sex offense recidivism risk, given the VRAG's substantial resource requirements (i.e., professionally trained interviewers and careful file review)' (Hanson, 1997).*

Rigour and systematic method alone does not offer a protection against the weaknesses of the tools, they also require to be combined with considerable professional training and investment.

As mentioned above, because the accuracy of prediction of risk assessment tools is so low it threatens the foundations of risk-based provisions for sex offenders (Hanson 1997). An important issue in relation to the poor predictive powers of risk assessment tools is the problem of false positives or negatives. A 'false positive' is a

case where an individual is assessed with a high risk of reoffending, who does not offend when eventually released from custody or supervision. A 'false negative' is the reverse where someone is assessed as having a low risk of reoffending but offends after release. The first is a civil liberty concern the second is one of public protection. Hood et al (2002) in researching Parole Board decisions on sex offenders found that out of 162 prisoners followed up four years after their date of release from custody, there was a high proportion (92%) of those who were identified as 'high risk' by a member of the Parole Board panel turned out not to have been convicted of a sexual offence by the end of this follow up period; in the sense given to the term above they were the 'false positives'; when the researcher team included reconvictions for serious violent offences, i.e. offences that were not sexual, the proportion of 'false positives' were still as high as 87%. When 94 individuals from this group of prisoners were followed-up after six years from their release, the 'false positive' rate fell, but remained a high proportion at 78% per cent for a sexual reconviction and 72% when reconvictions from both sexual and serious violent offences were combined. An interesting finding in relation to risk offences was also noted in this research, as noted above, risk assessment must be a continuous process rather than a one off assessment. Hood et al (2002) found that there was a higher proportion of 'false positives' in the last review than in earlier reviews or the original assessment, i.e. in the last assessment before release. The factor that raised the level of risk in this case appeared to be the circumstantial factor of immanent release.

In contrast to the 'false positive' findings, where the prisoner was not identified as a 'high risk' by a member of the Parole Board panel, the prediction was nearly always

found out to be correct; only one such prisoner was reconvicted of a sexual offence. In other words out of the 162 cases there was only one 'false negative'. In terms of the civil liberty and public protection concerns, the above research indicates the balance of error to be strongly weighted towards producing 'false positives'. That is, if decisions regarding preventive sentences were based on such assessments, it is more likely for individuals who may not pose a threat to be incarcerated, than for those that do to be released.

It is important to mention that we also have to be careful what we draw from such conclusions. The research focuses on reconviction after a particular time period not reoffending. It is generally true in research on reconviction, that sex offenders have lower reconviction rates than other categories of offender. The reason for this is not that sex offenders are less likely to re-offend than other offenders, but because of the nature of the offence. Victim surveys show that the reporting of sexual abuse or assault is lower that the reporting of other offences; whether due to the risk of further violence; emotional trauma in reliving the experience in court; shame on the part of the victim; and a lack of confidence in the court system. It is also an offence that is difficult in getting a conviction even when the charge is brought to court. So in terms of re-offending, we simply do not know whether those who were 'false positivists' did or did not re-offend over that period. We only know whether they were reconvicted. This may lower the actual proportion of 'false positives' in the sample. The research also was carried out during the early 1990's and from the paper it could be drawn that the risk assessments that were carried out were clinical assessments with limited validity in predictive accuracy. So this research does not provide arguments in favour or arguments against risk assessment in general. If

structured clinical approaches were used it is possible that the 'false positives' would have been lower. Better risk assessment will obviously reduce the problem of 'false positives' and 'false negatives'. However, it is important to note that risk assessment by itself will not eliminate them. The question that this research raises is whether the risk-based provisions for sex offenders as a particular category of offender, i.e. post-sentence detention, community notification, lifetime community supervision etc, can be justified on the basis of assessment tools, even at the level of accuracy that they claim today.

The investing of risk assessment tools with the qualities of rigour and 'scientific' objectivity raises serious questions about the role that research evidence is expected to play. To return to the Maclean report, it recommends that research is essential to improve risk assessment, that best practice is disseminated throughout the relevant professions and agencies, and that staff adopt a consistent approach to this task based on research evidence. It also suggests that regular audit by agencies of the structured clinical approach and associated tools used by their workers will help ensure that best practice is maintained throughout each organisation. However, there is a blurring between science as a body of knowledge, in this case psychology and its instruments (risk assessment instruments), and science as management (systems of audit and control etc). Not only are specific approaches recommended on research evidence of a particular discipline but the designation of *expert* in the scientific or criminological sphere as opposed to the expertise of the practitioner has been narrowed to forensic psychologists and psychiatrists. Here the report not only recommends that all agencies involved in work with sex offenders should adopt a

particular approach but that a particular discipline is highlighted as the privileged site of knowledge for such offenders.

> *Additional resources should be provided to recruit, train and employ more clinical or forensic psychologists and more forensic psychiatrists.*
>
> *Forensic and clinical psychologists have a key contribution to make to the assessment of risk by administering psychometric and other tests. We are aware that there is already insufficient provision of forensic and clinical psychology services in some parts of the country to the extent that there have been difficulties in obtaining post conviction reports for the court. The current lack of provision is unlikely to improve unless there is substantial additional investment in the recruitment and training of psychologists [...] and the increased involvement of psychologists in the delivery of community based personal change programmes which we advocate (The Scottish Government, 2001: 32)*

As mentioned earlier, a synecdoche is a linguistic device where a particular case stands in for the whole or a general case stands in for the specific. In this case it is the psychological sciences that stand in for science as a whole. At one level this is understandable, both forensic and clinical psychologists have a central role because the development of assessment tools and the correct administration of assessments rely on their expertise. However, the recommendation for a singular approach to sex offenders regulated by research from a singular discipline not only privileges a distinct body of knowledge but advocates a specific understanding of human nature.

Part one of this chapter attempted to locate the Risk Management Authority in a longer history about dangerousness – a historical perspective that it is argued is missing from current policy debates relating to sexual offending. Part two and part three of the chapter shifted focus from the broadly historical to the particular in order to analyse specific policy documents relating to the Risk Management Authority. The aim here in part three was to critically examine the legitimation

claims of the commitee responsible for setting up this organisation by analysing the Maclean report both in content and style. The final section brings us up to date and looks at how the Risk Management Authority fits in with recent crime initiatives from the Scottish Government. In doing so it present the thesis that the Risk Management Authority intersects with residual discourses about multi-agency crime prevention as well as new discourses which relate to modernization, community, and dangerous and violent offenders

IV

Community, Modernisation and Risk

Part four of this chapter will examine the Risk Management Authority as it currently exists. It will show how the RMA fits in with a reconceptualisation taking place within Scottish debates on dangerous offenders which has been brought about by the intersection of three key discourses. Firstly, the symbolisation of community and the restructuring of institutional boundaries related to the establishment of a Scottish Parliament in 1999. This was characterised by a concern with finding culturally relevant solutions to a home grown crime problems and which focussed on 'protecting the public' from crime and 'improve community safety'. Secondly, the Risk Management Authority's managerial remit was instrumental to New Labour's modernization agenda; thirdly, discourses not only about the management of dangerous offenders, but managing offenders in general. Earlier in this chapter in relation to the concept of psychopathy, it was argued that it was not reason that guided social action but *indeterminacy*. In the following section we return to indeterminacy, this time in relation to the conceptualisation of community. Here a

range of discourses drawing on locality, accountability, security and modernization are all called upon as a means of enunciating consensus and legitimating Government policy on crime. Perhaps the most surprising articulation of community in relation to the legislation surrounding dangerous offenders is the blurring of the local and the international, where the resurgence of dangerousness offender legislation, under the guise of community protection, directly influenced by earlier initiatives in the USA and Canada, has been re-branded as '*Scottish solutions […] devised to meet Scottish problems*'.

Language and the Migration of Symbols

> '*To speak of rites of institution is to suggest that all rites tend to consecrate or legitimate an arbitrary boundary, by fostering a misrecognition of the arbitrary nature of the limit and encouraging a recognition of it as legitimate; or, what amounts to the same thing, they tend to involve a solemn transgression, i.e. one conducted in a lawful and extra-ordinary way, of the limits which constitute the social and mental order which rites are designed to safeguard at all costs*' (Bourdieu, 1991:118)

When analysing institutional forms and their relationship to discourse it is important to note that we are concerned not only with language, but also with how language structures and legitimises these forms. In chapter two it was argued that legitimacy was related to belief and as such was distinct from coercion in that it describes the acceptance of an authority or social order without the imposition of violence. We saw that belief in the rationality of science competes with belief in the rationality of law in modern societies (Lyotard, 1984). The belief in science is based in the certainty that the existing social order has the competence to find a 'technical' solution to its gravest problems. Therefore the acceptance of a social order was based as much on technical rationalisation and expertise as it is on the legality of its

system of law. It was argued that it was in this context that the legitimacy of the scientific expert, whether in the forms of psychiatry, psychology, psychoanalysis or criminology, has been important.

In the case of the Risk Management Authority, it is part of its remit to play an active role in the symbolisation/mobilisation of its own authority.

> *'we have identified national indicators that are relevant to our work and have used these as reference points in developing our strategy. We are also looking at ways to strengthen our relationships with our sponsor department, ensuring we are working in alignment with each other. We are identifying public bodies and other key stakeholders to develop and improve communication with them. This is to establish how we can effect savings, increase effectiveness and efficiency and create a synergy. These are all ongoing processes and we will build on the work of the last four years, strengthening our position as we move forward.'(Risk Management Authority (2001a: 3)*

This section of the chapter focuses on the symbolic redrawing of institutional boundaries and examines the role of symbolism in understanding how the Risk Management Authority became embedded and extended its influence in Scotland's criminal justice scene. The background of this symbolic restructuring of institutional boundaries was the establishment of a Scottish Parliament in 1999.

The Symbolisation of a Community

> *The Scotland Act 1998 reconstituted a separate Scottish Parliament in 1999 with its own Justice Department with sole responsibility for criminal justice matters. Over this period of the reconstitution of the Scottish Parliament, the Commitment to Protect report had already been published and the Cosgrove and McLean Committees had been established. However, these developments were only a part of a broader agenda for change that related to the reconfiguration of criminal justice institutions in Scotland (The Scottish Office, 1999: 23).*

The first statement of intent for the new parliament in relation to crime was the document *Safer Scotland: Tackling Crime and its Causes (The Scottish Office, 1999).*

> *We were elected in May 1997 on a promise to be tough on crime and the causes of crime. The Government's paramount concern is public safety and a belief that everyone should feel safe in their communities and in their own homes. That means protecting the public by crime prevention and by dealing effectively with crime when it is committed. But our promise, and our distinctive approach, means attacking the causes of crime and disorder, as well as crime itself (The Scottish Office, 1999: 1).*

While the foreword outlined the government's strategy - one that recognised the complexity of the crime as a problem which needed a comprehensive and thoughtful range of solutions – it also emphasised in the New Labour language of the time, that *Safer Scotland: Tackling Crime and its Causes* was a people's agenda. The Government's approach was based on four key principles. Fairness for all those involved in the criminal justice system with particular emphasis on victims and witnesses; addressing the social causes of crime via a range of social inclusion and an emphasis on responsibility; a justice system that was to be more efficient and effective in the delivery of justice; and, most importantly in terms of emphasis, a commitment to protect the public. These principles were further underlined by a declared commitment to treating the problem of crime as culturally embedded and to finding local solutions to local problems.

> *'The Government's emphasis is on long-term planning to produce long-term results and the paper provides a description of what we have done, what we plan to do and how it all fits together to improve public safety for all those who live in Scotland…the Scottish Parliament will provide the forum for considering any necessary changes to the criminal law. The creation of the Parliament will help ensure in this field, as in others, that Scottish solutions are devised to meet Scottish problems' (The Scottish Office, 1999).*

This commitment to finding culturally relevant solutions to a home-grown crime problem was outlined within a symbolic appeal to 'the people'. This appeal sought consensus not through the objective and expert language of the committee reports, but through an assumed discourse of intimacy with the reader and shared membership of a distinct political community. A key theme throughout government documents at this time was a 'safer Scotland'. A corporate logo was also designed at this time for the cover of a range of official publications including: *Safer Scotland: Tackling Crime and its Causes; Reduce, Rehabilitate, Reform: a consultation on reducing reoffending in Scotland.*

> *The public is entitled to expect protection from crime and the Government are committed to building a society in which individuals, families and their communities can live and work without fear of crime. The Government are committed to tackling the unacceptable level of anti-social behaviour and crime on Scotland's streets and to addressing problems of disruptive neighbours (The Scottish Office, 1999: 2).*

The theme of a 'Safer Scotland' was bolstered by a set of initiatives (*Safer Communities Through Partnerships; Communities that Care*) that the Government were aiming to pursue to 'protecting the public' from crime and 'improve community safety' [ref]. Three areas that the Government argued gave particular cause for concern to the public was anti-social behaviour, drugs misuse and sex offending.

On Modernisation

A second area of symbolisation within the new Parliaments proposals was related to New Labour's modernization agenda.

'A successful criminal justice system never stands still. It must be continuously reviewed and modernised'.

Although there is little debate as to what a successful criminal justice system might be - it is difficult to grasp what 'successful' means in the context of the system as a whole – nor why it <u>must</u> be continuously reviewed and modernised. The closest we get to an answer is that in order to improve crime detection and conviction rates the system must be 'streamlined' to ensure efficiency and that there must be improved coordination between the institutions involved.

> *'The Government recognise the need to streamline the criminal justice system to improve crime detection and conviction rates. A high risk of conviction, rather than any particular penalty, is the most effective deterrent to crime. We have taken that commitment forward by addressing the way in which the various organisations and agencies involved in the system work together to ensure an effective, efficient and co-ordinated approach' (The Scottish Office, 1999: 19).*

The changes outlined in this paper are embedded in a series of overlapping discourses whose boundaries are not distinct. Discourses that are often perceived as antagonistic (the Gesellschaft values of modernization vs the Gemeinschaft values of community) are here merged; impersonal discourses of economic rationality and managerialism (Total Quality Management in the form of continuous improvement and best value) are combined with the intimacy of political populism and its appeal to the local, community and the people. Both of these distinct discourses were neatly brought together under the slogan: *Smarter Justice, Safer Communities.*

In relation to the managerialist discourse of the former, the 'success' of the law itself is characterised not by *legality*, but as an institution with particular social objectives, legitimated through criteria of efficiency rather than the classical principles of justice[181].

> *'How the law succeeds in achieving its objectives also depends crucially upon how efficiently it operates' (The Scottish Office, 1999: 26).*

The merging of the symbolism of 'community' with a language of 'modernisation' - of 'partnership working' and 'effective management' - is also present in the language of the Risk Management Authority as it currently defines itself.

> *'The RMA undertakes work with agencies, organisations and individuals to ensure effective assessment and management of serious violent and sexual offenders. The RMA contributes to a number of national working groups and projects including: National Advisory Body for Offender Management, MAPPA Working Group, Risk Assessment Management Pathways Working Goup, National Standards for Criminal Justice Social Work Project Advisory Group, SA07 Implementation Group and the LSCMI[182] Implementation Group. In addition we are often asked to advise on specific matters related to risk management for example the Scottish Prison Service recently approached the RMA to advise them in their internal review of their Open Estates following the Foye case[183]. The RMA sponsored and chaired the second ACPOS/RMA/ADSW Think Tank on January 23rd. The themes discussed were performance management, public confidence and media management' (Risk Management Authority, 2008:4) .[184]*

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[181] See chapter two on the shift from legality as a category of legitimacy to substantive understandings of law and the economy.

[182] 'SA07 targets two types of dynamic risk factors considered to be associated with the sexual offender population. The RMA have recently commissioned the design of an evaluation package for the SA07 in Scotland. The Level of Service Case Management Inventory (LSCMI) is an offender assessment and management tool that incorporates the principles of risk, need and responsivity. It is a substantial revision of the existing, widely used LSI – R assessment tool'.

[183] In January 2008 an internal review was carried out by the Scottish Prison Service (SPS) into the case of Robert Foye. Foye admitted raping a 16-year-old girl in Cumbernauld in August 2007 while on day release from SPS Open Estate. He was previously sentenced to 10 years' imprisonment for the attempted murder of a policeman.

[184] The director of the RMA also sits on a British Psychological Society (BPS) working party on the risk assessment of terrorists.

The statement above from the Risk Management Authority illustrates how broadly the remit of the Authority has been interpreted. Here the Authority's influence is much broader than its original focus, outlined in the Maclean report, on dangerous, violent and sexual offenders. Two new key areas of involvement are *The National Advisory Body on Offender Management* established in 2006 and the *Multi Agency Public Protection Arrangements (MAPPA)*.

The first of these bodies was established to deal with what were perceived to be Scotland's high re-offending rates. This was set up under the Government's national strategy for managing offenders and operates as a similar model to the earlier *Scottish Council on Crime;* that is, as a panel of experts that will provide advice on best practice and on the shape and direction of offender management. The National Advisory Body's remit is also to support the work of the new Community Justice Authorities (CJAs)[185].

As well as including representation from the Risk Management Authority, members of the *The National Advisory Body on Offender Management* include the Minister for Justice (Chair) and two other members of the Justice Department, the Scottish Prison Service, members from the Association of Directors or Social Work, the Parole Board, the Association of Chief Police Officers in Scotland, the Scottish

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[185] The Community Justice Authorities (CJAs) were established after the consultation document *'Supporting Safer, Stronger Communities'* in 2005. Eight local Community Justice Authorities (CJAs) were set up to provide a co-ordinated approach to planning and monitoring the delivery of offender services by planning, managing performance and reporting on performance by local authorities or groups of local authorities. Their aim is to target services to reduce reoffending and to ensure close co-operation between community and prison services to aid the rehabilitation of offenders. The legislation supporting the CJAs also give Ministers new powers to intervene if either SPS or councils fail to adequately reduce reoffending.

Association of the Care and Re-settlement of Offenders, COSLA, Victim Support

Scotland and APEX, as well as a number of academics and two lay members.

> *'The RMA has plenty more to contribute to the National Performance Outcomes, to MAPPA and the challenges laid down by the Prisons' Commission and I look forward to seeing the influence of the RMA continuing to make a significant contribution to public safety in Scotland' (Risk Management Authority, 2008:4).*

The Multi Agency Public Protection Arrangements (MAPPA) were set up under the

provisions of Sections 10 and 11 of the Management of Offenders (Scotland) Act

2005. They fulfil recommendation 49 of the report of the Expert Panel on Sex

Offending:

> *'to place a statutory duty on Chief Constables and Chief Social Work Officers to jointly establish arrangements for assessing, monitoring and managing risk'.*

MAPPAs developed along the lines of those of the Multi Agency Public Protection

Arrangements (MAPPA) in operation in England and Wales. Their key purpose is

to ensure public safety and the reduction of serious harm. The guidance highlights

the protection of children and vulnerable adults as paramount. Like *The National*

Advisory Body on Offender Management MAPPAs draw from expert knowledge

and are multi-disciplinary in their membership. They include the Scottish Prison

Service the Health Service, the police and local authorities. The Risk Management

Authority is a key voice in the co-ordination of MAPPAs and is central to its remit

in developing best practice in the risk management of sexual and violent offenders.

The Symbolisation of the Dangerous Offender

The MAPPAs relationship to the Risk Management Authority is particularly interesting in relation to this thesis as a whole, as together they bring the two discourses already mentioned, modernization and community, with the third one of dangerous and violent offenders. In terms of efficiency, MAPPAs were partly constructed as a means of targeting resources where they were most required. However, these three discourses have been brought together explicitly as a means of breaking down and reconfiguring institutional boundaries.

> *'The need for the introduction of statutory provision and a partnership approach to the management of the risk posed by sexual and violent offenders has been further highlighted by recent high profile sex offender cases in which it was apparent that the capacity of individual agencies to assess, plan and manage the needs of offenders who pose a risk to the community is diminished because of the natural limit imposed by each agency's statutory function and professional boundaries (The Scottish Office, 1999: 6)'*

Reisigl and Wodak (2001) argue that discourses are continually being *operationalised* in new ways of acting and interacting. In this case not only can residual discourses become *operationalised* within new settings and languages (e.g. positivism becoming operationalised via the language of risk, political populism and managerialism) but, and despite the declaration that Scottish solutions will be devised to meet Scottish problems, they are also given new life by borrowing from different cultural practices.

The emphasis on '*Scottish solutions [...] devised to meet Scottish problems'* is part of the symbolisation of community brought about by the creation of the Scottish Parliament, however, it could also be argued that the discourses around community have also been 'learned' from other jurisdictions where appeals to the community

have been used to legitimate penal policy. As outlined earlier in this chapter, one of the remits of the Risk Management Authority was to keep abreast of international developments in what the MacLean Committee identified as a new and emergent knowledge base in relation to dangerous, sexual and violent offenders. As we have seen, this emergent knowledge base was particularly identified with the developments occurring within the North American and Canadian jurisdictions both of which, contrary to the earlier Scottish approaches to working with offenders, treated dangerous offenders as a distinct category of offenders. Although both the MacLean and the Cosgrove Committee were cautious about the applicability of these approaches to the Scottish context they were enthusiastic in adopting a distinct category for such offenders, and in their support for structured risk assessment and systems of accreditation of programmes and programme delivery systems.

> *Both in our work looking at developments in the United Kingdom and in our fact finding visits abroad, we were presented with evidence of a rapidly developing expertise in assessing the risks presented by violent offenders and in developing interventions designed to lessen the risks. We saw evidence of a lively but small international community working in this field, and in Canada, in particular, there was evidence of effective communication between that community and policymakers. The developments we saw offer a real opportunity in Scotland to achieve better protection for the public from this group of offenders. What we did not find, however, were effective mechanisms in Scotland for benefiting from the developments we saw. We see a need, if that opportunity is to be realised, to introduce means for keeping abreast of the methodologies and technologies of risk management as they are developed, and for making them available to practitioners (Scottish Executive, 2000: 16).*

Importantly, the McLean Committee were interested in the reconfiguring of institutional boundaries as a means of ensuring cross institutional collaboration, not only in terms of the criminal justice system, but in terms of the research community

and the state; in both of these areas they looked towards the Correctional Service in Canada for a model.

The result of this is the blurring of the local and the international, as the resurgence of dangerousness offender legislation, under the guise of community protection, is presented as a response to local problems, while directly adopted from the earlier initiatives in the USA and Canada. The key tenets of the community protection model which developed in this North American context are all recontextualised within current multi-agency approaches in Scotland. These include the following beliefs that sexual and violent offenders pose a serious and persistent threat to women and children; too much attention has been given to the rights of offenders and insufficient attention to the rights of the victims of violent and sexual crimes; not enough has been done to address issues of public safety from violent crime; sexual and violent offenders respond poorly to treatment and therefore present a risk to the public on release from prison; the criminal justice system has inadequately monitored dangerous individuals upon release from prison and fails to provide adequate information to the public (Petrunik, 1994).

That a dominant model of community protection with a clearly international origin, as outlined earlier in this chapter, can be presented as a local response to local problems lies in the *indeterminacy* of the idea of community. With this concept, a range of discourses -- locality, accountability, security, modernization - are all drawn upon, not only as a means of enunciating consensus, but of legitimising particular courses of action. As Williams (1989)[186] notes, the word community is

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[186] See chapter one of this case study.

unusual in that it is almost never used in a negative sense. People are never against community or against the community. However as we saw in chapter one community can also have more negative and reactionary formations, such as conformism, unreflective custom, and the coerciveness of habitual ties[187].

In terms of our discussion of the legitimation of new operational boundaries we find that the surface story of '*Scottish solutions [...] devised to meet Scottish problems',* fails to explain this reconfiguration. Instead this chapter, and this case study as a whole, has looked towards a more complex socio-historical picture where contemporary problems regarding violent and sexual offending become recontextualised within a network of relations from a different structure, history and culture and where *residual* discourses can re-emerge under this new narrative.

Conclusion

This chapter was an attempt to provide a counter narrative to those provided by official reports, of the emergence of the Risk Management Authority. More specifically it was an attempt to place the Risk Management Authority within a socio- historical framework and to trace the reconceptualisation taking place within Scottish debates on dangerous offenders. These debates centred on what the MacLean Committee, called 'a new regime for high risk offenders,' a regime where the Risk Management Authority was identified as playing a key role. The chapter was in four parts: the first part situated the MacLean and Cosgrove committees within a socio-historical background of dangerous offender legislation. It provided

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[187] See Plessner (1999: 91) on the limits of community and its constraint on an open and democratic politics: 'The community is always an enclosed sphere of intimacy set against an indeterminate milieu. Its essential and necessary opponent is the public sphere [*Öffentlichkeit*], the background from which it distinguishes itself. Such a sphere is the epitome of people and things that 'no longer belong'.

an early history of psychiatry and how the clinical model of dangerousness came into being.

It looked at indeterminacy in relation to the concept of psychopathy and that concept's translation within North American Psychiatry, where it gained authority within the criminal courts and in the public imaginary. The significance of this history was the consequence of the application of the clinical model to sex offenders and the depiction of dangerousness as a problem of individual pathology, conceptualized in the language of diagnosis and the treatment of a disease. The section discussed also the resurgence of dangerousness, under a new guise of community protection in the 1980's.

Part two provided an account of the Risk Management Authority, told through the official documents related to its emergence. It began with *A Commitment to Protect - Supervising Sex Offenders: Proposals for More Effective Practice.* (SWSIS, 1997), which focussed on new ways of monitoring and treating sex offenders based on theories that were being developed in the USA and Canada. A significant aspect of the report was to treat such offenders as a *distinct legal and clinical category*. It then dealt with an analysis of the Cosgrove and MacLean reports. The section gave a detailed outline of the MacLean report and its recommendations for the creation of the Risk Management Authority and a new lifelong sentence imposed on the basis of risk.

Part three was a discourse analysis of the documents addressed in part two. It looked at the evidence drawn on by the Maclean committee and the use of language

in legitimating its emergence. This section argued that within the language of governmental reports a neutralisation of language is noticeable, the function of which is to establish a consensus between agents or groups of differing interests (Bourdieu, 1991) and between the author and reader. It described the language of these reports and what the expression of that language achieved. In other words, it addressed those aspects of the texts concerned with the authority of language and how such authority establishes a particular state of affairs. Part three also looked at how the problem of dangerous offenders has been constructed and the blurring of science as an ideal and science in practice.

Throughout the official documents there are references to new bodies of knowledge and an 'emergent knowledge base' that allows new approaches to offender management. These new bodies of knowledge not only provide a solution to the main concern of the committee, i.e. those offenders who, following release from custody for a serious violent or sexual crime, go on to commit another offence of a similar kind, but also resonate with a more general desire to modernize the criminal justice system.

Part four of this chapter, looked at how the RMA has become embedded in the Scottish criminal justice setting in the present and in particular it explored its role in recent Scottish debates on dangerous offenders – debates that are at the intersection of three key discourses. Firstly, the symbolisation of community and the restructuring of institutional boundaries related to the establishment of a Scottish Parliament in 1999. This was characterised by a concern with finding culturally relevant solutions to a home grown crime problems and which focussed on

'protecting the public' from crime and 'improve community safety'. Secondly, an important area of symbolisation in which the RMA was instrumental was New Labour's modernization agenda; and thirdly was the symbolisation surrounding the category of dangerous and violent offenders that was explicitly drawn from the resurgence of dangerousness, under the guise of community protection, that emerged in the United States, Australia and Canada in the 1980's and which the Scottish Council on Crime (1975) was an early precursor. The story of '*Scottish solutions [...] devised to meet Scottish problems',* in the area of dangerous offenders therefore is more complex than it at first seems and follows from a network of relations adapted from many different sources, and in the case of dangerous legislation, from entirely different historical and cultural backgrounds.

The *residual* discourse on multi-agency crime prevention initiatives and the sentencing of dangerous offenders in Scotland, dating back to The Scottish Council on Crime, had been recontextualised in light both of international developments of a community protection model and a local appeal to community and national membership facilitated by the new Scottish Parliament. The Risk Management Authority itself has been instrumental in bringing together the three strands of discourse (modernization, community, and dangerous and violent offenders) and has had a key role in the breaking down and reconfiguring of institutional boundaries.

The concluding chapter will draw the case study together by returning to the importance of the concept of modernity in relation to its inherited and repressed pasts and its influence on the present.

CONCLUSION

THE INHERITANCE OF MODERNITY

> *MRS ALVING…'I am afraid and timid, because there is in me something of that Ghost-like, inherited tendency, I can never quite get rid of […] I almost think we are all of us Ghosts. It is not only what we have inherited […] that walks again in us. It is all kinds of dead opinions, and all manner of dead old beliefs and things of that sort. It is not living matter in us; but it stays there, all the same, and we can't get rid of it […] there must be Ghosts all the country over. They must be as thick as the sand of the sea […] And that is why we are, one and all, so dreadfully afraid of Light. (Ibsen, Ghosts, 1891: 54-55)*

Introduction

 The quotation at the beginning of this chapter is from Ibsen's (1891) *Ghosts,* a play about the constraints of inheritance, the influence of *'all kinds of dead opinions',* and *'dead old beliefs'* on the living. It refers to an inherited past that *'is not living matter in us; but it stays there, all the same, and we can't get rid of it' (Ibsen, 1891).* In relation to the inherited past of modernity how do we judge the living matter and the dead, the vital content from the ghosts? As outlined in chapter three, the problems of inheritance are related to the problems of beginning. The constraints of this thesis are associated not only with the practicalities at the start of a particular project but one's relationship to residual traditions and current work. Not only was it argued in chapter three, that it was necessary to be reflexively aware of one's relationship to these residual and current influences in order to 'ground' the thesis historically, it was also an aim of this thesis to provide a 'groundwork'. In this concluding chapter I outline how the thesis can be read as a 'groundwork' for future research and explore some of the limitations of the project.

Hegel (1977) argued that a ground (*Grund*) must exist for the determination of thought; a ground was necessary in order to posit sufficient reason. For Hegel, thought, reflection, must ground its own ground. This aspect of Hegel's thought has been interpreted as an example of Hegel's idealism (Taylor, 1975; Beiser, 2005), yet this notion of reflection, of grounding its own ground, is also reflected in Marx's (1986) famous groundwork, *Outlines of the Critique of Political Economy 1857-58*, often referred to and published under the title *Grundrisse*. In this work Marx argues that if one were to start merely with what at first appears as real, the presupposition, then all that one would achieve would be a distorted and limited conception of the whole. What Marx means by this is, that in order for an object of study to become concrete, a 'rich totality of many determinations and relations' (Marx 1986: 38), it requires to be situated within a conceptual framework that allows us to grasp its complexity as a totality. Just as Hegel opposed making an objectivised (non-historical) reality the starting point of scientific endeavour, so Marx argued that the knowledge of objects does not presuppose their existence at the starting-point in the raw material. In this way we can read *Capital* not as the description of a historical society, but rather the construction of the abstract concept of capitalism. It is this distinction of the object of knowledge as real-concrete objects that distinguish meta-critique from more objectivist approaches.

The shift towards a meta-critical approach during the life of the thesis, meant rethinking chapter five, the 'data chapter'. Chapter five, although appearing last in the thesis, was, as the introduction made clear the chronological starting point for the project, and in a sense the general 'feeling' in writing the thesis was of working backwards from that starting point. It was this working backwards from a set point

that provided the overall themes and structure of the thesis, but it also createda set of problems; in particular, a gap between chapter five and the preceeding chapters. This gap is between what we might call the empirical 'core' of the thesis and its theoretical 'ring' (see Heller[188], 1989). As outlined in the introduction, the thesis grew out of the initial debates surrounding the Risk Management Authority. However, as the thesis developed, the main focus of interest no longer lay with the RMA as it was constituted through criminal justice policy, but with how to conceptualise the intersection of the institutional culture of criminal justice and the formation of human subjectivity. In other words it moved from an interest in the emergence of a particular institutional form at a particular social and historical context, to an elucidation of the conditions which made this emergence possible. To address this question required a different theoretical understanding of historical emergence than the original question allowed. It was this different theoretical understanding of historical emergence – one that retains an internal relationship between modernity and rationality - that brought the thesis into a relationship with the work of Hegel and led to an antagonism between the starting point and the rest of the thesis. That is, the antagonism between the (positive) empirical 'core' of the thesis and its (negative) theoretical 'ring'.

This shift of emphasis created the gap between chapter five and the preceding chapters, a gap which isbest understood at two levels

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[188] 'A work that is the product of the social sciences could […] be said to contain a *core* and a *ring*, not as two separate parts of a theory but as its two aspects […] *Core knowledge* is knowledge of the type that one has good reason to believe that any person would arrive at, if this person studied the available sources […] and entered into discussion with the members of the scientific community familiar with the matter under scrutiny […] *Ring knowledge* is knowledge […] of a kind one arrives at from a particular standpoint, perspective, or cultural interest not shared with others.' (Heller, 1989: 299)

1. First, it relates to the gap between empirical data and theoretical reflection (a conflict at the level of abstraction).

2. Second it relates to the gap between two conceptualisations of the subject (a conflict at the level of ontology).

In relation to this first gap, Mills (1963: 554) has argued, there are two forms of social scientific research, on one hand, what can be called the 'macroscopic', which attempts to deal with total social structures in a systematic and historical way, and the 'molecular' form of sociological research, characterised by more focussed empirical studies into particular social problems. The 'molecular' or 'micro' form of sociological research operate on lower levels of abstraction, in that they isolate from the wider social contexts a small number of narrowly defined elements to study. The 'macroscopic', or 'macro' rely on higher levels of abstraction, in that such forms of research are more generalised, and although there may be a pattern of numerous variables on which it draws, there is no discrete one that can be measured. There is no clear cut variable that can be applied to the concept modernity. Or to put it another way, there is no easy way to 'operationalise' modernity. It is the gap between the 'molecular' and 'macroscopic', the gap in levels of abstraction that distinguish the relationship of chapter five to the rest of the thesis. The methodological attempt to bridge this gap was in the adoption of an Hegelian approach that understood the *case*, not only as representing a 'typical' moment within a particular historical conjuncture, but one which problematised the particular structure from which it originated. The adoption of the Jolles' (1930) model of *casus*, the *case as form*, was a methodological attempt to reconcile universality with concrete particularity.

As outlined in chapter three, the *casus* or case is a narrative or representative-image which can work to 'crystallize' and explain specific cultural, national or global states of affairs (Frow, 2003: 70). *Casus* as a form of immanent critique, a problematisation of the form it brings to light (Frow, 2003). As Jameson (1998) notes, the problem of *casus* deploys and exacerbates a fundamental philosophical problem: the relationship between the universal and the particular. It mediates between the contingency of its occasion and the generality of '*field* of interpretation'. *Casus* juxtaposes two different levels of analysis. On further reflection, however, the typicality of the case could have been embedded more fully into the broader themes outlined in the earlier chapters. This would have involved a more radical application of Hegel's conceptual framework to the empirical work in chapter five, a more consciously dialectical approach which has a precedent in the work of the early Frankfurt school. It is possible that such an approach might have preserved the initial impulse of the research to offer a more critical and socio-historical account of criminal justice approaches to risk and the Risk Management Authority.

The second ontological gap, the gap between two conceptualisations of the subject was, on reflection, necessarily unbridgeable. As we have seen, for Hegel, the ground of knowledge is always in flux and unstable, Hegel's ontology did not presuppose the actuality of its object (society) and therefore of the autonomous subject. This approach is opposed to the subject/object split of psychological and individualistic accounts of the human subject: The subject for Hegel was 'pure *simple negativity',* a mere function of the social structure. These two opposing views of the subject, the

autonomous, disembodied and self-transparent one of individualistic approaches, and the split and intersubjective account of Hegel are irreconcilable.

Within the philosophy of science this idea of being unable to reconcile opposing frameworks of thought or scientific paradigms is captured by the notion of *incommensurability* (Kuhn, 1996: Feyerabend, 1993) and is closely connected with the question of the rationality of science. One solution to the problem of *incommensurability* in this thesis would have been to remove chapter five and replace it with another theoretical chapter on the contemporary development of the subject. This would have solved the problem of gaps but would not only have excluded the point of beginning from the thesis but would have lost the juxtaposition of the two incommensurable frameworks, which in turn would have prevented the opportunity of productively interpreting the products of the criminal justice system outside the system.

Jameson (2006) argues that incommensurability not only refers to irreconcilable theories, but to the predicament that one requires both at the same time yet cannot fit them together in a systematic way. In other words, it is this *need* for both levels that clash with the inability to construct a coherent system out of their differences that make incommensurability a significant problem. It reflects Critical Theory's focus on the constraints of scientific method and the significance it places on contradiction and conflict as essential elements to social reality. Defeat therefore does not cancel the validity of the original impulse of a work. The necessity of some degree of failure points to the defective nature of sociology's own concepts. In other

words, the dissonance at the heart of a contradiction reflects the limitation of knowledge. As Jameson (1990: 38) writes:

> *'[E]ven at their most intellectually energetic, the concepts of sociology cannot but be flawed and fractured, since their very object is contradictory, faithfulness to it thereby requiring a certain transfer of the social contradictions into thought'.*

The limitation of sociological thought is apparent in both the simplified and false opposition between the 'macro' and the 'micro' as well as the aporias at the heart of the subject.

In conclusion, the groundwork provided by this thesis is a conceptualisation of the relationship of the individual to the social that counters the positivistic and individualistic ('common sense') accounts that have structured much of the legal and practice settings of the contemporary criminal justice system and that have led to the Risk Management Authority. The thesis argued that Hegel's notion of 'ethical life' provided an alternative way to conceptualise intersubjectivity and the understanding of crime and its relation to the state. The thesis closes however by arguing that the gap between the two conceptualisations of the subject - the autonomous, disembodied and self-transparent emphasis of individualistic approaches, and the split and intersubjective aspects focussed on by Hegel - was necessarily unbridgeable. This thesis, at a theoretical and methodological level, has drawn on Hegel to recover the 'social' character of our thought and practices in relation to the dangerous other/actuarial subject both through examining institutional responses such as the Risk Management Authority and current social science approaches to crime and risk. In doing so it can be read as part of an

Hegelian inspired legacy to challenge the artificial distinction between the individual and society.

Bibliography

Adamson, M. (2005) 'Archiving the Present: Death and History in the Wake of Hegel,' Paper given at *Thinking the Present Conference* May 27-28, University of Minnesota, University of California, Berkeley.

Adorno, T. W. (1967) 'Sociology and Psychology I' in *New Left Review* 1/46, Nov-Dec, pp. 67-80.

Adorno, T. W. (1968) 'Sociology and Psychology II' in *New Left Review* 1/47, Jan-Feb, pp. 79-97.

Adorno, T. W. (1994) *Hegel: Three Studies* Massachusetts: MIT Press.

Adorno, T. W. (2002) *Introduction to Sociology* Cambridge: Polity Press.

Adorno, T. W. and Horkheimer, M. (1979) *Dialectic of Enlightenment* London: Verso.

Adorno, T.W. (1973) *Aesthetic Theory* London: Routledge & Kegan Paul

Adorno, T.W. (2001) Problems of Moral Philosophy Cambridge: Polity

Agamben, G. (2005) *State of Exception* Chicago: The University of Chicago Press.

Alexander, J. C. (1995) *Fin de Siècle Social Theory: Relativism, Reduction, and the Problem of Reason* London: Verso.

Alexander, J. C. (1996) 'Critical Reflections on 'Reflexive Modernization' in *Theory, Culture & Society* 13/133, pp. 133-138.

Alvesson, M. (2002) *Postmodernism and Social Research* Buckingham: Open University Press.

Anderson, P. (1998) *The Origins of Postmodernity* London: Verso.

Andrews, D. A. (1995) 'The Psychology of Criminal Conduct and Effective Treatment', in J. McGuire (ed) *What Works: Reducing Reoffending. Guidelines from Research and Practice'.* Chichester: John Wiley and Sons, pp 35-62

Andrews, D. A. and Bonta. J. (1998) *The Psychology of Criminal Conduct* Cincinnati: Anderson Publishing.

Arendt, H. (1973) *Men in Dark Times* Harmondsworth: Pelican.

Arrighi, G. (2007) *Adam Smith in Beijing: Lineages of the Twenty-First Century* London: Verso.

Avineri, S. (1974) *Hegel's Theory of the Modern State* Cambridge: Cambridge

University Press.

Barthes, R. (1972) *Mythologies* London: Vintage.

Bauman, Z. (1993) *Modernity and Ambivalence* Cambridge: Polity Press.

Bauman, Z. (2000) 'Social Uses of Law and Order', in Garland, D. and Sparks, R. (eds.) *Criminology and Social Theory* Oxford: Oxford University Press.

Beck, U. (1992) *Risk Society: Towards a New modernity* London: Sage.

Beetham, D. (1991) *The Legitimation of Power* Hampshire: Palgrave MacMillan

Beiser, F. (2002) *German Idealism: The Struggle Against Subjectivism 1781-1801* Massachusetts: Harvard University Press.

Beiser, F. (2005) *Hegel* London: Routledge.

Beiser, F. C. (1987) *The Fate of Reason: German Philosophy from Kant to Fichte* Massachusetts: Harvard University Press.

Beiser, F. C. (1998) 'The Context and Problematic of post-Kantian Philosophy' in Critchley, S. And Schroeder, W. R. (eds) *A Companion to Continental Philosophy* Oxford: Blackwell Publishers.

Benhabib, S. (1986) *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* New York: Columbia University Press.

Benjamin, W. (1973) *Illuminations* London: Fontana.

Berman, M. (1983) *All that is Solid Melts into Air: The Experience of Modernity* London: Verso.

Bernstein, J. M. (1995) *Recovering Ethical Life: Jurgen Habermas and the Future of Critical Theory* London: Routledge.

Bernstein, J. M. (2004) 'Negative Dialectic as Fate: Adorno and Hegel' in Hume, T (Ed) *The Cambridge Companion to Adorno* Cambridge: Cambridge University Press.

Bernstein, R. J. (1979) *The Restructuring of Social and Political Theory* Bristol: J. W. Arrowsmith Ltd.

Bernstein, R. J. (1986) 'Structuration as Critical Theory' in *A Philosophical Journal* 6/2, pp 235-249.

Bewes, T. (2002) *Reification: or the Anxiety of Late Capitalism* London: Verso.

Blackburn, R. (1995) *The Psychology of Criminal Conduct: Theory, Research and Practice* Chichester, Wiley.

Bleicher, J. and Featherstone, M. (1982) 'Historical Materialism Today: An Interview with Anthony Giddens' in *Theory, Culture & Society* 1/63, pp. 63-77.

Bloch, E. (1987) *Natural Law and Human Dignity* Cambridge: MIT Press.

Bloch, E. (2000) *The Spirit of Utopia* California: Stanford.

Bonta, J. (1996) 'Risk-Needs Assessment and Treatment' in Harland, A. T. (Ed) *Choosing Correctional Options That Work* London: Sage.

Bonta, J. (1997-2001) *Offender Rehabilitation: From Research to Practice,* Public Works and Government Services Canada.

Bonta, J. (et al) (1996) *The Crown Files Research Project: A Study of Dangerous Offenders* Canada: Solicitor General of Canada.

Bottoms, A. E. (1977) 'Reflections on the Renaissance of Dangerousness' in *Howard Journal of Criminal Justice* 16, pp. 70-96.

Bottoms, A. E. (2000) 'The Relationship between Theory and Research in Criminology' in King, R. D. and Wincup, E. (Eds.) *Doing Research on Crime and Justice* Oxford: Oxford University Press.

Bourdieu, P. (1977) *Outline of a Theory of Practice* Cambridge: University of Cambridge.

Bourdieu, P. (1991) *Language and Symbolic Power* Massachusetts: Harvard University Press

Bourdieu, P. (2000) *Pascalian Meditations* Cambridge: Polity Press.

Bourdieu, P. and Wacquant, L. (1996) *An Invitation to Reflexive Sociology* Cambridge: Polity Press.

Brauns, H.J. and Kramer, D. (1976) 'Political Repression in West Germany: 'Berufsverbote' in Modern German History' *New German Critique* No 7 Winter pp 105-121.

Bryman, A. (2008) *Social Research Methods* (3rd Ed), Oxford: Oxford University Press.

Buck-Morss, S. (1979) *The Origins of Negative Dialectics: Theodor W. Adorno, Walter Benjamin, and the Frankfurt Institute* New York: The Free Press.

Burchell, G., Gordon, C., and Miller, P. (1991) *The Foucault Effect: Studies in Governmentality* Chicago: University of Chicago Press.

Burton, F. and Carlen, P. (1979) *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State* London: Routledge and Kegan

Paul.

Butler, J. (1997) *The Psychic Life of Power: Theories in Subjection* Stanford: Stanford University Press.

Butler, J. (1999) *Subjects of Desire: Hegelian Reflections in Twentieth-Century France* New York: Colombia University Press.

Butler, J. (2005) *Giving an Account of Oneself* New York: Fordham University Press.

Calhoun, C. (2005) 'The promise of public sociology' in *The British Journal of Sociology* Volume 56 Issue 3 pp 355-363.

Callinicos, A. (1999) 'Social Theory put to the Test of Politics: Pierre Bourdieu and Anthony Giddens' *New Left Review* vol 236 pp 77-102.

Carlen, P. (2008) *Imaginary Penalities* Devon: Willan Publishing.

Castel, R (1975) 'The Doctors and Judges' in Foucault, M. (Ed) *I Pierre Rivière, having slaughtered my mother, my sister, and my brother…A Case of Parricide in the 19th Century* New York: Pantheon Books, pp. 250-269.

Castel, R (1988) *The Regulation of Madness: The Origins of Incarceration in France* Cambridge: Polity Press.

Cavadino, M. and Dignan, J. (1997) *The Penal System: An Introduction* London: Sage.

Cobler, S. (1976) Law, Order and Politics in West Germany Harmondsworth: Penguin.

Connerton, P. (1976) *Critical Sociology* Middlesex: Penguin Books.

Creamer, A. and Williams, B. (1996) 'Risk Prediction in Criminal Justice' in G.McIvor (Ed) *Working with Offenders* London: Jessica Kingsley.

Critchley, S. (2001) *Continental Philosophy: A Very Short Introduction* Oxford: Oxford University Press.

Croce, B. (1915) *What is Living and what is Dead of the Philosophy of Hegel* London: Macmillan.

Derrida, J. (1978) *Writing and Difference* London: Routledge.

Douzinas, C. And Gearey, A. (2005) *Critical Jurisprudence: The Political Philosophy of Justice* Portland: Hart Publishing.

Duff, A. (1998) 'Principle and Contradiction in the Criminal Law: Motives and Criminal Liability' in (ed) *Philosophy and the Criminal Law: Principle and*

Critique Cambridge: Cambridge University Press.

Durkheim, E. (1964) *The Division of Labour in Society* London: Collier-Macmillan Limited.

Eagleton, T. (1991) *Ideology* London: Verso.

Eagleton, T. (2003) Figures of Dissent London Verso

Eagleton, T. (2009) *Trouble With Strangers: A Study of Ethics* Chichester: Wiley-Blackwell

Elliot, G. (2008) *Ends in Sight* London: Pluto Press.

Engels, F. (1954) *The Origin of the Family, Private Property and the State* Moscow: Foreign Languages Publishing House.

Ericson, R.V. and Haggerty, K.D. (1997) *Policing the Risk Society* Oxford: Oxford University Press

Esquirol, J. E. (1838) *Maladies Mentalis* Paris.

Feeley, M. And Simon, J. (1994) 'Acturial Justice: The Emerging New Criminal Law' in Nelken, D (ed) *The Futures of Criminology* London: Sage.

Feeley, M. and Simon, J (1996) 'The New Penology' in J. Muncie, E. McLaughlin and M. Langan (eds.) *Criminological Perspectives* London: Sage.

F Feely, M. and Simon, J (2003) 'The New Penology' in McLaughlin, E., Muncie, J. and Hughes, G. (eds.) *Criminological Perspectives (2nd Ed)* London: Sage.

Feyerabend, P. (1993) *Against Method (3rd Ed)* London: Verso.

Fine, R (1993) ''The Rose in the Cross of the Present': Closure and Critique in Hegel's Philosophy of Right' in Norrie, A. (Ed) *Closure or Critique: New Directions in Legal Theory* pp. 45-60 Edinburgh: Edinburgh University Press.

Fish, S. (1993) 'The Law Wishes to Have a Formal Existence' in Norrie, A. (ed*) Closure or Critique: New Directions in Legal Theory* Edinburgh: Edinburgh University Press.

Flechtheim, O. K. (1947) 'Hegel and the Problem of Punishment' in *Journal of the History of Ideas* 8/3, pp. 293-308.

Foucault (1996) *Foucault Live: Collected Interviews, 1961-1984* New York: Semiotext.

Foucault, M. (1971) *Madness and Civilisation* London: Routledge.

Foucault, M. (1991) *Discipline and Punish: The Birth of the Prison* London:

Penguin.

Foucault, M. (2001) *The Essential Works Vol 3: Power* London: Penguin.

Foucault, M. (2002) *The Archaeology of Knowledge* London: Routledge

Foucault, M. (2006) *History of Madness* London: Routledge.

Fraser, N. (2000) 'Rethinking Recognition' in *New Left Review* 3, May-June.

Fraser, N. and Honneth, A. (2003) *Redistribution or Recognition?: A Political-Philosophical Exchange* London Verso.

Frow, J. (2003) 'The Uses of Terror and the Limits of Cultural Studies' in *Symploke,* 11/1-2, pp. 69-76, University of Nebraska Press.

Garland, D. (1991) *Punishment and Modern Society: A Study in Social Theory* Oxford: Clarendon Paperbacks.

Garland, D. (1995) 'Penal Modernism and Postmodernism' in Blomberg, T. G. and Cohen, S. (eds) *Punishment and Social Control* New York: Aldine de Gruyter.

Garland, D. (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' in *The British Journal of Criminology* 36/4, pp. 445-471.

Garland, D. (2001) *The Culture Of Control: Crime and Social Order in Contemporary Society* Oxford: Oxford University Press.

Gerth, H. H. and Mills, C. W. (eds.) (1948) *From Max Weber: Essays in Sociology* London: Routledge.

Giddens, A. (1979) *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* London: MacMillan Press.

Giddens, A. (1984) *The Constitution of Society* Cambridge: Polity Press.

Giddens, A. (1990) *The Consequences of Modernity* Cambridge: Polity Press.

Giddens, A. (1991) *Modernity and Self-Identity* Cambridge: Polity Press.

Goethe (1961) *Goethe's Faust* New York: Anchor Books.

Habermas, J. (1971) *Knowledge and Human Interests* Massachusetts: Beacon Press.

Habermas, J. (1974) *Theory and Practice* London: Heinemann.

Habermas, J. (1976) *Legitimation Crisis* Cambridge: Polity Press.

Habermas, J. (1976b) 'Systematically Distorted Communication' in Connerton, P. (Ed*) Critical Sociology* London: Penguin.

Habermas, J. (1982) 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment' *New German Critique* 26, Spring/Summer, pp. 13-20.

Habermas, J. (1985) 'A Philosophical-Political Profile' in *New Left Review* 151, May-June 1985, pp 75-105.

Habermas, J. (1986) *'Law and Morality'*, The Tanner Lectures on Human Values, Delivered at Harvard University, October 1 and 2, 1986.
http://www.tannerlectures.utah.edu/lectures/documents/habermas88.pdf

Habermas, J. (1987) *The Philosophical Discourse of Modernity* Cambridge: Polity Press.

Habermas, J. (1991) *The Theory of Communicative Action, Vol 1: Reason and the Rationalization of Society* Cambridge: Polity Press.

Habermas, J. (1995) *The Theory of Communicative Action, Vol 2: Lifeworld and System : The Critique of Functionalist Reason* Cambridge: Polity Press.

Habermas, J. (1996) *On the Logic of the Social Sciences* Cambridge, Massachusetts: MIT Press.

Habermas, J. (2001) *The Postnational Constellation* Cambridge, Massachusetts: MIT Press.

Habermas, J. (2002) *Knowledge and Human Interests* Oxford: Polity Press.

Habermas, J. (2006) *Time of Transitions* Cambridge: Polity

Hahn-Rafter, N. (1997) 'Psychopathy and the Evolution of Criminological Knowledge' in *Theoretical Criminology* 1/235, pp. 235-258.

Hammersley, M. (1992) 'On Feminist Methodology' in *Sociology* 26/2, pp187-206.

Hannah-Moffat, K. (1999) 'Moral Agent or Actuarial Subject' *Theoretical Criminology* Vol 3 No 1 pp71-94.

Hart, H. L. A. (1997) *The Concept of Law (2nd Ed)* Oxford: Oxford University Press.

Hanson, R. K. (1997) *The Development of a Brief Actuarial Risk Scale for Sexual Offence Recidivism* Ottawa: Department of Solicitor General of Canada

Hanson, R.K. and Bussière, M.T. (1998) 'Predicting Relapse: A Meta-analysis of Sexual Offender Recidivism Studies', *Journal of Consulting Clinical Psychology*, 66 (2) 348-362.

Harvey, D. (1981) *The Spatial Fix – Hegel, Von Thunen, and Marx* in *Antipode* Vol 13, issue 3, pp 1-12.

Harvey, D. (2006) *The Limits to Capital* London: Verso.

Hegel, G.W.F. (1967) *The Philosophy of Right* Oxford: Oxford University Press.

Hegel, G. W. F. (1977) *Phenomenology of Spirit* Oxford: Oxford University Press.

Held, D. and Simon, L. (1976) 'Toward Understanding Habermas' in *New German Critique* 7 Winter, pp. 136-145.

Heller, A. (1989) 'From Hermeneutics in Social Science toward a Hermeneutics of Social Science' in *Theory and Society*, Vol. 18, No. 3 pp. 291-322

Heller, A. (1999) *A Theory of Modernity* Cambridge: Polity Press.

Honneth, A. (1990/1995) *The Fragmented World of the Social: Essays in Social and Political Philosophy* New York: State University of New York Press, Albany.

Honneth, A. (1991) *The Critique of Power: Reflective Stages in a Critical Social Theory* Massachusetts: MIT Press.

Honneth, A. (1993) 'Max Horkheimer and the Sociological Deficit of Critical Theory', in Benhabib, S., Bonß, W. and McCole, J. (Eds.) *On Max Horkheimer: New Perspectives* Cambridge: MIT Press.

Honneth, A. (1996) *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Cambridge: Polity Press.

Honneth, A. (2000) 'The Possibility of a Disclosing Critique of Society: The Dialectic of Enlightenment in the Light of Current Debates in Social Criticism' in *Constellations* 7/1, pp. 116-127.

Honneth, A. (2000b) *Suffering from Indeterminacy: An Attempt at a Reactualisation of Hegel's Philosophy of Right* Amsterdam: Van Gorcum.

Honneth, A. (2004) 'A Social Pathology of Reason: On the Intellectual Legacy of the Frankfurt School', in Rush, F. (Ed) *The Cambridge Companion to Critical Theory* Cambridge: Cambridge University Press.

Honneth, A. (2009) *Pathologies of Reasons: On the Legacy of Critical Theory* New York: Colombia University Press.

Horkheimer, M. (1976) 'Traditional and Critical Theory' in Connerton, P. (ed) *Critical Sociology* Harmondsworth: Penguin.

Horkheimer, M. (1978) 'Notes on Institute Activities', in Arato, A. and Gebhardt, E. (Eds) *The Essential Frankfurt School Reader* Cambridge: Cambridge University Press.

Horkheimer, M. (1997) *Critical Theory* London: Continuum.

Hudson, B. (2001a) 'Human Rights, Public Safety and the Probation Service: Defending Justice in the Risk Society' in *The Howard Journal* 40/2, pp. 103-113.

Hudson, B. (2001b) 'Punishment, Rights and Difference: Defending Justice in the Risk Society', in Stenson, K. and Sullivan, R. R. (eds.) *Crime Risk and Justice* Devon: Willan.

Hunt (1995) 'Worthwhile Bodies' in *Parliamentary Affairs* Hansard Soc :192-206.

Ibsen, H. (1891) *Ghosts* London: Griffith Farran Okeden and Welsh.

Irving, G. L. (2005) *Registering The Risk: Review of Notification Requirements, Risk Assessment and Risk Management of Sex Offenders* The Scottish Government Publications.

Jacoby, R. (1977) *Social Amnesia: A Critique of Conformist Psychology from Adler to Laing* Brighton: Harvester.

Jameson F. (1994) *The Seeds of Time* New York: Columbia University Press.

Jameson, F. (1972) *The Prison-House of Language* Princeton: Princeton University Press.

Jameson, F. (1988) *The Ideologies of Theory, Vol 2: The Syntax of History* London: Routledge.

Jameson, F. (1988) *The Ideologies of Theory: Vol. 1: Situations of Theory* London: Routledge.

Jameson, F. (1989) *The Political Unconscious: Narrative as a Socially Symbolic Act* London: Routledge.

Jameson, F. (1990) *Late Marxism: Adorno, or, the Persistence of the Dialectic* London: Verso.

Jameson, F. (1998) *Brecht and Method* London: Verso.

Jameson, F. (2002) *A Singular Modernity: Essay on the Ontology of the Present* London: Verso.

Jameson, F. (2006) 'Lacan and the Dialectic' in Žižek, S. (Ed) *Lacan: The Silent Partners* pp. 365-397 London: Verso.

Jameson, F. (2007) *Signatures of the Visible* London: Routledge.

Jay, M. (1984) *Adorno* London: Fontana.

Jenkins, P. (1994) *Using Murder: The Social Construction of Serial Homicide* New York: Aldine De Gruyter.

Jolles, A. (1930) *Einfache Formen* Tubingen: Max Niemeyer Verlag.

Jones, S. (2001) *Criminology* Oxford: Oxford University Press.

KAN.STAT.ANN. § 59-29(a) (01) December 10, 1996, Decided: June 23, 1997. (http://www.law.cornell.edu/supct/html/95-1649.ZS.html)

Kaufmann, W. A. (1951) 'The Hegel Myth and Its Method' in *The Philosophical Review* 60/4 pp. 459-486.

Kempshall and Maguire (2001) 'Public Protection, Partnership and Risk Penalty: the Multi-Agency Risk Management of Sexual and Violent Offenders' in *Punishment and Society* 3/2, pp. 237-264.

Kemshall, H. (2003) *Understanding Risk in Criminal Justice* Maidenhead: Open University Press.

Kirchheimer O. (1969) *Politics, Law and Social Change* New York: Columbia University Press.

Körner, S. (1955) *Kant* Middlesex: Penguin.

Kuhn, T. S. (1996) *The Structure of Scientific Revolutions (3rd Ed)* Chicago: University of Chicago.

Kundera, M. (2007) *The Curtain: An Essay in Seven Parts* London: Faber and Faber.

Lacan, J. (2006) *Écrits* London: W. W. Norton & Company.

LaCapra, D. (1994) *Representing the Holocaust: History, Theory, Trauma* New York: Cornell University Press.

Laplanche, J. (1999) *Essays on Otherness* London: Routledge.

Laplanche, J. and Pontalis, J. B. (1973) *The Language of Psycho-Analysis* London: The Hogarth Press.

Lash, S. (1993) 'Reflexive Modernisation: The Aesthetic Dimension' *Theory, Culture and Society* vol 10, no 1 pp 1-33.

Lemert, C. (2000) 'The Clothes have no Emperor: Bourdieu and American Imperialism' *Theory, Culture and Society* 17 pp 97-106.

Lianos, M. Douglas, M. (2000) 'Dangerization and the End of Deviance: the Institutional Environment', in D. Garland and R. Sparks (eds.) *Criminology and Social Theory* Oxford: Oxford University Press.

Lilly, J.R., Cullen, F.T., Ball, R.A. (1995) *Criminological Theory: Context and*

Consequences, Thousand Oaks: Sage.

Lippens, R. (2009) *A Very Short, Fairly Interesting and Reasonably Cheap Book about Criminology* London: Sage.

Lipton, Martinson and Wilks (1975) *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies.* New York: Praeger.

Loader, I. and Walker, N. (2007) *Civilising Security* Cambridge: Cambridge University Press.

Lombroso, C. (2006) *Criminal Man* London: Duke University Press.

Löwy, M. (2005) *Fire Alarm: Reading Walter Benjamin's 'On the Concept of History'* London: Verso.

Luhmann, N (1993) *Risk: A Sociological Theory* New York: Aldine De Gruyter.

Lukács, G. (1969) *The Historical Novel* Harmondsworth: Peregrine Books.

Lukács, G. (1971a) *History and Class Consciousness* London: Merlin.

Lukács, G. (1971b) *The Theory of the Novel* London: Merlin.

Lukes, D. And Scull, A. (1983) *Durkheim and the Law* Oxford: Basil Blackwell.

Lukes, S. and Scull, A. (1984) *Durkheim and the Law* Oxford: Blackwell

Lyotard, J. F. (1984) *The Postmodern Condition: A Report on Knowledge* Manchester: Manchester University Press.

Mandel, E. (1975) *Late Capitalism* London: New Left Books.

Marcuse, H. (1954) *Reason and Revolution* New York: Humanities Press.

Marcuse, H. (1998) *Eros and Civilisation* London: Routledge.

Marx, K. (1975) 'A Contribution to the Critique of Hegel's Philosophy of Right, Introduction' in L. Coletti (Ed) *Marx Early Writings* London: Pelican.

Marx, K. (1986) 'Outlines of a Critique od Political Economy 1857-58' in *Karl Marx and Frederick Engels Collected Works Volume 28* London: Lawrence and Wishart

McAra (2005) 'Modelling Penal Transformation' in *Punishment and Society* Vol 7 No 3 277-302

McCarthy, T. (1978) *The Critical Theory of Jürgen Habermas* London: Hutcheson.

McCarthy, T. (1991) *Ideals and Illusions: On Reconstruction and Deconstruction in*

Contemporary Critical Theory Cambridge Massachusetts: MIT Press.

McGuire, J. and Priestley, P. (1995) 'Reviewing 'What Works': Past, Present and Future' in McGuire, J. (Ed.) *What Works: Reducing Reoffending – Guidelines from Research and Practice* London: John Wiley & Sons Ltd.

McManus, J. (1998) *Report on Investigation into Aberdeen City Council Social Work Department's Handling of the Case of Mr Steven Leisk* Aberdeen City Council.

Melossi, D. (2000) 'Changing representations of the Criminal, in Garland, D. and Sparks, R. (eds.) *Criminology and Social Theory* Oxford: Oxford University Press.

Melossi, D. (2008) *Controlling Crime, Controlling Society: Thinking about Crime in Europe and America* Cambridge: Polity Press.

Miliband, R. (1973) *The State in Capitalist Society: The Analysis of the Western System of Power* London: Quartet Books Limited.

Mills, C. W. (1963) 'Two Styles of Social Science Research' in Horowitz, L. (Ed) *Power, Politics and People: The Collected Essays of C. Wright Mills* New York: Oxford University Press.

Monaghan, B. (1997) *International Journal of the Sociology of Law*, 25, 21–44

Moretti, F. (1996) *Modern Epic: The World System from Goethe to García Márquez* London: Verso.

Murray, C. (1996) 'The Underclass' in Muncie, J., McLaughlin, E. and Langan, M. (eds.) *Criminological Perspectives* London: Sage.

Neumann, F. (1964) *The Democratic and the Authoritarian State* Toronto: Free Press

Neumann, F. (1986) *The Rule of Law* Leamington Spa: Berg Publishers.

Norrie, A. (1993) 'Closure and Critique: Antinomy in Modern Legal Theory' in A, Norrie (Ed) *Closure or Critique: New Directions in Legal Theory* pp. 45-60 Edinburgh: Edinburgh University Press.

Norrie, A. (1998) 'Simulacra of Morality'? Beyond the Ideal/Actual Antinomies of Criminal Justice' in Duff, A. (ed) *Philosophy and the Criminal Law: Principle and Critique* Cambridge: Cambridge University Press.

Norrie, A. (2001) *Crime, Reason and History: A Critical Introduction to Criminal Law (2nd Ed)* London: William Clowes Limited.

O'Malley, P. (1999) 'Volatile and Contradictory Punishment' in *Theoretical Criminology* 32, pp. 175-195.

O'Malley, P. (2004) *Risk, Uncertainty and Government* London: Glasshouse Press.

Oakley, A. (1998) 'Gender, Methodology and People's Ways of Knowing: Some Problems with Feminism and the Paradigm Debate in Social Science' in *Sociology* 32/4, pp. 707-731.

Pascal, B. (1966) *Pensées* Middlesex: Penguin Books.

Pashukani, E. B. (1978) *Law and Marxism: A General Theory* London: Pluto Press.

Pearson, G. (1977) *The Deviant Imagination: Psychiatry, Social Work and Social Change* London: Macmillan Press.

Petrunik, (1994) *Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice* Canada: Solicitor Generals Office.

Popper, K. R. (1966) *The Open Society and its Enemies Vol.2: The High Tide of Prophecy. Hegel, Marx, and the Aftermath* London: Routledge & Kegan Paul.

Poulantzas, N. (1973) *Political Power and Social Classes* London: New Left Books

Pratt, J. (1995) 'Dangerousness, Risk and Technologies of Power' in *The Australian and New Zealand Journal of Criminology* 28.

Pratt, J. (1997) *Governing the Dangerous* Sydney: The Federation Press

Pratt, J. (2000) 'The Return of the Wheelbarrow Men: or, The Arrival of Postmodern Penality?' in *The British Journal of Criminology* 40, pp. 127-145.

Radkau, J. (2009) *Max Weber: A Biography* Cambridge: Polity

Rafter, N. H. (1997) 'Psychopathy and the Evolution of Criminological Knowledge' *Theoretical Criminology* 1, pp. 235-259 London: Sage.

Rauch. L, (1983) *Hegel and the Human Spirit: The Jena Lectures on the Philosophy of Spirit (1805-6)* Detroit: Wayne State University Press.

Rawls, J. (1972) *A Theory of Justice* Oxford: Oxford University Press.

Rawls, J. (1993) *Political Liberalism* New York: Colombia University Press.

Regnault, E. (1828) *Du degré de competence des médecins dans les questions judiciares relatives aux alienations mentalis* Paris.

Riddall, J. G. (1999) *Jurisprudence* Wilts: Anthony Rowe Ltd.

Risk Management Authority (2005) *Network: The official newsletter of the Risk Management Authority* Issue 1, September.

Risk Management Authority (2005) *Network: The official newsletter of the Risk

Management Authority Issue 2, December.

Risk Management Authority (2006) *Network: The official newsletter of the Risk Management Authority* Issue 2, December.

Risk Management Authority (2007) *Risk Management Authority Briefing: Current Practice and Research into internet sex offending*, March.

Risk Management Authority (2008) *Network: News from the Risk Management Authority,* November.

Risk Management Authority (2008) *Network: The official newsletter of the Risk Management Authority*, July.

Risk Management Authority (2008) *Network: The official newsletter of the Risk Management Authority,* March.

Rose, G. (1978) *The Melancholy Science: An Introduction to the Thought of Theodor W. Adorno* London: MacMillan Press.

Rose, G. (1981) *Hegel Contra Sociology* London: Athlone.

Rose, G. (1997) *Mourning Becomes the Law: Philosophy and Representation* Cambridge: Cambridge University Press.

Rose, J. (2004) *On Not Being Able to Sleep: Psychoanalysis and the Modern World* London: Vintage.

Rustin, M (1999) 'A New Social Evolutionism? *New Left Review* vol 234 pp 106-126.

Sahni, I.P. (2001) 'The Will to Act: An Analysis of Max Weber's Conceptualisation of Social Action and Political Ethics in the Light of Goethe's Fiction' *Sociology* Vol. 35, No. 2, pp. 421–439.

Said, E. W. (1995) *Beginnings: Intention and Method* London: Granta Publications.

Scheuerman, W.E. (1997) *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* Cambridge, Massachusetts: MIT Press

Schiller, F (2004) *On the Aesthetic Education of Man* Connecticut: Dover.

Schmitt, C. (2004) *Legality and Legitimacy* London: Duke University Press.

Scottish Executive (2000) *A Report of the Committee on Serious Violent and Sexual Offenders* Edinburgh: The Scottish Government Publications.

Scottish Executive (2001) *MacLean Committee Report: Serious Violent and Sexual Offenders, Consultation Analysis* (July) The Scottish Government Publications.

Scottish Executive (2001) *Making Scotland Safer: Improving the Criminal Justice System* Edinburgh: The Scottish Government Publications.

Scottish Executive (2001) *Serious Violent and Sexual Offenders: Criminal Justice* The Scottish Government Publications.

Scottish Executive (2002) *Analysis of External Consultation on, and the Scottish Executive's response to, 'Reducing the Risk: Improving the Response to Sex Offending', the report of the Expert Panel on Sex Offending* (June) The Scottish Government Publications.

Scottish Executive (2005) *'Reducing the Risk: Improving the Responses to Sex Offending': the report of the Expert Panel on Sex Offending, Progress Report* (October) The Scottish Government Publications.

Scottish Executive (2005) *Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps* (March) Edinburgh: Scottish Executive.

Silverman, J. And Wilson, D. (2002) *Innocence Betrayed: Paedophilia, the Media and Society* Cambridge: Polity Press.

Simon, J. (1988) 'The Ideological Effects of Actuarial Practice' *Law and Society Review*, 22 pp771.

Simon, J. (1998) 'Managing the Monstrous: Sex Offenders and the New Penology' *Psychology, Public Policy, and Law* 4/1-2, pp. 452-467.

Simon, J. and Feeley, M. (2003) 'The Form and Limits of the New Penology' in Blomberg, T. G. and Cohen, S. (eds) *Punishment and Social Control* New York: Aldine de Gruyter.

Sinnerbrink, R. (2007) *Understanding Hegelianism* Stocksfield: Acumen Publishing Limited.

Smith, S. B. (1989) *Hegel's Critique of Liberalism: Rights in Context* Chicago: The University of Chicago Press.

Sparks, R. (2000) 'Perspectives of Risk and Penal Politics' in T, Hope and R, Sparks (Eds) *Crime and Insecurity* London: Routledge

Sutherland, E. H. (1950a) 'The Diffusion of Sexual Psychopath Laws' in *The American Journal of Sociology,* 56/2, pp. 142-148.

Sutherland, E. H. (1950b) 'The Sexual Psychopath Laws' in *Journal of Criminal Law and Criminology*, 40/5 Jan-Feb., pp. 543-554.

Taylor, C. (1985) *Philosophy and The Human Sciences: Philosophical Papers 2* Cambridge: Cambridge University Press.

Taylor, C. (1992) *Sources of the Self: The Making of the Modern Identity*

Cambridge: Cambridge University Press.

Taylor, C. (2004) *Modern Social Imaginaries* London: Duke University Press.

Terdiman, R. (1987) Introduction to The Force of Law: Towards a Sociology of the Juridical Field in *The Hastings Law Journal* July, pp. 805-813.

The Scottish Government (2001) *Reducing the Risk: Improving the Response to Sex Offending* The Scottish Government Publications.

The Scottish Office (1997) *A Commitment to Protect: Supervising Sex Offenders: Proposals for More Effective Practice* Edinburgh: The Social Work Services Inspectorate.

The Scottish Office (1999) *Safer Scotland: Tackling Crime and its Causes* The Scottish Government Publications.

Thompson, E.P. (1990) *Whigs and Hunters* London: Penguin Books.

Unger, R. M. (1976) *Lectures on Social Theory, Spring 1976*.
 http://www.law.harvard.edu/faculty/unger/english/reori.php

Unger, R. M. (1977) *Law in Modern Society: Toward a Criticism of Social Theory* New York: The Free Press.

Unger, R. M. (1986) *The Critical Legal Studies Movement* Massachusetts: Harvard University Press.

Unger, R. M. (2002) *Letter to Student.*
 http://www.law.harvard.edu/faculty/unger/english/docs/passion2.doc.

van Swaaningen, R. (1997) *Critical Criminology: Visions from Europe* London: Sage.

van Swaaningen, R. (1999) 'Reclaiming Critical Criminology: Social Justice and the European Tradition' in *Theoretical Criminology* 3/1, pp. 5-28.

Vaughan, B. (2001) 'Handle with Care: On the Use of Structuration Theory within Criminology' in *British Journal of Criminology* 41, pp. 185-200.

von Kraft-Ebing, R. (1965) *Psychopathia Sexualis: With Especial Reference to the Antipathetic Sexual Instinct* London: Stapeless Press.

Wacks, R. (2006) *Philosophy of Law: A Very Short Introduction* Oxford: Oxford University Press.

Weber, M. (1954) *Law in Economy and Society* Cambridge: Harvard University Press.

Weber, M. (1978) *Economy and Society: An Outline of Interpretive Sociology Vol. I*

& II London: California Press Ltd.

Weber, M. (2001) *The Protestant Ethic and the Spirit of Capitalism* London: Routledge.

Wiggershaus, R. (1995) *The Frankfurt School: Its History, Theories, and Political Significance* Cambridge: MIT Press.

Williams, R. (1964) *Drama: From Ibsen to Eliot* London: Penguin.

Williams, R. (1977) *Marxism and Literature* Oxford: Oxford University Press.

Williams, R. (1980) *Problems in Materialism and Culture* London Verso.

Williams, R. (1981) *Politics and Letters: Interviews with New Left Review* London: Verso.

Williams, R. (1989) *Resources of Hope* London: Verso

Wilson, J.Q. (1996) 'On Deterrence' in Muncie, J., McLaughlin, E. and Langan, M. (eds.) *Criminological Perspectives* London: Sage.

Yin, R. K. (1994) Case study research: Design and Methods (2nd Ed), London: Sage.

Young, J. (1999) *The Exclusive Society* London: Sage.

Zedner, L. (2003) 'Too Much Security' in *International Journal of the Sociology of Law* 31, pp. 155-184.

Žižek, S. (1994) *The Metastases of Enjoyment: Six Essays on Women and Causality* London: Verso.

Žižek, S. (2000) *The Ticklish Subject: The Absent Centre of Political Ontology* London: Verso.

Žižek, S. (2002) *For They Know Not What They Do: Enjoyment as a Political Factor* London: Verso.

Žižek, S. (2006) *Lacan: The Silent Partners* London: Verso.

Žižek, S. (2006) *The Parallax View* Cambridge MA: MIT Press.

Zupančič, A. (2006) 'The 'Concrete Universal,' and What Comedy Can Tell Us About It' in S. Žižek, (Ed) *Lacan: The Silent Partners* London: Verso.